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JEFFERSON--33 GRATTAN.

1730-1880.

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THOMAS JOHNSON MICHIE.

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IN THE  
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AND IN THE  
GENERAL COURT,  
OF  
VIRGINIA.

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BY BENJAMIN WATKINS LEIGH.

**VOLUME IX.**

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**JUDGES**  
**OF THE**  
**COURT OF APPEALS**

**DURING THE TIME OF THESE REPORTS.**

---

**HENRY SAINT GEORGE TUCKER, PRESIDENT.**  
**FRANCIS T. BROOKE.**                      **WILLIAM H. CABELL.**  
**WILLIAM BROCKENBROUGH.\***        **RICHARD E. PARKER.**

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*Attorney General:* **SIDNEY S. BAXTER.**

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\*Judge Brockenbrough died December 10, 1838. The case of M'Coy v. Herbert (p. 548 of this volume) and the subsequent cases in the court of appeals, were decided after his death.

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**JUDGES**  
**OF THE**  
**GENERAL COURT**

**DURING THE TIME OF THESE REPORTS.**

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# CASES

ARGUED AND DETERMINED IN THE

## Supreme Court of Appeals of Virginia.

**Clements v. Powell's Adm'rs.**

November, 1887, Richmond.

(Absent CABELL and PARKER, J.)

**Continuances\*—Insufficient Ground of Continuance for Administrator—Case at Bar.**—In a summary motion against administrators for money paid by plaintiff for defendants' intestate, it is no sufficient ground for a continuance, that defendants had qualified only some seven or eight months before, and so had not had time to settle their accounts of administration, and that they desired to defend themselves on the ground of want of assets to pay the debt, without offering any plea, or affidavit, that the assets were insufficient.

**Appellate Practice—Reversal for Refusal of Continuance—Judgment of Appellate Court.**—But, if it had been error in the county court, to refuse a continuance for defendants, in such case, and to proceed to judgment for plaintiff, yet it was error in the circuit court, reversing the judgment for that cause only, to give final judgment for defendants, instead of sending the cause back to the county court for a new hearing.

This was a motion, under the statute providing a summary remedy for sureties against their principals, \*1 Kev. Code, ch. 116, by Clements against the administrators of Powell, made in the county court of King William, upon notice duly given, at June term 1830, to recover 185 dollars, which Clements had paid for Powell in his lifetime as his surety. The defendants appeared in pursuance of the notice, and moved for a continuance of the motion till the next term; which the court overruled: whereupon they filed a bill of exceptions, shewing the grounds on which they had asked the continuance; namely, "that they had qualified as administrators in September 1829, and had not yet settled their accounts of administration, nor had had sufficient time to do so, and that they desired to defend themselves by shewing that there were no assets in their hands, to which the plaintiff was entitled in a due course of administration of the assets." The court then proceeded to hear the motion, and gave judgment for the plaintiff, for the 185 dollars, with interest and costs. Powell's administrators appealed to the circuit court of King William; which reversed the judgment of the county court, with costs, without making any other disposition of the cause. And

then Clements, in his turn, appealed to this court.

R. T. Daniel, for the appellant, maintained, that there was no error in the proceedings of the county court, and that whether the county court erred or not, the judgment of the circuit court was clearly erroneous. For, 1. Powell's administrators shewed no good reason for the continuance they asked in the county court; and that court therefore properly refused the continuance, and proceeded to give judgment for Clements. And 2, even if the county court erred in refusing the continuance, the circuit court erred yet more in giving final judgment for Powell's administrators; for as the only question presented to the circuit court was the propriety or impropriety of overruling the motion 3 for the continuance \*the circuit court, differing with the county court on that point, ought certainly to have sent the cause back to the county court for a new hearing of the motion on the merits.

There was no counsel for the appellees.

BROCKENBROUGH, J. If the circuit court was correct in holding that the county court erred in refusing to continue the cause till the next term, yet that court itself erred in rendering a final judgment for the defendants, instead of sending the cause back to the county court for another trial. There was, certainly, no other error apparent in the record of the proceedings of the county court. It simply sets forth a notice, that a judgment would be moved for against the defendants, for money which had been paid by the plaintiff as surety for their intestate; which notice had been served on the defendants; and they appeared to defend the motion. The evidence is not spread on the record; nor is there any thing in it to shew that the defendants objected to the evidence adduced in support of the motion. Judgment was rendered for the plaintiff; and the appellate court was bound, under such circumstances, to presume that there was competent and sufficient evidence of the claim.

The only question, then, was whether the county court erred in refusing to continue the cause? And I am of opinion that it did not. The only ground alleged for the continuance was, that the defendants had qualified as administrators only some seven or eight months before the motion was made; that they had not settled their administration accounts, not having had time to do so; and that they desired to defend themselves by

\*Continuances.—See monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.



shewing that there were no assets in their hands, to which the plaintiff was entitled in a due course of administration. I presume this motion for a continuance was founded on *Chisholm v. Anthony*, 1 Hen. &

4 Munf. 27. in which \*the administrator, having pleaded payment at the November term, moved the court for leave to plead the additional plea of fully administered at the succeeding March term, and to continue the cause. The county court rejected the plea; and this court said, the county court erred in not permitting the defendant to amend his plea, by pleading fully administered, according to his motion. It is to be observed, that this court did not place the reversal on the ground, that the county court erroneously refused to continue the cause, but that it precluded the defendant from making a defence to which by the law of the land he was entitled. In the case at bar, the defendants tendered no plea alleging a full administration; or that there were outstanding debts of superior dignity, and no assets beyond them to pay the plaintiff's demand; or any defence of the kind: this case, therefore, is not like *Chisholm v. Anthony*. The defendants here did not even suggest, much less offer to make affidavit, that there were no assets in their hands to satisfy the claim; they merely stated, that they desired to defend themselves on that ground, without the exhibition of any plea or proof to that effect: they did not even produce their inventory and appraisement, or any list or statement of debts of superior dignity due from their intestate, by which to render it probable, that any injury would result to them from the rendition of a judgment against them as administrators. Indeed, by the very terms of the statute, 1 Rev. Code, ch. 104, § 36, they were exempted from liability beyond the assets, even if another suit had been thereafter brought against them on their administration bond. There being then no cause shewn for a continuance, the county court acted rightly, in the exercise of a sound discretion, to refuse it.

The judgment of the circuit court should, therefore, be reversed, and that of the county court affirmed.

5 \*BROOKE, J. I am of the same opinion.

The recent grant of administration to the defendants was not, of itself, good reason for a continuance of the motion. Nor was the suggestion that they had not had time to ascertain the state of the assets, without pretending that the condition of the estate presented any obstacle to their ascertaining the state of them, any sufficient ground for the continuance they asked. However inclined courts of justice ought to be, to give all reasonable indulgence to executors and administrators, I do not think the county court erred in refusing the continuance in this case. But if that was an error in the proceedings of the county court, yet, surely, the circuit court erred, in not only reversing the judgment of the county court, but entering final judgment for Powell's administrators instead

of sending the cause back for a new trial of the motion.

TUCKER, P. That the judgment of the circuit court is erroneous, is palpable; for even if the county court erred, the judgment of reversal should have been followed by an order sending the cause back to the county court to be further proceeded in.

But the county court did not err. However indulgent to executors the courts have always been, yet, in justice to suitors, some caution should be observed in continuances which may rob the plaintiff of a just debt, and sweep away the assets, by enabling the executor in the meantime to confess judgments in after brought actions. While, therefore, it will not be denied, that an executor may be entitled to a continuance, if he can shew good cause for his inability to support his plea of fully administered, and will not be forced to trial merely because he may make defence in a future action, yet I do not think a creditor is bound to wait until the executor has had his administration account settled under an ex parte order of the court of probate, or in the regular

6 \*course of a suit in equity. If he is full handed with the materials for his defence, a court of law is competent to try it; if he is not, he should shew that fact by affidavit, and give satisfactory reasons why he is not. Here nothing of the kind appeared, and the county court, therefore, properly rejected the motion for the continuance.

Judgment of the circuit court reversed with costs, and that of the county court affirmed.

#### Wood's Adm'r v. Duval.

November, 1837. Richmond.

(Absent CABELL and BROCKENBROUGH,\* J.)

**Written Assignments—Consideration—Gift—Liability of Assignor.**—A written assignment of a claim does not necessarily import a valuable consideration; and if it be fairly inferrible, from the circumstances, that the assignment was a gift, the assignor cannot be held responsible to make good the claim, to the immediate assignee or to his assignees for value.

**Assignments—Liability of Assignor—Due Diligence—Case at Bar.**—A. having a claim for debt in suit, assigns that claim to B. for a valuable consideration, and writes a letter to his attorney entrusted

\*He decided the cause in the circuit superior court.

†**Written Assignments Do Not Necessarily Import Valuable Consideration.**—The assignment of a chose in action not assignable at common law, does not make the assignor liable without a valuable consideration for the assignment; and the assignment being in writing does not necessarily import that it was for valuable consideration. *Hopkins v. Richardson*, 9 Gratt. 492, citing the principal case; *Hall v. Smith*, 3 Munf. 560; *Breckenridge v. Auld*, 1 Rob. 148.

See further, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

to prosecute and collect the claim, informing him of the assignment, and requiring him to pay the money, when collected, to the assignee; the attorney accepts the order, payable when collected; he afterwards collects the money, fails to pay it over to the assignee, and becomes insolvent: **Held**, the assignor and drawer is not liable to the assignee, unless he has used due diligence to recover the money from the acceptor of the order, and given the assignor and drawer notice of the acceptor's failure to pay.

Lucy Wood recovered judgment and award of execution on a forfeited forthcoming bond, against William Miller and William Sampson, in the district court \*of Richmond, in September 1797, for £139. 19, with 5 per centum per annum interest from August 1796 till paid, and the costs; and Sampson obtained an injunction from the then high court of chancery, to stay further proceedings at law. Samuel M'Craw was the attorney of mrs. Wood for the prosecution and collection of this claim. While the injunction staying the proceedings at law was yet pending in the court of chancery, mrs. Wood executed a writing in the form of a letter addressed to M'Craw, dated in October 1806, in these words: "My son William Wood is authorized to collect or dispose of a debt due me by W. Sampson and W. Miller, which debt was some years past in-joined by them in the chancery court for the Richmond district. (Signed) Lucy Wood." William Wood then executed a writing, likewise in the form of a letter to M'Craw, dated in November 1806, in these words: "Sir, on the 6th October 1806 I traded to mr. T. M. Woodson 1200 dollars of the within debt with its interest till paid, for which I am bound. You will, therefore, on collection of Sampson and Miller's debt, pay the same to him or order. (Signed) W. Wood." And Woodson, in the same month of November 1806, made an assignment of his interest in the claim, by writing in these words: "The claim I hold in this debt, I transfer to J. F. Price, without recourse to me and heirs. (Signed) T. M. Woodson." Upon a copy of the above writings, M'Craw made the following indorsement, dated in January 1807—"The within are copies of originals filed in my office by J. F. Price, and which I will comply with when the money comes into my hands, should it ever get there. (Signed) Sam. M'Craw." After which, Price assigned the claim to William Duval, and he assigned it to his son John Duval.

In November 1822, John Duval exhibited his bill in the court of chancery of Richmond against William Duval, the executors of Price Woodson, William Wood, 8 \*Lucy Wood, and M'Craw, setting forth the facts above stated, and alleging further, that Sampson's injunction had been dissolved; that the debt due from Miller and him (the subject of the several assignments above mentioned), or some part of it, had been received by some one of the defendants; and that, supposing M'Craw liable for the money, the plaintiff had brought an action against him at law, but had dismissed it,

being advised that he could only be relieved in equity, since the assignments under which he claimed were only available in equity. Therefore, the bill prayed, that the defendants respectively should be compelled to account for and pay to the plaintiff, any money by them, or any of them, received of the debt so assigned to him.

William Duval, and the executors of Price, answered the bill. The defendants Lucy Wood, William Wood, and M'Craw, all died pending the suit, and without having put in answers; and the proceedings were revived against their administrators, respectively. M'Craw's administrator put in an answer, shewing that M'Craw died insolvent, and that he had no assets. As to the administrators of Lucy Wood and William Wood, the bill was taken pro confesso. The defendant Woodson also continued in default.

It appeared by the pleadings and proofs in the cause, that the assignment of the debt in question from William Duval to the plaintiff John Duval, was a gift from the father to the son; that the assignments from Price to William Duval, and from Woodson to Price, were both assignments for valuable consideration though they were both without recourse to the assignors; that the assignment from William Wood to Woodson was also made for valuable consideration; but of the character of the transaction as between mrs. Wood and her son William, there was no other evidence than that afforded by her letter to M'Craw of October 1806. It was also proved, that M'Craw, professing 9 to act as attorney for \*mrs. Wood, received from Miller's administrator, in July 1815, the sum of 1051 dollars in full of the debt due from Miller and Sampson. And it appeared, that M'Craw had taken the oath of insolvency, under the statute for relief of insolvent debtors, in March 1820. But when he became actually insolvent, no-wise appeared.

The cause having been transferred to the circuit superior court of Henrico, that court decreed, that the administrator of Lucy Wood, and the administrator of William Wood, out of the estates of those decedents in their hands, should pay the plaintiff 1051 dollars, the amount received by M'Craw, with interest from July 1815, the date when he received it. As it appeared, that any decree against M'Craw's administrator would be unavailing, none was given, but liberty was reserved to the plaintiff, or to the administrators of the Woods against whom the decree was made, whichever of them should satisfy the decree, to apply to the court for a decree against M'Craw's administrator. And the plaintiff asking no decree against William Duval, or the executors of Price, or Woodson, the suit was discontinued as to those defendants.

Upon the petition of mrs. Wood's administrator, this court allowed him an appeal from the decree.

Johnson, for the appellant.  
Robinson, for the appellee.

PARKER, J. It may be doubted whether

Lucy Wood, the appellant's intestate, would, under any circumstances, have been liable to the appellee for the debt which she authorized her son "to collect or dispose of," since there is no evidence that it was to be done for her benefit, and the probability being, both from her own letter and that of her son to M'Craw, that it was a gift to her son. The bill  
10 does not charge that she assigned \*her claim for value; there is no proof that she did so; her son speaks of his being bound, but says nothing of her liability over; and her letter to M'Craw does not purport to be an assignment of the claim, but a mere announcement to her attorney of the fact that she had authorized her son to collect or to dispose of it, in order, no doubt, to satisfy M'Craw of her son's right to call upon him for a settlement, unless he disposed of the debt of another. It would be difficult, I think, under these circumstances, to charge her even if the appellee had diligently pursued M'Craw.

But, without pressing this point, I am of opinion that, in the events which have happened, neither of the Woods can be charged. The letters addressed by them to M'Craw are no more than orders on their agent or attorney, for money; imposing on the writers the ordinary responsibility of drawers of such paper, and no more. If the fund had been collected and in the hands of M'Craw, their accepted drafts would have imposed upon the holders the obligation, at least, to demand payment, and in case of refusal, to give notice to the drawers, in order to enable them to take the proper steps for their security: the holders could not lie by for years, and then resort to the Woods, or either of them. The law is the same where the fund is to be collected. M'Craw, upon accepting the order, became liable to pay to the transferees as soon as he received the amount of the debt. The money was received in July 1815, and there is no evidence of M'Craw's insolvency until March 1820. In the meantime, the whole debt belonging to the appellee or to the holders of the orders, they might control M'Craw in the collection; and if they permitted him to receive it, he might instantly have been sued at law upon his acceptance, or the orders been returned, with notice to the drawers of his default. It was their duty to ascertain when the money came into his hands; and then to take the proper  
11 steps to enforce \*payment, or to return the orders, and enable the drawers to charge M'Craw. Instead of this, it is not shewn that they took any efficient steps to recover the money from M'Craw, or gave any notice of his default to either of the Woods, until the filing of this bill in November 1822; more than seven years after M'Craw had collected the debt. All this appears upon the face of the bill itself.

I am therefore of opinion, that the decree of the circuit superior court should be reversed, and the bill, as to both the Woods, dismissed.

BROOKE, J. As it does not appear that Mrs. Wood received any consideration for

her order on M'Craw her attorney, in favour of her son William Wood, she was not responsible to the plaintiff, or to any of the intermediate assignees of the order. That William Wood was responsible, appears by the terms of his assignment of 1200 dollars with interest, which, he says, he had "traded" to Woodson, "and for which he was bound." M'Craw accepted the order in 1807, and collected the money in 1815. From that time we hear nothing of any demand upon him by any of the parties through whose hands the order had passed, nor of any notice to either of the Woods that M'Craw had refused to pay, until 1822, when this suit was brought. Treating the case as an ordinary assignment of a debt, I perceive no ground for coming into a court of equity. After an acceptance of M'Craw, and the receipt of the money by him, it was no longer a mere equitable assignment as to him; he became a debtor at law; and it appears by the bill, that the plaintiff so considered him; for he brought his suit at law, and dismissed it, because, as he says, he could not establish his claim in that forum, but more probably, I think, because M'Craw had become insolvent. However that may be, the great delay in giving notice to  
12 Mrs. Wood, if she \*was bound, and to William Wood, who was bound, that M'Craw, after the acceptance of the order and the receipt of the money, had refused to pay it, was, I think, such laches as exonerated them from any responsibility for the failure of M'Craw to pay the order. The plaintiff is not entitled to recover in any forum. The decree should be reversed, and the bill dismissed, both as to Lucy Wood's representative, and William Wood's, though the latter has not appealed.

TUCKER, P., concurred. Decree reversed, and bill dismissed.

#### Kemp v. Mundell and Chapin.

November, 1887, Richmond.

(Absent CABELL, J.)

**Appellate Practice—Irregularity in Setting Aside Issue on Improper Plea\*—Effect.**—If an improper plea be received, and issue be taken on it, the court may afterwards set aside the issue and the plea; and if this be in substance and effect done, though in form irregularly done, the proceedings shall not be reversed for such irregularity.

**Pleading—Debt on Judgment of Sister State\*—Plea of Nil Debet.**—The plea of nil debet is not a good plea to an action of debt on a judgment of another state of the union.

**\*Pleading and Practice—Striking Out Plea after Issue Joined.**—To the point that the court may strike out a plea that is wholly unnecessary even though issue has been joined upon it, the principal case is cited in *Fant v. Miller*, 17 Gratt. 67; *Va. F. & M. Ins. Co. v. Buck*, 88 Va. 530, 13 S. E. Rep. 978. For the proposition laid down in the first headnote, see the principal case also cited in *Hart v. B. & O. R. Co.*, 6 W. Va. 343.

**†Judgment of Sister State—Effect.**—In *Coleman v. Waters*, 13 W. Va. 307, it is said: "Numerous deci-

**Same-Same;—Declaration—Case at Bar.**—A Maryland judgment is rendered for the debt, the damages, and costs, with a memorandum at foot that the plaintiff shall release the damages on payment of the interest due on the debt; in debt on this judgment in Virginia, the declaration demands the debt and the interest, not the damages; and held good.

On the 30th November 1822, Kemp and two others executed a joint and several bond to Mundell and Chapin for 198 dollars payable six months after date with interest from the date. Mundell and Chapin brought an action on the bond against Kemp in the county court of Prince George, Maryland, laying the damages for the detention  
13 \*of the debt at 400 dollars; Kemp confessed judgment for the debt and damages claimed; and, thereupon, the court rendered judgment for 198 dollars, the debt, and 400 dollars, the damages, and the costs of suit; with a memorandum entered at the foot of the judgment on the record, that the plaintiffs agreed to release the 400 dollars damages, upon payment of the interest on the debt from the 30th of November 1822 till paid, and the costs of suit. §

Kemp afterwards coming to Virginia, Mundoll and Chapin brought an action of debt against him on the Maryland judgment, in the circuit superior court of Princess Ann; and in their declaration demanded 205 dollars, being the amount to the principle debt and costs recovered by the judgment, and instead of the 400 dollars damages, the interest on the principal from the 30th November 1822—but the declaration, in the sequel, set forth the record of the judgment as it really was; that is, it stated that the judgment was for the principle debt, the damages, and the costs, subject to a release of the damages on

sions of state courts, holding a judgment fairly and regularly obtained in another state, as full and conclusive evidence of the matter adjudicated, have been made by numerous state courts. *Evans v. Totem*, 9 Serg. & R. 269; *Benton v. Burgot*, 10 Serg. & R. 240; *Kean v. Rice*, 12 Serg. & R. 208; *Baxley v. Lynch*, 4 Harr. (N. J.) 241; *Wemnag v. Pawling*, 5 Gill & J. (Md.) 507; *Clarke's Adm'r v. Day*, 2 Leigh 172; *Kemp v. Mundell, etc.*, 9 Leigh 12; *Rogers v. Coleman*, Hard. (Ky.) 418; *Litt. (Ky.)* 273, 417; *Williams v. Purton*, 3 Mar. J. J. (Ky.) 604; *Fletcher, etc., v. Ferrell*, 9 Dana (Ky.) 377; *Andrews v. Montgomery*, 19 Johns. (N. Y.) 166; see *Robinson's (new) Practice*, vol. 1, chs. 45 and 46 and authorities there cited." See further, monographic note on "Judgments" appended to *Smith v. Chariton*, 7 Gratt. 425

§**The Action of Debt.**—See monographic note on "Debt, The Action of" appended to *Davis v. Mead*, 13 Gratt. 118.

§In Maryland, interest is recoverable of right in actions on bonds or other written contracts for the payment of money on a day certain; but the practice is, to give judgment for it in the form of damages, with a memorandum at the foot of the judgment, that the damages shall be released on payment of the interest. *Preston v. West*, 4 Har. & M'Hen. 70. *Gwinn v. Whitaker*, 1 Har. & Johns. 574. *Newson's adm'r v. Douglass*, 7 Har. & Johns. 417. But the law and practice of Maryland was nowise stated in this record.—Note in Original Edition.

payment of the interest; and it contained, moreover, an averment that the debt, damages and costs, so recovered by the judgment, were of the value of the debt and interest now here demanded.

The defendant first pleaded no such record, on which issue was joined. And he afterwards tendered a plea of nil debet; to which the counsel for the plaintiffs objected, but on the defendant's counsel saying that he hoped to shew by authorities that this  
14 was a proper \*plea in such a case, the court overruled the objection, and the plea was put in, and the plaintiffs took issue upon it. But at the next term after these proceedings, there was a judgment entered for the plaintiffs as upon a general demurrer by them to the defendant's plea of nil debet; and the court gave judgment for them also on the plea of no such record, and then judgment for them according to the demand in the declaration; namely, for the debt and interest.

The defendant applied by petition to this court for a supersedeas to the judgment; which was allowed.

Johnson, for the plaintiff in error, contended, 1. That while the issue joined on the plea of nil debet stood on the record, no demurrer to that plea was admissible; the plaintiffs could nor reply and demur too. And if the demurrer was not properly admissible, much more irregular and erroneous was the proceeding of the court overruling the plea as upon demurrer, when in truth no demurrer had been put in. The consequence of this irregularity might have been to deprive the defendant of a good plea, such as payment of the debt after the judgment rendered. 2. That the plea nil debet to this declaration was not a demurrable plea. He said the case of *Clarke's adm'r v. Day*, 2 Leigh 172, required a reexamination; and notwithstanding that case, he insisted, that the laws of Maryland must, in our courts, be regarded as matters of fact to be proved by evidence; that the declaration here should have set forth the effect of the law of Maryland; or the plaintiffs might have replied, that the plea was not a good bar according to the law of that state; and the question whether it was so or not, was, in its nature, a matter of fact, and so a proper subject of pleading and evidence: that the court could not upon a general demurrer to the plea take judicial notice, that by the law of Maryland the plea was not a good plea to the action there.

15 \*3. That this being an action on a judgment, the declaration should have demanded what the judgment gave, namely, the debt and the damages, not the debt and the interest, for which no judgment was given, though the payment of interest was, by the memorandum, to be a defeasance of the judgment for the damages; in like manner as in debt on a judgment for the penalty of a bond to be discharged by the payment of principal and interest, the declaration should demand the penalty adjudged. *Ragsdale ex'or v. Batte ex'or*, 2 Wash. 201. *Anderson adm'r v. Price*, 4 Munf. 307.

Robinson, contra, said, 1. That it was plain the question whether the plea of nil debet should be received or not, was not decided, but was held sub judice till the defendant's counsel should shew the authorities to sustain it. It was doubtless owing to a clerical misprison that the similiter was added to the plea. But if the plea was not a good plea to the action, the defendant could have had no benefit from a trial of the issue upon it. Suppose the plea an improper one, which the court below should have rejected, and from which the party could have derived no benefit; this court would not reverse the judgment for any irregularity in the manner in which the plea was overruled. If the plea had been received, it should have been struck out; Wyche v. Maclin, 2 Rand. 426, Read v. Hanna's ex'or, 3 Rand. 56. Then, 2, he said, the plea was unquestionably demurrable: he relied on Clarke's adm'r v. Day, and cited also Barney v. Patterson, 6 Har. & Johns. 182, and Wernwag v. Pawling, 6 Gill & Johns. 500. And as to the last point, he insisted, that the declaration properly demanded the interest which was really due, instead of the damages which were not due, by the judgment. But if that was a defect in the declaration, it was cured by the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512.

16 \*TUCKER, P. I am of opinion that there is no error in this judgment. The cases of Ragsdale v. Batte, and Anderson v. Price, are not direct authorities upon the point, and without disturbing them, we may sustain the declaration in this case. I consider the demand of the plaintiff to be substantially for the debt and interest, they having, at the time the judgment was entered, released the damages and agreed to receive interest in lieu of them. After that agreement, they never could enforce payment of 400 dollars damages, which were equivalent to thirty-three years interest, when only three years interest was due at the date of the judgment. Now, this is not the case of a demand reduced by payments or matter ex post facto. The reduction is in the judgment itself, and the plaintiffs never had title to demand more. They therefore properly demanded what was due, and no more. Indeed, it is obvious, that this practice in Maryland has been adopted to enable the plaintiff to recover continuing interest; and though the contrivance seems awkward, we cannot fail to see, that the true meaning of the judgment is that the plaintiffs shall recover their debt with interest till paid.

The plea of nil debet was, in this case, an improper plea, according to the decision in Clarke's adm'r v. Day, which we are not disposed to disturb, though I do not acquiesce in some of the reasoning of judge Coalter in that case. The court, therefore, erred in receiving the plea, and might very properly at a subsequent time correct that error by setting aside the issue and the plea. It has done this, substantially, by entering a judgment as if there had been a demurrer. Perhaps, indeed, we ought to infer that there

was one; but even if there were none, the court having done what was right, we cannot reverse its act because it has not done it in the right way; since the mode of doing it has no influence upon the justice of the case. It was said, indeed, that if the plea had been rejected, the defendant \*might have pleaded payment, and that he has been taken by surprise. I do not think so. He ought to have pleaded payment at first or if he did not, still, on the plea of nil debet being overruled, he would have had a right to plead payment. But he offered no such plea. Had he done so, I should have considered it error to refuse it, as the court, by accepting his first plea, had led him reasonably to suppose he might defend himself under it.

I am of opinion, that the judgment be affirmed.

BROOKE, J. I entirely concur in the opinion of the president. I did not concur in all the reasoning of judge Coalter in Clarke's adm'r v. Day, though I did in the conclusion to which he came, and I said no more. I then entertained the opinion I do now,—that the judgments of our sister states, under the constitution of the U. States and the acts of congress in pursuance thereof, are to be treated as domestic judgments; and that the effect of such judgments in the state from which they came, is a question of law, not a question of fact as in the case of foreign judgments. And I was surprised to hear it argued to the contrary in this case.

BROCKENBROUGH and PARKER, J., concurred. Judgment affirmed.

#### 18 \*Governor for Fisher v. Vanmeter.

November, 1837, Richmond.

[83 Am. Dec. 221.]

(Absent CABELL, J.)

**Executions\*—Postponement of Sale—Acquiescence of Plaintiff—Discharge of Sheriff—Case at Bar.**—A sheriff having levied a *fi. fa.* on goods of the debtor, receives an order to postpone the sale from an unauthorized person, and postpones the sale accordingly; and the sheriff relies on the acquiescence of the plaintiff in the order, to discharge him from liability for conforming with it: **Held**, it is incumbent on him to prove such acquiescence and the time of it; for if it occurred after the sale day of the execution, it would be of little weight, since then all the mischief had been done.

**Same\*—Same†—Restoration to Debtor of Goods Taken—Effect on Lien.**—When goods have been taken in execution under a *fi. fa.* a direction given by the creditor to the sheriff to restore the goods to the

\*Executions.—See monographic note on "Executions" appended to *Paine v. Tutwiler*, 37 Gratt. 440.

†Same.—Suspension of Proceedings—Effect.—A mere suspension of proceedings on a levied execution does not authorize a restoration of the property to the possession of the defendant nor release the levy. *Walker v. Com.*, 18 Gratt. 50, citing the principal case.

possession of the debtor, is fraudulent, and destroys the lien of the execution on the goods; but a mere order to postpone the sale, without collusion, does not affect the lien of the execution.

**Same—Same—Restoration by Deputy of Property**

**Taken—Liability of Sheriff.**—A deputy sheriff having levied a *fi. fa.* on the goods of the debtor, receives an order from the creditor to postpone the sale for two months, holding the property subject to the sheriff's control to satisfy the debt; and the deputy sheriff postpones the sale, but instead of holding the property restores it to the debtor, whereby the lien of the execution is destroyed and the debt ultimately lost: **Held**, this is official misconduct in the deputy, for which the sheriff and his sureties are liable in an action on his official bond.

**Appellate Practice—New Trial—Rule of Decision When Facts Certified.**—

Exceptions to an opinion of a court refusing a new trial, are not analogous to a demurrer to evidence: and in reviewing such an opinion, upon a bill of exceptions setting forth the facts proved at the trial, where there appears no conflict of evidence and no dispute concerning the credit of witnesses, the appellate court inquires, whether the verdict conforms with the fair inferences of fact from the facts stated; and if it sees that it does not, reverses the judgment, and directs the new trial.

Debt on a sheriff's official bond, brought in the circuit court of Hardy, in the name of The Governor at the relation of William Fisher, against Vanmeter, the sheriff of Hardy, and M'Mechin and Williams, his sureties, to recover damages for an official default of the sheriff.

19 \*The declaration demanded 10,000 dollars, the penalty of the bond; and, after stating the execution thereof, and setting forth the condition, which was in the usual form,—that the sheriff should well and truly execute and due return make of all process and precepts to him directed, and pay and satisfy all sums of money by him received by virtue of such process, to the person or persons to whom the same should be due, and in all other things should truly and faithfully execute and perform the duties of the said office of sheriff during the time of his continuance therein,—assigned the breach, in substance, to the following effect: that a writ of *fieri facias*, sued

\* See \* on page 18.

**Appellate Practice—New Trial—Rule of Decision When Facts Certified.**—

In *Slaughter v. Tutt*, 12 Leigh 163, it is said: "Where the facts certified to this court under the rule established in *Bennett v. Hardy* (6 Munf. 126), present but a naked question of law, there seems to be no difference of opinion. In such a case, this court would not be influenced by the opinion of the jury or inferior court as to the law of the case, and would grant a new trial or not, according to its own opinion of the law arising upon the facts stated. *Fisher v. Vanmeter*, cited at the bar, rests on this principle." To the same point, see the principal case cited in *Valden v. Com.*, 13 Gratt. 727; *Strode v. Clement*, 90 Va. 560, 19 S. E. Rep. 177. See further, monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 26 Gratt. 887.

out by William Fisher, the relator, upon a judgment of the circuit court of Hardy, against Machir and Hopewell, for 682 dollars and costs, to be discharged by the payment of 341 dollars with interest and the costs, had been delivered to Craigen, a deputy of Vanmeter the sheriff, and by him levied on fourteen horses the property of Machir, which he failed to make sale of, and though Fisher afterwards sued out a writ of *venditioni exponas* commanding the sheriff to make sale of the property, yet the deputy, without authority, returned it to Machir the debtor; whereby Fisher had lost the debt.

The defendants pleaded, 1. Conditions performed. 2. That William Fisher, the relator, had given written instruction to Craigen, the deputy, after the execution was levied, to postpone the sale for two months, and hold the property subject to the control of the sheriff, and that the sale was accordingly postponed; whereby the property was released from the execution. And 3. that no such writs of execution as were in the declaration supposed, had come to the hands of the sheriff or his deputy, or had been levied on the property, nor was the property surrendered as in the declaration alleged. Issues were made up on all the pleas.

Upon the trial of the issues, the jury found a verdict for the defendants, which the plaintiff moved the court \*to set aside, and to order a new trial. But the court overruled the motion, and gave judgment for the defendants.

Whereupon, the plaintiff filed a bill of exceptions to the opinion of the court overruling his motion for a new trial; setting forth, in *hæc verba*, the official bond of the sheriff and his sureties, on which the suit was brought; the judgment of the circuit court of Hardy for William Fisher against Machir and Hopewell, on which the *fieri facias* mentioned in the declaration was sued out, whereby it appeared that it was an award of execution on a forfeited forthcoming bond in which Machir was principal and Hopewell his surety; and the *fieri facias*. And then the bill of exceptions stated, that it was proved that the *fieri facias* was, before the return day thereof and while it was in full force, put into the hands of Craigen, the deputy of Vanmeter, sheriff of Hardy: that Machir and Hopewell were then possessed of goods and chattels out of which the sheriff could have made the debt and costs in the execution mentioned; that Craigen, the deputy, levied the execution on fourteen horses, the property of Machir, the principal debtor, and afterwards returned the execution with the following return indorsed thereon—"Executed on fourteen head of horse creatures, and two months given by Jacob Fisher"—though it was not proved at what time the execution was so returned. That it was admitted, that in a suit in the court of chancery of Winchester, wherein the parties to this suit were parties, Hopewell had been relieved from all liability on William Fisher's judgment and execution against Machir and him, in consequence of the return made by the sheriff on the execution; that Hopewell yet had sufficient prop-



erty to satisfy the debt, if he had not been so relieved from liability for the same; that the fourteen horses of Machir, on which the execution was levied by Craigen the deputy, were, subsequently to the levy thereof, mortgaged by Machir to other creditors;

21 that, "in consequence of the return made by Craigen on the execution, the mortgage had gained a preference over the execution; and that, after the making of the mortgage, Machir became, and died, insolvent. That the defendants, on their part, then offered in evidence an order, proved to be in the handwriting of Jacob Fisher, the father in law of William Fisher, the relator, in the following words—"Mr. George Craigen, sheriff. You will postpone the sale of the property of mr. James Machir, taken in execution in behalf of William Fisher, for two months. You will hold the property subject to your control to satisfy the debt, should it not be done otherwise. (Signed) Jacob Fisher." That the defendants then introduced Jacob Fisher as a witness, who proved, that he was not the agent of William Fisher, and was not authorized by him to control or manage his execution against Machir and Hopewell; after that he had given the order above recited to the sheriff, but before the two months had expired, he told William Fisher what he had done, who was offended at it, but told the sheriff to go on and sell the property at the end of the two months, and make the money as soon as he could. That it was proved, that the sheriff advertised the property for sale at the end of two months, but he did not attend at the day and place of sale. That it was proved, by a witness for the defendants, that after the above recited order was given by Jacob Fisher, and the execution returned, the father of Craigen, the deputy sheriff, told William Fisher, that "now he might make his money out of Machir;" to which he answered, "that he looked to Hopewell for it." And that these were all the facts proved in the cause. Whereupon, the plaintiff's counsel moved the court for a new trial, because the verdict was contrary to the evidence. The court overruled the motion, and the plaintiff filed his exceptions.

Fisher applied by petition to this court for a supersedeas; which was allowed.

22 \*Johnson, for the plaintiff in error, objected, that the cause was tried on immaterial issues: That the order to postpone the sale, relied on in the first of the special pleas, furnished no ground of defence, since such order would not in law discharge the property from the execution: That the second of those pleas rested the defence on a denial, that such writs of execution as the declaration supposed ever came to the hands of the sheriff or his deputy, that those executions were levied on the property of Machir, and that the property was surrendered to Machir, as the declaration alleged; but it could not be material, that both the writs should have come to the sheriff's hands, much less that they should both have been levied; it was enough if the fieri facias came to his hands, and was levied; nor was it material,

that the property should have been surrendered to Machir, since if it was retained by the sheriff, and yet not sold, his responsibility was complete. But of this objection no notice was taken by the court.

The objection on which he mainly relied, was, that the verdict was contrary to the plain justice of the case, upon the uncontested facts stated in the bill of exceptions. He said, the order given by Jacob Fisher to the sheriff, was given without authority from William Fisher, and was nowise so sanctioned by him as to make it available to the defence of the sheriff; indeed, it did not appear that he had any knowledge of the order, till after the sale day appointed on the fieri facias, and even the return day of that writ, had elapsed; and then his disavowal of the order could not have obviated the mischief of the sheriff's compliance with it. But if the order had been given by William Fisher himself, it neither justified the surrender of the property to the debtor Machir, nor the return which was made on the execution; not the surrender of the property, because the order only authorized a postponement of the

23 sale, upon condition that the sheriff should hold the property \*subject to his control, and sell it if necessary; not the return that was made, for that return only stated, in general, that Jacob Fisher (a stranger) had given time, whereas the return, to have been true to the order, should have stated the real effect thereof, namely, that the sale only was postponed, and the property retained by the sheriff. It might be objected, that the venditioni exponas alleged in the declaration was not shewn at the trial, or proved to have been sued out; but it was immaterial, for that writ was not necessary, not being required by law to authorize a sale, and none could in this case have been availing, because the property had been sold under Machir's subsequent mortgage, which, it is agreed, had gained a preference in consequence of the sheriff's return.

Stanard, contra, argued only the question arising on the refusal of the new trial. He insisted, that the jury having found a verdict, and the court below having approved it as being well warranted by the evidence, and therefore refused a new trial, the exceptions to that opinion ought to be treated in the appellate court like a demurrer to evidence, so that if there were any admissible inferences from the facts stated in the exceptions, which would warrant the verdict, or any defect in the case of the party excepting, this court should not reverse the judgment of the court which tried the cause. Now, he said, there was no proof here, of the principal fact complained of in the conduct of the sheriff; namely, that he had returned the property on which he had levied the execution, to Machir, the debtor. [Brooke, J. Is not the inference irresistible, that the property was restored to Machir? If the sheriff had retained it under his own control, he could have sold it to satisfy the execution; if it had not been restored to Machir, his mortgage of it could not have given any preference over the execution.] Stanard an-

answered, that in such a case as this, he  
 24 thought the appellate \*court ought not  
 to make such inferences of fact as those  
 suggested, contrary to the finding of the  
 jury, approved by the circuit court. But  
 suppose the fair inference on that point to be  
 such as had been suggested from the bench,  
 there was another point on which nothing  
 certain could be inferred from the facts stated  
 in the exceptions; which was, the time when  
 the fact of the order given by Jacob Fisher  
 to postpone the proceeding on the execution,  
 was communicated to William Fisher. If he  
 was informed of that order before the sale  
 day originally appointed under the levy of the  
 fieri facias, and yet told the sheriff to pro-  
 ceed to sell after the lapse of two months, he  
 thereby, in effect, approved and sanctioned  
 the order; he himself consented to the in-  
 dulgence given to Machir, which exonerated  
 Hopewell, the surety of Machir, from further  
 liability for the debt, and which gave the  
 creditors by mortgage, their priority over  
 his execution. And the circumstance, that  
 the exoneration of Hopewell, and the prior-  
 ity of the mortgage, was the consequence of  
 the indulgence given by the order, and the  
 sheriff's return on the execution, is enough  
 to shew, that William Fisher's knowledge of  
 the order having been given by Jacob, and  
 his implied sanction of it by directing the  
 sheriff to conform to it, preceded the sale  
 day under the execution; otherwise, the  
 court of chancery would not have held Hope-  
 well exonerated, or if it did, the decree should  
 not have been acquiesced in, as it was, by  
 William Fisher, neither would he have  
 yielded to the preference claimed for the  
 mortgage over his execution. [Brooke, J.  
 Here again, the fair inference seems to be,  
 that the sale day under the fieri facias had  
 passed, before William Fisher was informed  
 of Jacob's unauthorized order; for when he  
 was informed of it, he did not tell the sheriff  
 to proceed to sell on the sale day, though he  
 was offended that the order had been given,  
 and would therefore most probably have  
 countermanded and rescinded it, if  
 25 he could \*have done so with any effect;  
 that is, if the sale day had not passed,  
 and if the property had not been restored  
 to the debtor.] Stanard thought that the  
 just inference, or rather the fact, was, on  
 the contrary, that though he disapproved  
 the order, yet he did not disavow it, but  
 directed the sheriff to conform with it; for  
 the sheriff's conduct, and his return of the  
 execution, without any such sanction from  
 the creditor, could hardly have exonerated  
 the surety of Machir from the debt, or  
 given a subsequent mortgage a preference  
 over the execution. If a creditor put his  
 execution into the sheriff's hands with  
 instructions to forbear from serving it,  
 the lien of the execution on the debtor's  
 goods was lost; if the execution was levied,  
 and the creditor then directed it to be held  
 up, the lien was waived. He said, it was in  
 that way, without doubt, in this case, that  
 Hopewell the surety was exonerated, and the  
 lien of the execution on the property was  
 lost; and that William Fisher acquiesced in

those results. He referred to Bullitt's ex'ors  
 v. Winstons, 1 Munf. 269, in which it was  
 held, that a plaintiff directing the sheriff to  
 put off a sale of property taken in execu-  
 tion to a day after the return day, and to  
 suffer it to remain in the possession of the  
 defendant, without the concurrence of the  
 sureties, released the sureties from that or  
 any subsequent execution; and the plaintiff,  
 in such case, adding to the direction, that  
 the sheriff should hold the property subject  
 to the execution, would not prevent the  
 release from operating. But how, he asked,  
 could the sheriff be held responsible for such  
 an act as was here imputed to his deputy?  
 The deputy, of his own head, not in virtue  
 of his office, not in pursuance of any trust or  
 authority from his principal, made an  
 arrangement with Jacob Fisher, by which  
 indulgence was to be given upon William  
 Fisher's execution to his debtor. The  
 deputy, in thus acting, made himself  
 26 personally responsible, but \*acting  
 beyond the limits of his official author-  
 ity, he could not bind his principal.

Johnson replied, that it was exactly in the  
 fact of the deputy, acting for the sheriff in  
 the execution of the process, having taken  
 upon him to give an indulgence to the  
 debtor, which the law did not permit a sheriff  
 to give, that he violated the official duty of  
 the sheriff. Of course, his principal was  
 liable for his default. If the order of Jacob  
 Fisher was really the act of William, and  
 this were a question between William Fisher  
 and Hopewell, the case of Bullitt's ex'ors v.  
 Winstons would be an authority to shew  
 that Hopewell was exonerated; but that  
 authority could have no influence on the  
 question to be decided here. He maintained,  
 that this court, in reviewing the judgment  
 of the circuit court on the motion for the  
 new trial, had to perform the simple duty of  
 inquiring whether the verdict of the jury  
 was a fair conclusion from the facts proved  
 at the trial, as stated in the bill of exceptions.  
 There was here no contrariety in the evi-  
 dence; no dispute as to the credit of wit-  
 nesses. Was the order under which the  
 deputy sheriff gave the debtor the indul-  
 gence, the act of William Fisher? That it  
 was not given by him, or by Jacob Fisher  
 with any previous authority from him, was  
 certain. He never sanctioned it, in any way,  
 or at any time. The sheriff rested his  
 defence, wholly, on William Fisher's subse-  
 quent acquiescence, and on his acquiescence  
 signified while the execution was yet in his  
 hands, and it was in his power to proceed  
 with the sale. It was incumbent on him to  
 prove such acquiescence. The court did not  
 certify, that the fact of William's acquies-  
 cence in the order of Jacob was proved: it  
 only certified, that William, when told of the  
 order given by Jacob, was offended, and  
 then told the sheriff to sell at the end of the  
 two months, and make the money as soon  
 as he could. The fair inference from the  
 facts proved at the trial, was, that the deputy  
 sheriff had restored the property  
 27 \*to the possession of the debtor, in  
 consequence of the order given him by

Jacob, before William knew of the existence of the order: the sheriff's return itself sufficed to prove the fact beyond doubt, for it was founded on Jacob's order alone, without the least reference to William's sanction: and that fact produced all the mischief of which the plaintiff complained. But, he repeated, the order itself, supposing it had been given with the authority of the plaintiff, warranted the sheriff to do no more than postpone the day of sale, not to part with the possession of the property, and so to destroy the lien of the execution upon it.

**PARKER, J.** The bill of exceptions in this case does not state the fact that the property levied on was returned by the sheriff to the debtor, but the other facts proved sufficiently establish it. For, otherwise, the sheriff would have proceeded to sell at the end of the two months, and the mortgage of the property by Machir would not have affected the preferable lien of the plaintiff's execution, although the consent to postpone the sale, would, according to the authority of *Bullitt's ex'ors v. Winstons*, have released the surety.

The gravamen of this action, therefore, is that the sheriff did not retain in his possession the property levied on, and proceed to sell it; and from this obligation he was not released by any act of the plaintiff. If the conversation of the plaintiff with the sheriff took place after the return day of the execution, it can hardly be construed into a recognition of Jacob Fisher's officious act, for then the mischief had been done, and the surety released; and if before, it was no more than a direction to postpone the sale, holding the property in his own hands to satisfy the debt after the expiration of the two months, which did not authorize the sheriff to return it to Machir, nor, in my opinion, discharge the lien of the execution. The deputy sheriff must be considered <sup>28</sup>as still holding it as sheriff; and if, at the expiration of the time, he failed to sell, or, by any previous act of his, suffered the property to be elogned, or rights to be acquired in it by others, preferable to the plaintiff's, his principal is liable for its value.

I think, therefore, the new trial ought to have been awarded.

**BROCKENBROUGH and BROOKE, J.,** concurred.

**TUCKER, P.** I am also of opinion, that the judgment should be reversed, and a new trial awarded. Although the court and jury have concurred, yet the facts, and not the credibility of testimony, being fairly before this court, it must decide whether upon the facts stated the defence was made out. I think it was not. The order to the sheriff was given by an unauthorized person, and the acquiescence in that order by the plaintiff subsequently, ought to have been established in order to charge him. The fact, that he directed the sheriff to proceed at the end of the two months, would have afforded strong evidence of acquiescence, if it occurred before the day appointed for the sale. But if it occurred afterwards, it would be of little

weight, as the mischief was then done. It was incumbent, then, on the defendant to shew the time at which the alleged acquiescence occurred, and that fact not appearing, his defence as to this matter was not made out.

I am, however, farther of opinion, that if William Fisher had given the direction which Jacob gave, it would not have been a sufficient defence. The sheriff was not directed to return the property to Machir's possession. It was a mere direction to postpone the sale, but to hold the property subject to his control. The mere postponement of a sale under an execution does not affect the plaintiff's rights, unless there be collusion. But if he directs the sheriff not to sell, but to

<sup>29</sup> \*leave the property in the debtor's possession, the execution is fraudulent, and any other creditor may take the property in execution; 13 Vin., Abr. Fraud G. pl. 3, p. 524, cited by Green, J., in *Claytor v. Anthony*, 6 Rand. 305, 2 T. R. 596. The difference is obvious. So long as the goods are in the hands of the sheriff, they are in the custody of the law. But when the plaintiff directs a return of them, he takes them out of the custody of the law; and from that moment they are no longer bound by his execution. These principles will be found to be maintained by the cases of *Baird v. Rice*, 1 Call 18, and *Bullitt's ex'ors v. Winstons*, 1 Munf. 269. In this case, then, the order had not the effect of removing the lien, and leaving the property subject to the execution of another, or to be encumbered by trusts in favour of other creditors. The sheriff, however, failed to obey the order; he failed to hold the property, or if he does hold it, he has failed to appropriate it by sale for the benefit of the plaintiff. In point of fact, the property was encumbered by a mortgage and sold under it. The sheriff, therefore, must have permitted it to go out of his hands, and this without authority. If so, he is responsible. It is the simple case of a levy, and an elognment by his default.

Judgment reversed, verdict set aside, and cause remanded for a new trial.

### 30 \*Rohr v. Davis and Others.

November, 1837, Richmond.

**Bills of Exception—Certificate of Evidence.** \*—A bill of exceptions to an opinion of a court overruling a motion for a new trial, instead of stating the facts proved, states the evidence adduced at the trial: but the evidence thus set forth, shews that the

\***Bills of Exception—Certificate of Evidence.**—In *Bennett v. Hardaway*, 6 Munf. 125, it was held that if a motion for a new trial, on the ground that the verdict is contrary to evidence be overruled, a bill of exceptions to the court's opinion ought not to state *all the evidence* given in to the jury, but only the *facts* appearing to the court to have been proved. The principle upon which this decision rests is, that the revising court should have the same lights and act upon the same data as the inferior court, and that it will not undertake to determine what credit should be given to the oral testimony of witnesses, whose credibility it has not the same means of

evidence for the party for whom the verdict was found, supposing it true, and disregarding the evidence for the other party, is not sufficient to warrant the verdict: **Held**, such exceptions, in such case, are well taken, to enable an appellate court to review and reverse the judgment overruling the motion for a new trial.

**Demurrer to Evidence—Who May Demur—When Joinder Compelled.**—In the trial of actions at law,

testing as were possessed by the court and jury who saw and heard the witnesses testify and observed their whole demeanor. This decision has never been overruled; but, while the principle on which it was grounded has been adhered to, the rule established by it has, by a long line of cases subsequently decided upon, been modified in its application. *Danville Bank v. Waddill*, 81 Gratt. 478, citing the principal case as one of the decisions which modified the rule laid down in *Bennett v. Hardaway*, 6 Munf. 125. And in *Muse v. Stern*, 83 Va. 36, it is said: "But this case (*Bennett v. Hardaway*), was soon—to adopt the expressive phrase of *CARR, J.*, in *Ewing v. Ewing*, 2 Leigh 840—curtailed of its fair proportions. For, by a line of decisions beginning with *Carrington v. Bennett*, 1 Leigh 840, decided as early as 1839, it was quickly established, as a qualification of the rule, that if the bill of exceptions contains a certificate of the oral testimony given on the trial, the appellate court would review and reverse the judgment, if, after rejecting all the oral testimony of the excepting party, and giving full force and credit to the evidence of the adverse party, the judgment still appears to be wrong. *Rohr v. Davis*, 9 Leigh 30; *Pasley v. English*, 5 Gratt. 141; *Carrington v. Goddin*, 13 Gratt. 587; *Gimmi v. Cullen*, 20 Gratt. 489; *Read's Case*, 22 Gratt. 924; *Danville Bank v. Waddill*, 81 Gratt. 469; *Dean's Case*, 33 Gratt. 916; *Creekmur v. Creekmur*, 75 Va. 433; *Taylor's Case*, 77 Va. 692. This qualification, while it restricts the operation of the rule laid down in *Bennett v. Hardaway*, does not contravene the principle of that case. For, as *CABELL, J.*, acutely observes, in *Ewing v. Ewing*, *supra*, the appellate court does not decide on the credit of the witnesses; it proceeds on the admission of their credit; 'and surely if,' as a former and distinguished judge of this court puts it, in a lucid article touching this subject, 'a judgment against a party, after he has been stripped of all his own oral evidence, and all his adversary's evidence has been accorded full force and credit, still appears to be wrong, that judgment ought to be reversed.' Va. L. J. 1885, p. 259." To the same effect, the principal case was cited in *Patterson v. Ford*, 2 Gratt. 80; *Pasley v. English*, 5 Gratt. 148; *Farish v. Reigle*, 11 Gratt. 719; *Pryor v. Kuhn*, 12 Gratt. 618; *Valden v. Com.*, 12 Gratt. 726; *Wickham v. Lewis Martin & Co.*, 18 Gratt. 481; *Reed v. Com.*, 22 Gratt. 927; *Gimmi v. Cullen*, 20 Gratt. 482; *Payne v. Grant*, 81 Va. 169; *Cluverius v. Com.*, 81 Va. 896; *Moses v. Old Dominion, etc., Co.*, 82 Va. 38; *Newlin v. Beard*, 6 W. Va. 137; *Morgan v. Fleming*, 24 W. Va. 194; *State v. Flanagan*, 36 W. Va. 120; *foot-note* to *Dean v. Com.*, 32 Gratt. 912.

For further information on this subject, see *foot-note* to *Valden's Case*, 13 Gratt. 717, and *foot-notes* to which reference is there made; monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 35 Gratt. 587; Va. Code 1887, § 3484.

**Demurrer to Evidence—Who May Demur—When Joinder in Demurrer Compelled.**—Either party, plain-

either party has a right to demur to the evidence of the other, and the other party ought to be compelled to join in the demurrer, unless the case is plainly against the demurrant, and his object appears to be merely to delay the decision.

**Same—Refusal of Court to Compel Joinder—Effect.**—

Where a demurrer to evidence is tendered in a case in which the party may properly demur, if the court refuse to compel the other party to join in the demurrer, this is error for which the judgment shall be reversed.

**Action on Joint Contract—What Plaintiff Must Prove.** §

—In an action upon the joint contract of three defendants, the plaintiff, to sustain his action, must prove that all three joined in the alleged contract; for if it appear that one of the defendants was not a party to the contract, though the other two were, the plaintiff must fail in this joint action.

This was an action of assumpsit in the county court of Campbell, brought by Rohr against Davis, Bullock and Lynch, to recover the amount which the plaintiff claimed to be due to him from the defendants, for stone work by him done for them. The declaration alleged a joint contract of the three defendants with the plaintiff for the work; and the defendants pleaded jointly, non assumpsit.

Upon the first trial, the jury found a verdict for the plaintiff for 1164 dollars damages. The defendants moved the court for a new trial; the court overruled the motion; and the defendants filed a bill of exceptions to that opinion. The court then gave  
31 the plaintiff judgment for the damages assessed by the verdict; and the defendants appealed to the circuit court of Campbell.

tiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join in the demurrer unless the case be plainly against the demurrant, and his object in demurring seems to be clearly nothing else but delay. *Clark v. R. & D. R. Co.*, 78 Va. 713, citing the principal case, *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 619. *Boyd v. Savings Bank*, 15 Gratt. 501, *Hyers v. Green*, 2 Call 556, and *Eubank v. Smith*, 77 Va. 306. To the same effect, see the principal case also cited in *Peabody Ins. Co. v. Wilson*, 29 W. Va. 535, 2 S. E. Rep. 892; *foot-note* to *Boyd v. Savings Bank*, 15 Gratt. 501; *foot-note* to *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 619. See further, monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

**Same—Refusal of Court to Compel Joinder.**—To the point that it is error to refuse to compel a joinder in demurrer to evidence, where the evidence is not plainly against the demurrant, the principal case and *Green v. Buckner*, 6 Leigh 82, are cited in *Trout v. Va. & Tenn. R. Co.*, 23 Gratt. 687, 688.

**Action on Joint Contract—One Defendant Not a Party—Judgment.**—In an action against several defendants upon a joint or joint and several contract, if it appear from the proof that one of the defendants was not a party to the contract, though all the other defendants were parties to it, judgment will be rendered in favor of all the defendants.

*Stepoe v. Reed*, 19 Gratt. 9, citing the principal case, *Baber v. Cook*, 11 Leigh 606, and *Munford v. Overseers*, 2 Rand. 813.

The question in the circuit court, therefore, was whether, upon the state of the case appearing in the bill of exceptions, the county court erred in refusing the new trial asked by the defendants? The bill of exceptions did not purport to state the facts proved at the trial: it set forth the evidence on the part of the plaintiff, at large, as it was delivered by the witnesses, and the substance of the defendants' evidence. From the plaintiff's own evidence it appeared, that the work for which he claimed compensation in this action, was the building of a stone wall in the town of Lynchburg, for the purpose of filling up a deep ravine, in order to connect the Lynchburg and Salem turnpike road with a street called the sixth alley in that town. That the Lynchburg and Salem turnpike company could only bring their road to the outer boundary line of the town. That, therefore, the persons owning property in the lower part of the town, and interested in connecting the turnpike road with the sixth alley, set on foot a subscription for the purpose of effecting the work: there were twenty subscribers, engaging to pay various sums by them respectively subscribed; and among the subscribers were two of the defendants, namely, Davis and Bullock, but the defendant Lynch was not a subscriber. That all three of the defendants were interested in the improvement, being owners of property in the town which would be benefited thereby. That the plaintiff did the stone work which was required to connect the turnpike road with the alley of the town. That the defendants Davis and Bullock superintended the work, gave directions concerning it while it was in progress, were present at the measurement of it after it was done, and directed the plaintiff to make out his account for the same against themselves and Lynch;

and Davis and Bullock afterwards,  
32 \*upon being applied to for payment, made declarations and did acts, from which it might very fairly be inferred, that they held themselves bound to pay for it, or to see it paid for, and, therefore, that they had made the contract with the plaintiff for the work: but there was no evidence adduced on the part of the plaintiff, that the defendant Lynch had ever said or done any thing, from which it could be inferred, that he was a party with Davis and Bullock in the contract for the work with the plaintiff; and when he was applied to for payment, by the plaintiff, he promptly disclaimed all connexion with the transaction; nor did the evidence shew the least reason for supposing that he was connected with it, except the direction given by Davis and Bullock to the plaintiff, above mentioned, that he should make out his account against them and Lynch. Such being the state of the evidence on the part of the plaintiff, it is unnecessary to state that adduced for the defendants: upon the plaintiff's own shewing, he was not entitled to maintain this joint action, and to have a joint verdict and judgment, against Davis, Bullock and Lynch, even if his evidence was sufficient to entitle

him to recover against Davis and Bullock. Therefore, the circuit court reversed the judgment of the county court, set aside the verdict, and remanded the cause for a new trial.

There were several trials in the county court afterwards, with various results. At the last trial, the defendants tendered a demurrer to the evidence, wherein they set forth all the evidence on both sides: but the plaintiff objected to join in the demurrer, and the court refused to compel him to do so. The jury found a verdict for the plaintiff for 958 dollars with interest &c. for which the court gave him judgment, and the defendants again appealed to the circuit court.

Upon this second appeal to the circuit court, the question was, whether the county  
33 court erred in refusing to \*compel the plaintiff to join in the demurrer to evidence tendered by the defendants? The evidence of the plaintiff set forth in that demurrer consisted of the testimony of several witnesses, who were adduced to prove that Davis, Bullock and Lynch jointly contracted with the plaintiff for the stone work in question; but taking the plaintiff's evidence alone, and discarding that of the defendants entirely, though the evidence was stronger than that given at the first trial, it was yet plainly insufficient to implicate Lynch as a party to the contract with the plaintiff; it rather led to the opposite conclusion, that Lynch was nowise a party to it. The circuit court was of that opinion; and, therefore, reversed the judgment of the county court, and again remanded the cause, with directions that the plaintiff should be compelled to join in the demurrer to evidence tendered by the defendants.

In the county court, accordingly, the plaintiff joined in the demurrer to evidence; and a verdict was taken for him, subject to the opinion of the court upon the demurrer. The court gave judgment upon the demurrer for the defendants; the plaintiff appealed to the circuit court, where this judgment was affirmed; and then he appealed to this court.

Grattan and Stanard, for the appellant.  
Johnson, for the appellee.

PARKER, J. The cases of Carrington v. Bennett, 1 Leigh 340, Ewing v. Ewing, 2 Leigh 337, and Green v. Ashby, 6 Leigh 135, shew, that the bill of exceptions taken to the opinion of the county court overruling the motion for a new trial, was well taken; and the judgment of the circuit court reversing the first judgment of the county court, cannot be impugned on that ground. The bill of exceptions did not, it is true, purport to state the facts proved, but only the  
34 evidence given; yet as the \*plaintiff's evidence (throwing out of view all the evidence for the defendants, and admitting that of the plaintiff to be true) was clearly insufficient to support his action, the circuit court was right in directing a new trial.

As to the question whether the plaintiff ought to have been compelled to join in the demurrer to evidence, I take the rule to be,

that either party may demur, unless the case is clearly against the party offering to demur, and his object appears to be merely to delay the decision. Every case involves questions of law and fact, and a party has a right, admitting the facts which his adversary's testimony fairly conduces to prove, to bring the question of law arising out of the facts to the consideration and judgment of the court. How he may do this, is a point of practice, settled differently in England and in this country. The English practice is shewn by the cases of *Gibson v. Hunter*, 2 H. Blacks. 187, and *Cockeedge v. Fanshaw*, 1 Doug. 119, our practice, by the cases of *Whittington v. Christian*, 2 Rand. 353, *Green v. Judith*, 5 Rand. 1, *Hansbrough's ex'ors v. Thom*, 3 Leigh 147, *Clopton v. Morris*, 6 Leigh 278. We permit all the evidence to be spread on the record, reject the demurrant's evidence where it conflicts with that of the other party, consider such party's evidence as true, and make all inferences of fact from it which may be fairly and reasonably deduced. But we do not prevent either party from demurring, unless in a case so clear, both upon the fact and law, as to afford some reason for believing that vexatious delay is the object. Now, in the case at bar, there was much room to doubt whether the evidence proved any thing against Lynch, and if it did not, whether the other defendants were liable. It involved the consideration of what acts amounted to a contract with the plaintiff on the part of Lynch, or to a recognition of a previous contract; and the evidence not being direct, but doubtful as to the

35 inferences both of \*fact and law properly deducible from it, I think the defendants had a right to demur, and that the plaintiff was properly compelled to join.

Then, upon the demurrer to evidence itself, I am of opinion, that the evidence of the plaintiff, taking it all as true, proves nothing from which the jury ought fairly and reasonably to have inferred a contract with the plaintiff on the part of Lynch; and that, therefore, the judgment should be affirmed.

The other judges concurred. Judgment affirmed.

### 36 \*Commonwealth v. Marston's Adm'r.

November, 1837, Richmond.

#### Revolutionary Officers.—Who Entitled to Half Pay.\*—

An officer of the Virginia line on state establishment during the revolution, who became supernumerary after the passing of the act of May 1779, ch. 6, but before the end of the war, and so continued till the end of the war, is entitled to half pay for life under that act, upon the authority of Lilly's case, 1 Leigh 525, which, being directly in point, is to be followed.

Same—Same.—Quære, whether an officer in the state service, who became supernumerary before the act of May 1779, ch. 6, was entitled to the benefit of the provisions thereof?

Same.—Who Entitled to Commutation.—It seems, that officers in the state service, who continued in actual service till the end of the war, were entitled to de-

mand commutation of five years full pay, with interest from the end of the war, in lieu of half pay for life, according to the practical construction of the acts of assembly relating to the subject; but officers who became supernumerary before the end of the war, could only claim half pay for life, not the commutation.

Same.—Claims for Half Pay.—Where They May Be Settled.—The act of congress of July 1832, authorizing the settlement of claims of officers in the state service of Virginia for half pay, at the treasury of the U. States, is no reason for refusing the settlement of such claims at the treasury of Virginia, or for our courts declining to adjudicate such claims, and to decree them when found justly due.

The administrator with the will annexed of John Marston deceased, in December 1836, presented a claim to the auditor of public accounts, for about fifteen years half pay, which, as he alleged, had become due to his testator as a lieutenant of the Virginia line on state establishment, under the act of May 1779, ch. 6, 10 Hen. Stat. at large, p. 25, or for commutation of five years full pay with interest, in lieu of the half pay for life. The auditor rejected the claim; and the claimant appealed from his decision to the circuit superior court of Henrico.

In his petition for the appeal, the claimant alleged, that his testator Marston entered into the army as a private in the continental line, early in the war of the revolution, and served about three 37 years; that he was \*then made a cadet in the first Virginia state regiment commanded by col. George Gibson, and soon after a lieutenant; that he was commissioned, a first lieutenant on the 3d July 1779; and that he continued in service in that capacity, from that time till the end of the war. That lieutenant Marston died about the beginning of the year 1798. And therefore, he was entitled for his services, either to half pay for and during his life, or to commutation of five years full pay in lieu thereof, with interest from the 22d April 1783, which the claimant alleged was the date of the end of the war.

The auditor's answer to the petition shewed, that he did not reject the claim because he thought it unfounded either in fact or in law. He said, "that lieutenant Marston having been reported by the board which sat in 1782,\* as entitled to half pay, the act of congress of July 1832 authorized the settlement of the claim at Washington."

In the circuit superior court, all the evidence adduced by the claimant in support of the claim, as well as that adduced on the part of the commonwealth to repel it, was spread at large on the record. And that court was of opinion, that it appeared by the evidence, that Marston was a lieutenant in

\*The board of field officers formed by an order of the executive, founded on the provision of the act of November 1781, ch. 19, § 10, 10 Hen. Stat. at large, p. 466, for the purpose of ascertaining the officers in the state service entitled to half pay. See the notice of this board by Judge Carr in Lilly's case, 1 Leigh 533, 4.—Note in Original Edition.

\*See Tatum's Case, 9 Leigh 56.

the Virginia state regiment commonly called Dabney's legion, in the revolutionary war, and continued to serve as such till the end of the war; and that he was entitled to the commutation of five years full pay in lieu of half pay for life, with interest thereon from the 22d day of April 1783 till payment; and so the auditor erred in rejecting the claim:

therefore, the court ordered, that the auditor should give the claimant a warrant for the amount of the five years full pay, with interest &c.

Upon the application of the attorney general, this court allowed the commonwealth an appeal.

The case was argued here, by the attorney general for the commonwealth, and J. H. Smith for the appellee, upon the questions of fact arising on the evidence, and upon the points of law arising on the state of facts appearing in proof. The questions of law as well as those of fact, and the evidence touching the latter, are stated very fully in the following opinion of

**BROCKENBROUGH, J.** The first question to be decided is one of fact; namely, whether lieutenant John Marston did serve to the end of the war. A great difference of opinion heretofore prevailed between this court on the one side, and chancellor Wythe and the general court on the other, as to the precise period when the war ended within the meaning of the act of May 1779, ch. 6. The latter held that it terminated at the signature of the preliminary articles of peace in November 1782, but the former decided that the governor's proclamation of April 22d 1783 fixed the period of its termination. Although the decision on that point was much disapproved of by some of the judges of this court in Lilly's case, 1 Leigh 525, yet it was not overruled by them. That decision, whether right or wrong, has been subsequently acquiesced in, and must now be considered as settled.

I have never been able to ascertain, with any certainty, by what law of this commonwealth the courts have allowed to the officers in the state service, who served to the end of the war, commutation of five years full pay with six per cent. interest from the date of the proclamation of peace, in lieu of half pay for life, which was allowed to them by

the act of 1779. It was allowed, \*by a resolution of congress of March 1783, to the officers on continental establishment, on the representation of the officers themselves; 11 Hen. Stat. at large, p. 557. Judge Green intimates in Markham's case, 1 Leigh 524, that it was allowed here under a construction of the act of 1790, ch. 21, 13 Hen. Stat. at large, p. 131, which enacts, "that the same compensation of half pay should be extended to those officers of the state line who continued in actual service to the end of the war, as was allowed to the officers of the continental line:" he says that the construction put upon this act was, that the same commutation which had been given by congress to the officers of the continental line, should be given to the officers of the state

line. I think it probable that such is the source from which sprung the practice of giving our officers the commutation. I think it was a farfetched construction; but as the court of appeals has sanctioned it for more than forty years, that question ought now to be considered as settled. If therefore the representative of lieutenant Marston can prove that he served till the end of the war, the judgment of the court of Henrico giving him full pay for five years with interest as aforesaid, should be affirmed; otherwise not.

The first piece of evidence introduced to prove that Marston served till the end of the war, is the certificate of col. Dabney, dated 30th April 1783, stating that he had served upwards of three years in the service of this state. It is shewn by a document in the cause, that he was a cadet in Gibson's regiment in 1778, and that his commission as first lieutenant bears date the 3d July 1779. It is alleged, that this regiment was in continental service at the north till the spring of 1780, when it returned to Virginia; that he then entered Dabney's legion, in the service of the state; and as he served three years in that service, it is inferred that he served from

the spring of 1780 to the spring of 1783, that is, to the \*end of the war, in that service. Unfortunately for this argument, Dabney's legion was not in existence in 1780. It was not formed till after November 1781, when an act passed directing the officers of the regiments and corps in the service of the state, to be reduced, and the corps consolidated into one or more. 10 Hen. Stat. at large, p. 440. Dabney's legion was formed under that law. It could not have been in that legion, then, that lieutenant Marston served three years, though he might have been and probably was an officer in it after its formation. He was probably an officer in that legion in February and April 1782, as he was at that time reported as in service, by the board of officers which sat in Richmond at those periods. But it does not follow that he was in service on the 22d April 1783. Christopher Roane and some others were also reported to be in service by that same board, who were deraigned on the 9th February 1783, and yet they did not serve to the end of the war. As lieutenant Marston's name is not associated with that of Roane and others at the time of that deraignment, nor yet returned as having served till April 1783, the probability is, that he was somehow out of service before Roane.

The certificate of col. Dabney was obviously given to enable lieutenant Marston to obtain his land bounty, and it has served that purpose. It made no difference, whether the officer belonged to the Virginia line on state establishment, or the same line on continental establishment; he was entitled to the same quantity of land; 10 Hen. Stat. at large, p. 159-60. For three years service, either officer was to have an unconditional title to his land; 11 Id. p. 83-4. Colonel Dabney, knowing that Marston had served part of his time in the Virginia line in the service of the continent, and part in the same line in state service, though he had not served a full three

years in either service, but more than three in both taken together, might well certify 41 (without critically \*weighing his words) that he had served more than three years in the service of the state. It is not at all probable that he had in his mind the exact time when he entered or came out of the service. This certificate then does not prove, that Marston served to the end of the war.

The appellee then resorts to parol evidence. The affidavits of Wilcox and Christian may be thrown out of the case, as they are ex parte. But if admitted, they fail to prove the requisite fact. The former says, lieutenant Marston was an officer in the regular service "during the revolution:" he does not assert, that he served throughout the whole of the revolution: if he had only served two or three years, it would be truly said that he served during the revolution. Mr. Christian goes further, and says, that he served three years to the north, and then returned, and served to the end of the war. But he does not tell us what was, in his estimation, the end of the war in Virginia; whether it was the capture of Cornwallis, the signature of the preliminary articles of peace, the proclamation of the governor, or the definitive treaty of peace, which terminated it. This evidence is entirely too vague.

But the principal reliance is on the evidence of major Gibbs. He says, that in 1780, lieutenant Marston was attached to a Virginia state regiment, commonly called Dabney's legion, and he served in that regiment until the close of the war in April 1783. In a former ex parte affidavit, he shews, that he knew the 22d April 1783 to be the period that the courts had fixed on as the termination of the war. Notwithstanding his particularity, however, his memory has failed; for Dabney's legion was not formed, as I before remarked, in 1780, nor until after the session of assembly of November 1781. And as to his serving in it until April 1783, that is contradicted by an official document filed since the rendition of this judgment; namely, 42 the return of \*officers of the state legion, signed by Charles Dabney, lieutenant colonel commandant. This document is only a copy; but it is filed in the auditor's office as the groundwork of his official acts; and moreover, since the argument of this cause here, the original return has been found in the papers of the suit of *Innis v. Roane & al.* and its verity will not now be questioned. That list shews that one of the officers retired on the 1st January 1783; others were deraigned on the 8th February; and others, amongst whom was col. Dabney, served till the 23d April 1783. In that return, the name of lieutenant Marston is not to be found. If the administrator of captain Thomas Ewell has obtained a judgment for commutation with interest, on the ground that he served in Dabney's legion to the end of the war, although his name is not on this list, it only shews, that that plaintiff has obtained more than he was entitled to, as I fear is the case with too many others. I have no hesitation in saying, that

the judgment of the circuit superior court must be reversed.

The next question is, whether the decision of the auditor is to be affirmed. He admits that the board of field officers who sat in 1782, reported lieutenant Marston as entitled to half pay. That report has been adjudged to be authentic, by this court in Lilly's case. He was then reported to be "in service." Between that period and the termination of the war, he must have either resigned, or become a supernumerary by the subsequent reductions of the regiments, which are known to have taken place. I cannot presume that he resigned his commission at that late period. The commonwealth, indeed, does not allege it, and if she did, the burthen of proof would be on her. I think, then, we ought to conclude that he thereafter became a supernumerary.

Although this court decided twice, that a supernumerary was not entitled to half pay, unless he served to the end of the war, being required to do so, yet a contrary 43 \*decision was given by the court in

Lilly's case, and many subsequent judgments have been rendered in conformity with it, and much money has been drawn from our state treasury, and reimbursed by the federal treasury. It is, therefore, too late to inquire into the correctness of the decision in Lilly's case, in all cases where the officers became supernumerary after the passing of the act of 1779. Whether we can reexamine it in that class of cases where the officer became supernumerary before the passing of that act, will be determined in another case now before us.

The ground of the auditor's decision is, that the act of congress of July 1832 authorizes the settlement of this claim by the secretary of the treasury of the U. States. I think it is true that the 3d section of the act of congress does provide for the settlement and adjustment of this claim; but does it justify the state courts in refusing to give judgment for it? The officers included in the act of May 1779, ch. 6, are entitled to their half pay, "provided congress do not make some tantamount provision for them." The tantamount provision herein mentioned is an original provision to be made by congress, equivalent to the provision made by the state, not dependant on any provision made by the state, or any adjudication therein on the subject matter of the claim, and which would entirely release the state from making the provision desired to be made. The act of congress of 1832 directs the secretary to adjust and settle these claims, on the "principles of the half pay cases already decided in the supreme court of appeals" of this state. It may be, that the secretary may think this case does not come within those principles; or he may be unwilling to decide on the claim, unless it is declared to be sanctioned by those principles, either by our auditor of public accounts, or by our courts. If we reject the claim on that account, the party may lose his claim altogether, although 44 we are satisfied that it is a \*perfectly just claim. We ought therefore to act



on this claim according to the evidence, and the law of 1779, without reference to the act of congress.

I am therefore of opinion, that the auditor's decision ought to be reversed, and that he be directed to issue a warrant on the treasury in favour of the appellee, for lieutenant Marston's half pay.

The other judges concurred in the opinion, that lieutenant Marston did not continue in actual service until the end of the war, and therefore was not entitled to commutation of five years full pay with interest from the end of the war; but that he was an officer of the Virginia line on the state establishment, who became supernumerary after the act of May 1779, ch. 6, and was therefore entitled, upon the authority of Lilly's case (that being directly in point) to his half pay during his life.

Therefore, the court reversed the judgment of the circuit superior court, and then reversed the decision of the auditor also, and directed that officer to issue a warrant in favour of the appellee, for his testator's half pay from the 14th April 1782 (that appearing to have been the date of "the determination of his command or service") until the 1st January 1798, which was about the date of his death as nearly as it could be ascertained.\*

#### 45 \*Aylett's Ex'or v. Robinson.

November, 1887, Richmond.

(Absent CABELL, J.)

**Statute of Limitations—New Promise—Sufficiency—Case at Bar.**—In assumpsit against an executor, for a debt of his testator on an open account, of all the items of which appear to have been due more than five years before the testator's death, plaintiff proves, that within five years after the date of his account, he applied to the testator to settle the same, and testator said, "I am too unwell to do

\*There was an error committed by the reporter, in the report of Lilly's case, 1 Leigh 535, 6. It is there stated, that the circuit court of Henrico reversed the auditor's decision, and ordered him to issue a warrant in favour of Lilly's administrator, for the amount of five years full pay, with interest from the 22d April 1783; and that that judgment was affirmed. But, in fact, the circuit court gave judgment, not for the commutation, but for the half pay that accrued to Lilly during his life, without interest; and that was the judgment which this court affirmed. This court expressly decided, that no interest should be paid: see Judge Green's opinion, in the same case, *Id.* 538, and in Markham's case, *Id.* 523, 4.—Note in Original Edition.

†**Statute of Limitations—New Promise.**—In *Abrahams v. Swann*, 18 W. Va. 280, it is said: "The position taken by the counsel of the plaintiff in error is, that if the bar of the statute is sought to be removed by proof of a new promise in writing, such promise must be clear, explicit, unequivocal and determinate, and if any conditions are annexed, they must be proven to have been performed; and if an acknowledgment is relied upon to take a case out of the statute of limitations, it should be a direct acknowledgment of a subsisting debt from

business now, but when I am better, I will settle your account." *HOLD*, these words import no such promise to pay or acknowledgment of the debt, as will take the case out of the 16th section of the statute of limitations, requiring the court, in such actions, to expunge from such account every item which shall appear to have been due more than five years before the testator's death. ~~Same—Same—Same—Same.~~—Such a promise to settle, would not amount to a promise to pay, or acknowledgment of debt, that would take the case out of the general statute of limitations in respect to such actions.

**Assumpsit by Robinson against Aylett's executor**, brought in 1833, in the circuit superior court of King William. The declaration contained three counts of indebitatus assumpsit: one upon the promise of the defendant's testator to the plaintiff, to pay him for work and labour done, materials furnished, goods sold and delivered, money lent, and money paid, laid out and expended; another on an insimul computassent between the plaintiff and the defendant's testator; and the third, on an insimul computassent between the plaintiff and the defendant himself as executor. The defendant, at first, pleaded non assumpsit by his testator; and though this was no answer to the third count, the plaintiff, without any objection to it on that ground, took issue upon it, and there was a trial, but the jury not agreeing, there was no verdict. At the next term (as the record stated) "the defendant pleaded the act of limitation of actions, to which plea the plaintiff by his attorney replied generally, and joined  
46 \*issue;" and thereupon, a jury was sworn "to try the issue joined." At the trial, the defendant filed two bills of exceptions to opinions of the court.

1. The first stated, that the plaintiff's claim was founded on open account, amounting to about 320 dollars, for carpenter's work &c. done by the plaintiff for the defendant's testator in his lifetime, the first item of which was dated in March 1823 and the last in June 1825; and that it was proved, that the defendant's testator died in 1831; so that every item charged in the plaintiff's account, appeared to have been due more than five years before the testator's death; but the plaintiff

which an implied promise may be fairly inferred. These positions are sustained by the authorities referred to by the counsel of the plaintiff in error: *Bell v. Morrison*, 1 Pet. 351; *Moore v. President, etc., Bank of Columbia*, 9 Peters 86; *Bell v. Crawford*, 8 Gratt. 110; *Tazewell v. Whittle*, 13 Gratt. 329; *Aylett v. Robinson*, 9 Leigh 45. To the same effect, see the principal case cited in *Sutton v. Burruss*, 9 Leigh 384, 386; *Bell v. Crawford*, 8 Gratt. 119, 120, 121; *Rowe v. Marchant*, 86 Va. 181, 9 S. E. Rep. 995; *Dinguld v. Schoolfield*, 32 Gratt. 808; *Stansbury v. Stansbury*, 20 W. Va. 29; *Quarrier v. Quarrier*, 36 W. Va. 317, 15 S. E. Rep. 156; *foot-note* to *Tazewell v. Whittle*, 13 Gratt. 329. Thus, a promise merely "to settle" with claimant is not such a promise to pay as will take the claims out of the statute of limitations. *Bell v. Crawford*, 8 Gratt. 111, 123, and *foot-note*; *Sutton v. Burruss*, 9 Leigh, 385; *Gover v. Chamberlain*, 83 Va. 287, 5 S. E. Rep. 174, all citing principal case as authority.

offered evidence to prove, that sometime during the year 1829, he applied to the defendant's testator to settle the account which was the subject of this action, and the defendant's testator said—"I am too unwell to do business now—when I am better, I will settle your account." Whereupon, the defendant's counsel moved the court to expunge from the account every item which appeared to have been due five years before the testator's death; that is, in effect all the items of the account. But the court overruled the motion, thinking that the promise of the defendant's testator, contained in the words proved to have been spoken by him to the plaintiff in 1829, took the case out of the operation of the statute on which the defendant's motion was founded.\* The defendant excepted.

2. The other bill of exceptions stated, that the defendant offered as a set-off against the plaintiff's claim, a bond executed by the plaintiff and one Dudley to the defendant's testator, for 60 dollars which appeared on the face of the bond to be due for the rent of a tenement let by the testator to Robinson, of which set-off the defendant had given due notice; that the plaintiff's counsel moved the court to exclude this set-off, because it was a debt due from the plaintiff and another person, which could not be set off against the plaintiff's individual claim; and that the court sustained the objection, and excluded the set-off: to which the defendant excepted.

The jury found the following verdict: "that defendant did assume upon himself within five years next before the suing out of the original writ in this case; and they assessed the plaintiff's damages by occasion of the nonperformance of the promises and assumptions in the declaration mentioned, to 213 dollars" &c. The court gave the plaintiff judgment for the damages and costs. To which this court allowed Aylett's executor a superedeas.

Robinson, for the plaintiff in error.  
Daniel, for the defendant.

PARKER, J. The declaration contains three counts; two upon promises of the testator, and the third upon a promise of the defendant as executor. The defendant first pleaded non assumpsit by the testator generally, and, at a subsequent term, "the act of limitation of actions;" which, I think, we ought to consider as a plea that his testator had not assumed within five years; for as his testator died in 1831, and this action was brought in 1833, it is not reasonable to presume, that he meant to deny that his own assumpsit, as executor, had been made within

five years before the suing out of the writ. If the plea had been drawn out in form, it must have presented the bar of the non assumpsit of the testator within five years; and

on this record, we can come, I conceive, to no other reasonable conclusion.

This being so, the verdict of the jury responds to neither issue, and the judgment ought for this reason to be reversed.

I am also of opinion, that the declaration of the testator of the defendant to the plaintiff, when he applied to him to settle the account—"I am two unwell to do business now—when I am better, I will settle your account"—was not such an acknowledgment of the justice of the account, as to take the case out of the operation of the statute requiring the court to expunge all items bearing date over five years before the death of the testator; and that the court erred in overruling the defendant's motion.

The modern decisions, discarding the distinctions and refinements which had gone nigh to repeal the statute of limitations, and justly considering it as "an act of peace," to protect against long-dormant claims, even where they might not have been paid, have reestablished the doctrine settled in England soon after the making of the statute, 21 Jac. 1, ch. 16, from which our law is taken; namely, that the subsequent promise or acknowledgment, to take the case out of the statute, ought to be such a one as if declared upon would support an action of itself; that is, it must be an express promise to pay, or such an acknowledgment of a balance then due, unaccompanied by reservations or conditions, as that a jury ought to infer from it a promise to pay. See the old cases *Dickson v. Thomson*, 2 Show. 126, *Heyling v. Hastings*, 1 Ld. Raym. 389, 421, 1 Salk. 29, *Green v. Crane*, 2 Ld. Raym. 1101, 1 Salk. 28, 6 Mod. 309, *Bass v. Smith*, 12 Vin. Abr. Evidence. T. b. 63, pl. 4, p. 229, *Lacon v. Briggs*, 3 Atk. 105, and the modern cases of *Pittman v. Foster*, 1 Barn. & Cress. 248, *A'Court v. Cross*, 3 Bingh. 329, *Tanner v. Smart*, 6 Barn. & Cress. 603, 8 Eng. Com. Law Rep. 67, 11 Id. 124, 13 Id. 273, recognized in this court in the cases of *Butcher v. Hixton*, and *Farmers Bank v. Clarke*, 4 Leigh 519, 603, and 49 \*by the supreme court of the U. States in *Wetzell v. Bussard*, 11 Wheat. 309, and *Bell v. Morrison*, 1 Peters 360.

It is plain, that the declarations of the testator in the case now before us were made in reference to an unsettled demand, and therefore very unsatisfactory evidence of the quantum of damages. The application was to settle. The testator said, he was then too unwell to do business; clearly implying that it would be attended with some trouble and labour to adjust the account and ascertain the balance. This precludes the idea of his meaning to acknowledge any balance to be due, much more of a promise, express or implied, to pay it. The jury themselves did not consider the answer of the testator to refer to any stated balance; and have repudiated the ground taken by the court of a promise to pay arising from the words proved, by considerably reducing the amount of

\*The statute 1 Rev. Code, ch. 128, § 16, p. 492, the words of which are—"If any suit be brought against any executor or administrator, or other person having charge of the estate of a testator or intestate, for the recovery of a debt due upon an open account, it shall be the duty of the court before whom such suit shall be brought, to cause to be expunged from such account every item thereof, which shall appear to have been due five years before the death of the testator or intestate."

the account shewn to the testator, in consequence of payments and credits existing before the supposed acknowledgment and promise. If we infer a promise to pay the balance stated from the promise to settle, we infer a promise to pay a sum not actually due; and if it is to be taken as a promise to pay any balance that may be found due on a future settlement between the parties, then that settlement ought to be averred, and that a certain balance was found thereupon to be due.

Yet I do not mean to say, that a promise to settle an account may not, under some circumstances, be equivalent to a promise to pay, so as to take a case out of the statute of limitations. It depends upon the nature of the application, and the terms of the answer; as evincing a mere intent to adjust the account and see where the balance lies; or an acknowledgment of a stated balance; which to settle, means to pay. Thus, if one, upon an account being presented to him, says, "it is

50 right, and I will settle it at a future day," there \*could be no doubt about his meaning, and a jury would infer a promise. But, in the present case, the promise to settle, means (as I think) to go into a settlement, to adjust, to compare with another account, and to fix or determine a balance, which may be on the one side or the other. Taking it to mean this, I do not think it justified the court in overruling the defendant's motion to expunge the stale items: in this respect also the judgment is erroneous.

The other questions in the case, I do not consider it material to decide.

**BROCKENBROUGH, J.** The chief difficulty in this case is, to ascertain from the record the real issues which the jury tried. The first plea which was filed, "that the testator did not assume," was, obviously, not an answer to the whole declaration; it was no plea to the third count; and the plaintiff might have objected to its reception, or he might have taken issue on it, and had a writ of enquiry of damages awarded as to the third count. He failed to do so; and I have no doubt, that the counsel on both sides either forgot or disregarded the third count. The plaintiff replied generally, and joined issue on the plea to the first two counts, and the jury were sworn to try that issue: but they did not agree on a verdict. At the next term, the defendant pleaded the act of limitation of actions, to which plea the plaintiff replied generally, and joined issue; and the jury were sworn to try the issue joined. I am satisfied, that by this plea, thus briefly and informally put in, the defendant did not mean to respond to the third count at all, but that, as he had before pleaded that the testator had not assumed, so here he pleaded that the testator had not assumed within five years. He would hardly have pleaded that he himself as executor did not assume within five years, when he had not pleaded that he

51 as executor did not assume at all. The \*record shews, that his testator had died only three years before the filing

of the plea; and the defendant would not have pleaded that he did not as executor assume within five years, since, if it could be proved that he had assumed at all in that character, he must have assumed after his appointment, that is, within three years, and so the plea of the statute of limitations would have been no bar to the count against him as executor. If, then, he had intended to plead to the count charging an insimul computasent with him as executor, he would have pleaded the general issue, that is, that he did not assume in manner and form as in the third count is charged upon him; which is not done.

This is, I think, the only way of understanding the loose plea of "the act of limitation of actions." There is then, in fact, no issue whatever as to the defendant himself, and the finding of the jury that the "defendant did assume upon himself within five years next before suing out the original writ in this cause," does not respond to the real issues in the cause; which were, 1. whether the testator assumed, and 2. whether the testator assumed within five years; and it responds to an issue which was not made.

I am also of opinion, that the court clearly erred in refusing to cause to be expunged from the account on which the action was brought, every item appearing to be due thereon five years before the death of the testator; that is, the whole account. The declaration made by the testator when applied to by the plaintiff to settle his account—"I am too unwell to do business now—when I am better, I will settle your account"—does not, in my estimation, amount to any acknowledgment of the justice of the debt brought against him, or of the correctness of the account; nor does it amount to a promise to pay it. That declaration ought not to have been allowed to take the case out of the operation of the 16th section

52 of the statute for limitation of actions. \*I am inclined to think that the court was correct in rejecting the bond which was offered in evidence as a set-off; but as it is unnecessary, I do not think proper to give any decided opinion on the subject.

**BROOKE, J.** I shall say nothing on the subject of the pleadings: the cause must be sent back, and the irregularity of the pleadings may be corrected in the court below. The error for which the judgment of the circuit court must be reversed, is the refusal of the judge, on the motion of the defendant's counsel, to expunge all the items in the account exhibited by the plaintiff, which appeared to have been due more than five years before the testator's death, in pursuance of the 16th section of the statute of limitations. I am clearly of opinion, that the evidence stated in the bill of exceptions was not enough to take the case out of the statute. The plaintiff applied to the defendant's testator to settle the account; he said, he was too unwell to do business then; but when he was better, he would settle it. This did not amount to a promise to pay any bal-

ance that might be due, or to an acknowledgment that any balance was then due: at most, it was only an acknowledgment that an account was to be settled. But if more could be made of it; if it had been admitted by the testator, that there was a debt due upon the account, the amount to be ascertained on a settlement; that would not have been enough to take the case out of the statute of limitations. For I think it now well settled, that an acknowledgment that a debt was originally due, will not take a case out of the statute of limitations; *Clementson v. Williams*, 8 Cranch 72. This is treating the case at bar, as if it stood upon a plea of the general statute of limitations; which is the most favourable view of it, for the plaintiff.

53 \*TUCKER, P. I am of opinion, that this judgment should be affirmed. The objections which my brethren deem fatal to it, do not seem to me to justify its reversal.

The first alleged error I shall examine, is that which respects the issues. It is said, the jury have not responded to the issues, but have gone out of them. There were two issues. The first was non assumpsit by the testator. The second is entered thus: "the defendant pleads the act for the limitation of actions." This short entry, according to the loose practice with us, is to be understood as drawn out at length, and into such form as to meet the intention of the pleader. The plea is to the whole declaration, not to any one count. It must, therefore, be understood to mean, that the defendant pleaded that plea to each count; so that it is to be applied, distributively, to them all. Hence, the construction of the entry is, that the defendant pleads to the first two counts, that his testator did not assume within five years, and to the last count, that he himself did not assume within five years. The counsel for the plaintiff in error, indeed, has not contended, that this was only a plea that the testator did not assume within five years; but my brethren seem to think it must be interpreted to refer to the testator's assumption, in exclusion of the executor's. This is not necessary inference; and I will not draw it for the purpose of vacating a judgment rendered on the verdict of a jury, who have responded to the plea, as a plea that the executor did not assume. The verdict thus shews, that the plea was understood at the trial as I understand it, and the jury pronounced upon it accordingly. I do not think this court should be too astute in inferring what will lead to reversal of a judgment after a fair trial.

The verdict of the jury, then, has fairly responded to this issue. I think it responds to the whole, having assessed damages generally for the "nonperformance of the promises and assumptions in the declaration

54 mentioned," \*to the amount of 213 dollars. Now, as there was only one count against the defendant on his own promise, the verdict must have comprehended the counts against him on the testator's promises, and, of course, have found the issues made upon them. But even if it had

not, it would be no ground for reversing the judgment at the defendant's instance; for the finding upon the last count against him was sufficient to justify the judgment. Had the jury even found against the plaintiff on the first issue, he would have been entitled to judgment on the third count. The omission to find, cannot place him in a worse situation than a finding against him. In like manner, if it were true that there was no plea to the third count, the plaintiff would have had a right to the judgment on that count, and a writ of inquiry of damages. Now here, he has a judgment, and the damages are ascertained, we will suppose, upon the false idea that there was an issue. Can the defendant complain of this? Did not the proceeding enlarge, instead of impairing his rights, by permitting him to contest the action, instead of confining the jury to an inquiry of damages? Shall we now send the cause back to enter a judgment by default, and inquire of damages, when there is already a judgment upon a verdict, and the damages ascertained? Cui bono?

The next error alleged is the refusal to expunge the items of more than five years standing. The court properly refused to do so, if there was an express assumpsit of the testator, sufficient to take the debt out of the statute of limitations. *Brooke's adm'rs v. Shelley*, 4 Hen. & Munf. 266. Now here, it is proved that the plaintiff applied to the testator to settle the account: he replied, "I am now too unwell, but when I am better, I will settle your account." This was in the year 1829, when the account was not barred by the statute; and the forbearance to press a sick man, and the postponement of the demand upon the faith of his promise, is to

55 be the occasion of the loss of the debt! \*How are we to understand the promise to "settle the account?" The phrase is vulgarly used, very often, as equivalent to a promise to pay. But admit that in this case it was used in a more limited sense, and meant only a promise to go into an examination or the account for the purpose of ascertaining the balance: does not such a promise amount to a promise to pay such balance as might appear against the debtor? Why promise to settle, if I do not mean to pay, in case the balance is against me? The promise to settle, amounts to a promise to pay. It is a sufficient promise to take a debt out of the statute; and it ought to be so, as the delay is the delay of the debtor.

But it is said, the promise ought to be sufficient to give a new cause of action. And so it is. The balance not being ascertained, indeed, nor the precise amount known which may be due, the plaintiff has only title to nominal damages, unless he proves the amount of his account; and to entitle him to recover at all, he must shew that there is some balance at least in his favour. Suppose the defendant had expressly said, "As soon as I am well, I will go into a settlement, and whatever balance appears against me I will pay you." Can it be doubted, that after five years from the original contract, an action would lie against him

or his executor, in which the balance due might be proved and recovered? I imagine not. And if so, the promise in this case gave a right of action; for a promise to settle amounts, at the least, to an engagement to pay the balance when ascertained. I cannot make this matter plainer by argument.

Judgment reversed, verdict set aside, and new trial ordered, to try the issues already joined, and any other issue which may be joined on a plea to be filed to the third count of the declaration; with directions to the circuit court, if the motion shall be renewed to expunge \*the items of the account due more than five years before the death of the testator, without other evidence of a promise or acknowledgment of debt than that set forth in the bill of exceptions, to cause the same to be expunged.

### Tatum's Ex'or v. The Commonwealth.

December, 1837, Richmond.

**Revolutionary Officers—Supernumerary—Half Pay—Case Overruled.**—The decision of this court in Lilly's case, 1 Leigh 525, in favor of the claim of supernumerary officers to half pay for life, under the act of May 1779, ch. 6, reviewed, and overruled by three judges against two.

**Same—Same—Same\*—Case Approved.**—But this decision was made in the case of an officer of the Virginia line on continental establishment, who became supernumerary before the passing of the act of May 1779, ch. 6. As to officers in the state service of Virginia, who became supernumerary after the passing of that act, for whose claims to half pay Lilly's case is an authority directly in point, that authority, it seems, is still to be followed, as it was followed in Marston's case, decided a few days before this, and reported ante, p. 56.

Henry Tatum was a lieutenant of the Virginia continental line in the army of the revolution, who entered into service in March 1776 and continued therein until the reduction of the regiment to which he belonged in the year 1778, under the resolution of congress to that effect, when he became a supernumerary, and so continued until the end of the war. He never resigned his commission; but he was not called into active service again, though he professed that he had held himself at all times ready to resume active service if he had been

\***Officers of Virginia Line on Continental Establishment—Supernumerary—Right to Half Pay.**—Upon the authority of the principal case, it was held in *Slaughter v. Com.*, 2 Gratt. 391, and *Com. v. Peyton*, 2 Gratt. 294, that officers of the Virginia line on continental establishment who become supernumerary before the passage of the act of May 1779, ch. 6, were not entitled to half pay for life under said act. In the first of these two cases, CABELL, P., dissented from the opinion of the court, saying that he retained the opinion expressed by him in the principal case but that he should, thereafter, hold himself bound by the authority of the principal case and the case at bar. See principal case also cited in *Com. v. Yates*, 9 Gratt. 694.

required. For this service, and readiness for further service, he applied to the auditor of public accounts, in 1833, for half pay for life, commencing from the time he became supernumerary, under the act \*of May 1779, ch. 6, 10 Hen. Stat. at large, p. 25, entitled "an act concerning officers, soldiers, sailors and marines." The auditor rejected the claim, and Tatum presented a petition to the circuit superior court of Henrico, stating his case, and praying an appeal from the auditor's decision, which was allowed. Pending the appeal, Tatum died, and it was revived in the name of his executor. The circuit superior court, upon a hearing of the claim, affirmed the decision of the auditor; and from that judgment of affirmance, this court, upon the petition of Tatum's executor, allowed him an appeal.

Lyons and Johnson, for the appellant.

The attorney general, for the commonwealth.

**PARKER, J.** It appears, that Henry Tatum was a lieutenant in the Virginia line on continental establishment, and continued in service, it seems, from March 1776 until the new arrangement of the army was made in the fall of 1778, when he became a supernumerary officer, and so remained till the end of the war. He claims to be entitled to half pay under the act of May 1779, ch. 6. That was an act manifestly intended to hold out inducements to persons to enter and to continue in the service, which at that time it was absolutely necessary to offer, in consequence of the rapid depreciation of the paper money in circulation, and of the utter inadequacy of the pay then given. Its words are these: "All general officers of the army, being citizens of this commonwealth, and all field officers, captains and subalterns, commanding, or who shall command, in the battalions of this commonwealth on continental establishment, or serving in the battalions raised for the immediate defence of this state, or for the defence of the United States, and all chaplains, physicians, surgeons, and surgeon's mates, being citizens of this commonwealth, \*and not being in the service of

Georgia or of any other state, provided congress do not make some tantamount provision for them, who shall serve henceforward, or from the time of their being commissioned, until the end of the war; and all such officers who have or shall become supernumerary on the reduction of any of the said battalions, and shall again enter into the said service, if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half pay during life, to commence from the determination of their command or service."

We are saved much trouble in settling the true construction of this act, by Markham's and Lilly's cases, decided in this court, and in my opinion properly decided. 1 Leigh 516, 525. The latter case, particularly, settles the point that a supernumerary officer, not entering again into service, (unless he was called on and refused so to do) is entitled under the

act to half pay for life. It also decides, that lapse of time, similar to that occurring in this case, does not afford any presumption of payment or abandonment of the claim. Indeed, the circumstances here are stronger to account for the delay; because claims less questionable had been repelled, and the door shut against the claimants, by the resolutions of the legislature and the decisions of the court of appeals in *Innis v. Roane*, 4 Call 379.

If officers of the state line, becoming supernumerary after the act of 1779, and actually serving until February 1783, when the war was substantially at an end, were driven away and denied relief under that act, it could not be expected of Tatum, and others in the same predicament, to present and make continual claim of their title to half pay. Their laches, under such circumstances, is no evidence of payment or abandonment; and I am not prepared to presume a fact, which I know not to exist.

59 \*The first clause of that part of the act of 1779 already cited, applies, in terms, as well to officers in the battalions of the commonwealth on continental establishment, being citizens, as to officers of the state line proper. It is impossible to make this plainer by argument. The words "such officers," in the second clause, can refer to no other than the officers on continental establishment and in the immediate service of the state, mentioned before. Supernumeraries of that class and description, who had, as well as those who thereafter should, become such, were to be entitled to half pay during life.

Then, as it would seem to me, there is really but one question in this case about which there is a reasonable doubt, unless we are prepared to overturn the principles adjudged in *Lilly's* case, and to decry the many subsequent judgments rendered in this court in conformity with it; and that question is, whether the act of 1779 embraces supernumeraries before, as well as after, the date of the act? *Lilly's* case, it may be said, is not an authority upon this point, because *Lilly* became a supernumerary after May 1779; but it is apparent that the majority of the court recognized no such distinction, nor did the dissenting judge allude to it. On the contrary, all the concurring judges speak broadly of supernumeraries, before, as well as after, the date of the act; and the train of reasoning by which they justified their decision applies as strongly to the one class as the other. Thus judge Carr says—"At the passage of this act, the history and laws of the period tell us, there were a great number of supernumeraries; men inferior to none; men to whom the state was as deeply indebted for past service, and whose future services she deemed it as important to retain, as those of the officers in actual service: for these men, under the name of supernumeraries, in contradistinction to officers in actual service, the law meant to provide." And in another passage he quotes the words of the law

60 thus—"All officers \*who are now supernumerary, and shall again enter the service if required so to do"—considering

these expressions equivalent with those actually used, viz. "All such officers who have or shall become supernumerary" &c. Judge Green leaves as little doubt of his interpretation of the meaning of the law; for in one passage of his opinion he says—"I thought, until very recently, that there were strong motives to influence the legislature in making a discrimination between those who served to the end of the war, and supernumeraries, (especially the great number becoming so by the reduction of fourteen regiments or battalions, in 1777, from ten to eight companies, and never again called into the service), and that such discrimination had been made;" but he adds, "Subsequent reflection has satisfied me I was mistaken." And judge Coalter, throughout his opinion, argues in favour of supernumeraries in general, both of the continental and state lines, without regard to the time of their becoming supernumerary.

The grounds upon which the court justified its opinion in *Lilly's* case were, the terms of the law; the motives for making it; the fact that supernumeraries were still officers, liable to be called on at a moment's warning; that having seen service, the legislature, in anticipation of future exigencies, wished to hold out an inducement to them to retain their commissions; and that thus holding them, they could not enter into inconsistent engagements, nor refuse to enter into active service (without being liable to military censure and punishment) "if required so to do." All these reasons and grounds apply with as much force to officers who were supernumerary at the date of the law, as to those becoming so afterwards.

But let us attend to the occasion of making this law, and its terms.

On the 24th November 1778, congress, advertent to the fact that from the alteration of the military establishment,\*and 61 other causes, many valuable officers had been and might be omitted in the new arrangement, as being supernumerary, who from their conduct and services were entitled to the honourable notice of congress, and to a suitable provision until they could return to civil life with advantage,—resolved to give to all supernumerary officers one year's full pay, and earnestly recommended to the several states to which such officers belonged; to make such farther provision for them as their respective circumstances and merits might have entitled them to. Journals of congress, vol. 3, p. 133.

It is clear beyond question, that congress had reference to all supernumeraries, whether they had been or might be omitted in the new arrangement; and it is as evident to my mind, that as the act of May 1779 was intended to comply with this recommendation of congress, it meant to include the class of supernumerary officers who had been or might be omitted in the new arrangement. And what other construction can be given to the words of the last clause, concerning supernumeraries? which seems to have been added as an amendment to the original bill (see 1 Leigh 538). "All such officers who have or

shall become supernumerary on the reduction of any of the said battalions"—Can these words be construed to mean any thing but that officers who had become supernumerary already, on the reduction of the battalions, should be entitled to half pay for life, as well as those who should thereafter become supernumerary; unless we transpose the words, or do violence to their grammatical construction? To me it seems perfectly clear, that no distinction between supernumeraries can be drawn, except the one affirmed in *Innis v. Roane*, and repudiated by this court in *Lilly's case* and many subsequent ones. If supernumeraries, not again entering the service and continuing to the end of the war, are entitled to half pay, the appellant in this case is entitled for the same reasons; and the attempt \*to distinguish it from Lilly's case, is in effect to deny that case to be law.

If there was any reason for believing that Tatum ever refused to enter the service, or had contracted inconsistent obligations, or had resigned and returned to civil life, the case would be very different. But there is no other reason to presume this, than the length of time which elapsed from the autumn of the year 1778 to the end of the war; which is little more than the time which elapsed in other cases, where the officers were allowed their half pay. Various reasons might be assigned for the failure to call these supernumeraries into active service, which I forbear to urge, because it is agreed that he remained a supernumerary officer to the end of the war, and it is not pretended that he was called on and refused. It is also agreed that he was in the Virginia line on continental establishment, which brings him within the words, "officers commanding in the battalions of this commonwealth on continental establishment;" and that he was a citizen of Virginia, is not questioned. If so, as no tantamount provision has been made for him by congress, he is entitled to his half pay for life from Virginia; and the judgment denying it ought to be reversed.

**BROCKENBROUGH, J.** It appears, that Henry Tatum the testator of the appellant was a lieutenant in the Virginia line in continental service, and continued in service until the new arrangement of the army was made in the fall of 1778, when he retired as a supernumerary officer, and remained as such till the end of the war. But it is not stated to what particular regiment he belonged, nor is it stated whether the regiment of which he was an officer, was in existence at the time of the passage of the act of May 1779. I think it is apparent, that that act promises half pay for life to the officers of those battalions or regiments only, which were then (that \*is, at the passage of the act) in existence; and that the promise does not extend to such battalions as had, previously thereto, either by consolidation or discharge, been dispensed with.

1. I am very strongly inclined to the opinion, that, notwithstanding the words "who have become supernumerary," in the act of

May 1779, there were, at that time, no supernumeraries in those continental battalions or regiments which were in existence or in service at that date. That there were supernumeraries as early as 1778, or perhaps earlier, in some of the Virginia continental battalions, is, I think, sufficiently proved. It is proved by the resolution of congress of the 24th November 1778, *Journ. Cong. vol. 3, p. 133*, which speaks of many valuable officers having been omitted in the new arrangement, as being supernumerary. But several of those Virginia continental battalions had been entirely dispensed with in March 1779, only two or three months before the act of May 1779. Hence it is probable, that the officers deraigned previously to March 1779, and by dispensing with several battalions at that time, were officers of those battalions, and not those of the battalions retained. If I am right in this, then the words before quoted, "who have become supernumerary," will have their effect by being applied to the battalions in state service, none of which had been dispensed with previous to the passage of the act.

That four of the Virginia battalions on continental establishment had been dispensed with, or put out of service, by the resolution of congress of March 1779, seems apparent by a reference to the ordinances of the Virginia convention, the acts of assembly, and the resolutions of congress. The Virginia battalions were originally fifteen in number. The two first were raised by virtue of the ordinance of July 1775; seven others by the ordinance of December 1775; and the remaining six by the act of 64 October 1776. 9 *Hen. Stat. at \*large, p. 12, 76, 179*. On the 9th March 1779, congress resolved, that the infantry of the United States for the next campaign be composed of eighty battalions; and the number of the Virginia battalions was reduced to eleven. *Journ. Cong. vol. 3, p. 223*. This shews that four of the Virginia battalions were put out of service. Which they were, who can tell at this day? Can there be any certainty on this subject, without reference to the rolls of the army? I think it very probable that the 8th and 9th battalions were put out of service at that time, or previously thereto; but I have found no evidence to shew which of the others were put out of service. As to the 9th, we have record evidence, that it was taken captive by the enemy at the battle of Germantown, and the legislature, by the act of October 1777, substituted the first Virginia regiment in its stead. 9 *Hen. Stat. at large, p. 337*. And as to the 8th, there is a certificate of lieutenant col. Clark of that regiment, that it was annexed to the—regiment in 1778 or 1779.

I think it probable that these two battalions, and perhaps two others, were not existing "battalions of this commonwealth on continental establishment," at the passage of the act of May session 1779, and if so, their officers are not included in the promise of half pay, because they were not officers "commanding in the battalions of this commonwealth," nor could they be "supernumerary



on the reduction of any of the said battalions;" that is, of the battalions then in service.

It does not appear in the case now before us, and, most probable it never can be made to appear, that lieutenant Tatum had ever been an officer in either of the battalions retained under the resolution of congress of March 1779. Unless he was, he had no title to half pay under our act. Colonel Bowman was an officer of the 8th, which was merged, it seems, in some other, and he never was entitled to the half pay.

65 \*The view which I have taken was suggested by our brother Brooke, who was himself a revolutionary officer, and who is satisfied that the Virginia continental officers who became supernumerary were never entitled to half pay from the state.

It is strongly confirmed by the following statement. I think I can confidently assert, that from the midst of our revolution until the year 1833 (a period of more than fifty years) it was not known by any branch of the government of Virginia, legislative, executive or judiciary, that the officers of the continental line had any claim, either legal or equitable, upon the state for the bounty of half pay for life; and if I may judge from the silence of the officers themselves for more than half a century, I should say, that they did not know it, or if they knew it, that they did not choose to assert it. I have examined the journals of the house of delegates for several years, and cannot find the suggestion of such a claim. In December 1781, *flagrante bello*, the officers of the state battalions and corps presented their memorial to the general assembly, claiming as supernumeraries their half pay for life, and the opinion of the committee (of which Mr. Henry was chairman) was in favour of the claim; Journ. Oct 1781, p. 37. The legislature, without however voting on the resolution asserting their right, did by law direct a return of the state officers, in which return the corps, the rank of each officer, the date of his commission, the number of men at first raised in each corps, the number of men after reduction, and the time of reduction, should be specified, and a discrimination made of such officers as were unworthy of half pay. 10 Hen. Stat. at large, p. 466. It was in obedience to this law, that the board of officers in the particular service of the state sat in Richmond in February and April 1782, and made the report of such of the state line as were entitled, in their judgment, to half pay. The officers of

66 the navy too had presented \*their memorial, and a board of officers was also called to decide on their claims to half pay, which sat in 1784. But we hear of no such memorial from the officers of the Virginia line on continental establishment. And this did not proceed from any unwillingness to assert their rights; for, in the same session of December 1781, a memorial from them was presented, setting forth the inconveniences they experienced from the depreciation of their pay, and that large arrearages were due them: and a committee, of which Mr. Henry was chairman, reported a series of resolu-

tions in their favour. Journ. p. 22, 30. If they had taken the same view of their rights under the act of 1779, that the officers on state establishment did, would they not, at that period, have presented their memorials also? Would not Mr. Henry have reported in their favour as well as in that of the state officers? So, at the session of May 1783, the officers of the state line and of the state navy presented their memorials, claiming, amongst other things, their half pay for life: they were before the committee of the whole house, and the chairman reported it as the opinion of the committee, that so much of their memorial as prayed that effectual measures might be taken to secure the said officers their half pay, or a compensation for it, was reasonable, and that adequate funds ought to be established for paying to such officers their half pay agreeable to law. Journ. May 1783, p. 78, 89, 90. Accordingly, during that same session, a bill passed authorizing the auditors to issue to such of the officers of the state line and navy, as were by law entitled to half pay, their warrants for the same; 10 Hen. Stat. at large, p. 265. Then also, the officers of the continental line exhibited no claim for half pay for life. The war was at an end; the state officers were pressing their claims for half pay; the act of 1779 was as familiar to them as to the state officers; it was familiar to the two

67 branches of the legislature, who passed those resolutions \*and that act: why did not those officers then assert the claims? why did not the legislature, from a sense of justice, then pass a law in their favour, as well as in favour of the state officers? Why, but because neither the officers themselves, nor either branch of the legislature, had the least conception that they had any right to claim half pay for life from the state government? Nay further, the same officers, at the same session of May 1783, after the war was over, presented a memorial to the legislature, which is thus noticed in the journal, p. 15. "A memorial of the officers of the Virginia line in continental service, on behalf of themselves and the soldiers of the said line, was presented to the house, and read, setting forth, that fully satisfied of the attention of the legislature to their past requisitions, they are induced to represent the inequality and insufficiency of the bounty of lands intended for them, as well as the particular distress of the soldiers, and their inability to survey the said lands; that in the same confidence, they hope proper funds will be provided for the redemption of the certificates granted them for pay and depreciation; and praying that the assembly will adopt measures for their present relief, as well as to execute the former promises and intention of the legislature in their favour." The memorial was referred to the committee of propositions and grievances, and the resolutions of that committee were referred to the committee of the whole, and subsequently acted on by the legislature. The officers of the state line followed suit, and presented their memorial for relief as to their land bounty, and deficiencies of pay



and rations, and were in these respects placed on the same footing with the continentals. Now, here were the continental officers claiming their rights of bounty land, and retribution for depreciated pay, at the hands of a willing legislature, and yet not saying one word as to their right to half pay, which their brother officers of the state line were \*at that moment successfully pressing. Why this omission, but for their conviction that they had no such rightful claim against the state government? After that period, a controversy arose between the officers of the state line and the different departments of the government, as to their right to half pay, unless they served to the end of the war. On the 22d December 1783, the two houses resolved, that the auditors be directed not to issue any more warrants for the half pay of the state line, until the further order of the general assembly. Whether that resolution was founded on a belief that the act of 1779 had been misconstrued by the legislature in 1781 and May 1783, or whether, as has been suggested, it was because funds had not been provided, and the credit of their warrants had depreciated for want of funds, I am not able to ascertain. Nor have I examined the proceedings of the legislature from that time to December 1790, when the legislature gave a construction to the act of 1779, different from that of the two former legislatures, and confined the half pay for life of the officers of the state line, to those who continued in actual service to the end of the war, and to the supernumeraries who, being afterwards required, did again enter into actual service, and continue therein to the end of the war.

After this legislative construction, the officers of the state line appealed to the courts, and the controversy was kept up in them from 1791 to 1797, with alternate success, when it was supposed to be finally settled. During that period too, we hear nothing of the claims of the supernumerary officers of the Virginia continental lien. The doors of the courts of justice were just as open to them during the whole period, as they were to the officers of the state line, and yet we hear of no claim being set up by them. no pretence of right, till the year 1833. Had these officers exhibited their claims when the state officers did, the legislature might have adopted \*the same rule with them that they did with the state officers: they might have called on a board of officers to discriminate between the worthy and the unworthy, and to have a complete list of those entitled; but as it is, they are deprived of the means of preventing imposition. I am, for these reasons, strongly impressed with the opinion, that none of the supernumeraries of the continental line previous to May 1779, are entitled to half pay. The supernumeraries produced by the further reduction of the Virginia battalions to eight in October 1780, were provided for by congress.

2dly, I am of opinion, that although the commonwealth is not named in the statutes

of limitations, yet where no claim whatever has been set up for a series of years, or, if set up, has been abandoned, it is the duty of the courts to reject a claim condemned by its antiquity. If a claim against the commonwealth, which depends for its justice as well on the evidence as the law, be not exhibited for half a century, why should not the courts guard the public treasury against such stale claims, as well as the fortunes of individuals against claims of a much shorter existence? If fifty years are no protection against such claims, why should they not be kept alive for a century, or two centuries? On this ground, I should be of opinion to reject this claim, and leave the claimant to seek for his dues, if he has any, from that branch of the government which represents the sovereignty of the commonwealth.

But, 3dly, if it should be thought that I am wrong in both of these opinions, then the question is, whether the construction of the act of 1779, given by this court in Lilly's case, be a correct one? and if it be not, whether we are bound by it? That act has been very differently construed by this court at different times. In the year 1792, the court, consisting of three judges (Lyons, Carrington and Fleming) decided, that only such of the officers who became supernumerary on the reduction of \*their battalions, as again actually entered into the said service in the same or a higher rank, having been required so to do, and continued therein until the end of the war, were entitled to half pay. In 1797, the court, consisting also of three judges (Lyons, Carrington and Roane) gave the same decision. After these two concurring judgments were rendered, there was an acquiescence in them for more than thirty years. At length Lilly's case came on in 1830, and three of the judges (Coalter, Green and Carr) against the opinion of judge Brooke, overruled the two former decisions, and declared that supernumeraries, who continued such without being required to reenter the service, were entitled to half pay, and that they only forfeited it, if, on being required to reenter in the same or a higher grade, they refused so to do.

Now, when for the first time a new class of cases is brought before us, (new in being exhibited by continental officers, and in reaching beyond the passage of the law, possibly almost to the commencement of the war) it behoves us to pause, and reconsider our judgments. I should not think of doing so, if the decisions had been uniform; but when the last is expressly opposed to the former ones; when the court was warned of the maxim stare decisis, and refused to listen to it, it cannot be deemed improper for the present court to inquire which of the two constructions is right.

There is but one sentence in the law giving half pay, and that embraces both officers in command and supernumeraries. To me it seems clear, that both clauses of the sentence impose the continuance in the service to the end of the war, as an indispensable condition to the acquisition of half pay for life. It is not disputed, that such condition is

imposed on the officers mentioned in the first clause; namely, "all officers commanding or who shall command, all chaplains, physicians, surgeons, and surgeon's mates."

The second clause I will quote:  
 71 "And all officers who have or shall become supernumerary on reduction of any of the said battalions, and shall again enter into the said service, if required so to do, in the same or any higher rank, and continue therein until the end of the war, shall be entitled to half pay for life." The condition of continuance in the service until the end of the war, is but once expressed in the whole sentence; and the identical words which are applied to supernumeraries in the last clause, are applied to officers commanding and chaplains &c. in the first. Taking the grammatical construction, the nominatives officers commanding—chaplains—officers supernumerary, are connected together by the conjunction and; and the verb continue agrees with all of those nominatives, so connected together. If then the officers commanding, and the chaplains &c. must continue until the end of the war, to entitle them to half pay, so must the officers supernumerary continue to the end of the war.

The half pay is not a reward for past service, but a remuneration or bounty for prospective services: services to be rendered, not for two, three or more years, or for any definite period, but to the end of the war. The legislature do not express any determination to fasten all officers, past, present and future, as pensioners for life on the public treasury; not all who heretofore may have done, or hereafter may do, real service for a time; but only such as shall do that service to the end of the war.

But it may have been asked of the draughtsman of the bill, Is it not absurd to speak of supernumeraries continuing in service to the end of the war? Supernumeraries are those officers who are out of service by the reduction of their battalions; their services are not wanting for those battalions; they have no right to render service in them after being deraigned, and cannot continue till the end of the war.—To this the reply probably was,

Although out of service when deraigned, yet it may be the policy of the legislature to fill up those reduced battalions by new enlistments of soldiers: if they are so filled up, it may be good policy to call back into service the deraigned officers, or at least some of them (perhaps not all, for all are not skilled in war); and it may be a fit opportunity to separate the wheat from the chaff, the good officers from the indifferent ones, giving to the latter their full pay and bounty lands, and to the former, besides their full pay and bounty lands, the additional bounty of half pay for life, if, when they are called, they come, and continue to serve to the end of the war.—Some such view was most probably taken of the subject, and hence the words in the act, which have been the subject of so much criticism—"and shall again enter into the said service, if required so to do."

It is asked, why insert these words, "if re-

quired so to do"? are they mere surplusage? I think they are not mere surplusage. It cannot be surplusage to use words which convey the writer's idea accurately, although perhaps they would be understood were they omitted. The writer knew, that a supernumerary could not voluntarily enter again into the said service, in the same or a higher rank; he knew, that he must be called on or required so to enter. If he had said, "and all supernumeraries who shall enter again into the said service, in the same or a higher rank, and shall continue therein to the end of the war, shall be entitled to half pay during life," he knew it might be understood that he meant, that all of them who should be called on or required to enter again, and only such, should be entitled; but why not as well express the idea at once, as leave it to be understood? This accounts for the expression, "if required so to do;" which means nothing more than when required, or on being required. But the conjunction if imports a condition; so does the word when, or the words on being; but the

73 insertion of that condition \*does not destroy or impair the other indispensable condition of continuing in the service to the end of the war. I do not see in what more appropriate language the legislature could have expressed the idea.

I do not see the necessity of striking out those words; but if the construction adopted in Lilly's case is to prevail, that supernumeraries are to have half pay, although they do not continue in service to the end of the war, because the government will not require them, then we must either expunge the significant words "and continue therein till the end of the war;" or, if we retain all the words of the clause, then we must add to the end of it an expression to this effect: "but if the commonwealth shall not require the said officers again to enter the service as aforesaid, the said supernumeraries shall still be entitled to their half pay as aforesaid."

The principal stumbling block with chancellor Wythe, was the words command or service; and judge Carr seems to have adopted the same idea. It is successfully combated by judge Brooke in his opinion in Lilly's case (p. 564,) and judge Green acceded to that proposition. The words command or service are to be taken distributively, the former applying to officers who had a command, the latter to those of the staff who had no command. The officers commanding, or who shall command, and the supernumeraries of the same character, shall have half pay from the determination of their commands; and chaplains, physicians, surgeons, and surgeon's mates, and supernumeraries of the same character, from the determination of their services.

From the language of this law, I can see no legal obligation on the government, either to fill up the old battalions by new enlistments, or to call on the old officers to command them if they were so filled up. If the government was not legally bound to require them to reenter the service,—if it might dispense with their future services, I do not

74 see how it can be inferred from the \*use of the words "if required so to do," that the failure to require them gave to the supernumeraries the same right to half pay, that the requisition, and a compliance with it to the end of the war, would have done.

But it was said by judge Carr, if the supernumeraries not required to reenter the service, are not entitled to half pay, why mention them at all by that name? if they again enter the service, they cease to be supernumeraries; they are officers in service, and come within the first clause of the law. The answer to this is given by judge Green. "A special provision," he says, "was necessary for supernumeraries, if they were intended to be provided for in any case whatever; since none such, whether then being, or thereafter becoming supernumerary, could claim under the former part of the provision, as they could not claim as having served 'henceforth' (from the passing of the act) 'or from the time of their being commissioned, until the end of the war.'"

I cannot think with judge Green, that the expression "if required so to do," pervades and qualifies the whole sentence. I do not see on what principle of sound construction, we can give that expression a different collocation in the sentence, from that which the legislature gave it. It obviously refers to its immediate antecedent "shall again enter into the service," and not to the subsequent phrase "and continue therein until the end of the war." After the supernumerary shall, according to the requisition of the government, enter again into the service in the same or any higher rank, then he shall be entitled to half pay for life, provided he (like the officer commanding) shall continue therein until the end of the war.

The words "in the same or any higher rank," were inserted to save the honour of the officer. Holding his old commission, it would be degrading him to require him to reenter in an inferior rank. Whilst

75 the government \*enters into no obligation to call upon him again, yet if it exercises the right to do so, this is a pledge that he shall not be in such inferior rank. But I cannot see that this expression has any effect whatever on the condition on which the supernumerary is to have his half pay; namely, that when he enters, he is to serve to the end of the war.

I think the judgment should be affirmed.

CABELL, J., concurred in the opinion of Parker, J., that the judgment ought to be reversed, and the claim of Tatum allowed.

BROOKE, J., concurred with Brockenbrough, J., on the first and last points of his opinion; but he expressed no opinion on the second point.

TUCKER, P. My brethren being divided in opinion, it becomes my reluctant duty to express my sentiments, for the first time, upon the subject of these revolutionary claims. And I shall begin by saying, that notwithstanding the very strong views pre-

sented by my brother Brockenbrough in the opinion just delivered, and by my brother Brooke in conference, I still incline to the opinion, that the language of the act of May 1779 cannot be otherwise construed, than to place the continental officers on the same footing with the state lines as to half pay, and to include not only those who became supernumerary afterwards, but those also who had become so before the act. If this be so, the case stands upon the same principles as Lilly's case; and congress having provided for the payment of all claims "depending on the principles of the half pay cases already decided" in this court, and having thus adopted the decision in Lilly's case, whether right or wrong, I presume the claim of payment under this legislative grant would be availing at the treasury of the United States.

76 \*The question here, however, is whether, admitting the identity of Lilly's case with this, this court is bound to give judgment for the petitioner against the state of Virginia? This depends of course upon the questions, whether Lilly's case is conclusively binding upon us? and if not, whether it was rightly decided? I espouse the negative of both propositions.

I shall not find it necessary to examine, whether the rule stare decisis has any application to the question of a statute, partaking rather of the character of a contract, than of a general law. If such a distinction can be sustained, it would be the best apology for the utter disregard, in Lilly's case, of two previous well considered adjudications; but the distinction would, at the same time, relieve the present court from every obligation to follow Lilly's case, on the score of authority merely. If, on the other hand, the distinction is without foundation, then Lilly's case is without excuse for overruling the established judgments of this court. For my own part, though I heartily concur in the propriety of giving to our adjudications as much uniformity as possible, yet I cannot think that a single decision ought to be regarded as a precedent binding upon a succeeding court, which is not satisfied with its reasons, but is convinced that the former determination is not law. For a single decision is rarely taken to express the law upon any subject whatsoever, nor does it become law until it has received the corroboration of repeated decisions. And this is peculiarly proper, where that single decision is to be made the entering wedge for the introduction of a most numerous class of cases, by which the revenues and resources of the commonwealth are to be sapped, and heavy burdens to be imposed upon the people. In such a case, it would seem but reasonable that a single decision, however entitled to respect, should not be conclusive upon the judicial mind, but that the questions should be reexamined, if a succeeding court is not satisfied \*with the judgment.

77 And this is peculiarly proper, where the court has been divided as in Lilly's case; in which the oldest judge (who was also peculiarly qualified to pronounce upon this

revolutionary transaction) dissented from the opinion of his three brethren, one of whom, until very recently before the judgment, coincided with him, and for reasons of great weight, as appears from his opinion. Had he retained his first opinion, the court would have been equally divided. Standing then by itself, I do not think Lilly's case entitled to the weight which is attributed, and justly attributed, to the established precedents of the court.

But Lilly's case is liable to a more serious objection. It has set at naught the previous resolutions in the case of *Innis v. Roane*, 4 Call 379, which was twice before the court of appeals, at an interval of five years; argued and reargued by most able counsel; and decided unanimously in both cases by this court. If, then, adjudications under this statute are to be held as binding precedents, Lilly's case must be overruled, because it has disregarded binding precedents. If, on the other hand, it was competent to the court, in Lilly's case, to reconsider and reverse the former unanimous decisions on two occasions, it is equally competent to us to reconsider this question, and to pronounce between the conflicting decisions. The alternative, therefore, is either to follow a decision which appears to me erroneous in principle, and in conflict with prior resolutions, or to follow the former repeated decisions in concordance with my own views, and to overrule Lilly's case, which is altogether at variance with them. I cannot hesitate which to choose.

I have said, that I consider Lilly's case as having given an erroneous construction of the act of May 1779. I shall not enter into an investigation of that question, contenting myself with referring to the opinions of judge Roane, judge Brooke and judge Green, and to the argument of the attorney general in the case of *Innis v. Roane*.

78 \*I will merely add, that I cannot concur in tearing the words "if required so to do," from their place in the context, and placing them in another part of the sentence, so as to qualify other words than those with which they have been placed in opposition by the legislature itself. Taking the law as it stands upon the statute book, and considering the object of the legislature to diminish the charges of the army by disbanding the supernumerary officers, my mind entertains not a doubt, that, according to the true construction, no supernumerary was entitled to half pay, unless he was again called into active service, and so continued till the end of the war. I am therefore of opinion, that the judgment of the circuit superior court be affirmed.

Judgment affirmed.

79 \*Hansford and Wife and Others v. Elliott and Wife and Others.

December, 1887, Richmond.

**WILLS—Construction—Words of Survivorship—To What Period Referred—Case at Bar.**—Testator, after bequeathing the residuum of his estate to his wife during life or widowhood, bequeathed, that the

whole of his personal estate, at the death of his wife, should be equally divided among his surviving children thereafter named (naming five) and in case his wife should then be with child, that child should have an equal part of his personal estate with the rest of his children before named: **Held**, that the word surviving refers to the death of testator, not that of tenant for life, and so children of testator who survived him, but did not survive tenant for life, took vested interest in remainder.

**Same—Same—Same—Same.**—Words of survivorship, in such cases, are always to be referred to the period of the testator's death, if no special intent appears to the contrary.

**Persons under Disability—Limitation to Suits by.**—Persons claiming rights of personal property, being under disability of infancy or coverture when their rights accrue, may prosecute any remedy in equity they are entitled to, by prochein amy, at any time while the disability continues, no matter how long; or, in their proper persons, within five years after the disability removed; the right to such remedy being within the saving of the statute of limitations, 1 Rev. Code, ch. 128, § 12.

**Executors De Son Tort—Liability—Statute of Limitations.**—Executors in their own wrong are liable to account for the property of the decedent to his

**\*Wills—Construction—Words of Survivorship after Life Estate—To What Period Referred.**—Notwithstanding the conflict which seems to exist among the English cases on the subject, it is a well-settled rule of construction in Virginia—established by an unbroken line of authorities commencing with the principal case—that, after a bequest or devise of an estate for the life of the first taker, words of survivorship in a will are always to be referred to the period of the testator's death, when no special intent appears to the contrary. As authority for this rule, the principal case was cited with approval in *Martin v. Kirby*, 11 Gratt. 67, 69, 71, 72, 73, 75, and *foot-note*; *Stone v. Nicholson*, 27 Gratt. 17; *Brown v. Brown*, 31 Gratt. 510, 515; *Randolph v. Wright*, 81 Va. 612; *Stone v. Lewis*, 84 Va. 475, 476, 5 S. E. Rep. 282; *Jameson v. Jameson*, 86 Va. 56, 9 S. E. Rep. 490; *Gish v. Moomaw*, 89 Va. 345, 15 S. E. Rep. 868; *Crews v. Hatcher*, 91 Va. 389, 21 S. E. Rep. 811; *Cheatham v. Gower*, 94 Va. 386, 392, 26 S. E. Rep. 853.

**Same—Same—Vesting of Estates.**—The law favors the vesting of estates, and where a legacy or devise is given which is not to be enjoyed in possession until some future period or event, it will, where no special intent to the contrary is manifested in the will, be held to be vested in interest immediately on the death of the testator rather than contingent upon the state of things that may happen to exist at a more distant period. To sustain this proposition the principal case was cited in *Catlett v. Marshall*, 10 Leigh 92; *Cowan v. Epes*, 2 Pat. & H. 536; *Brent v. Washington*, 18 Gratt. 526, 529, 530, and *foot-note*; *Tallaferro v. Day*, 82 Va. 91; *Stokes v. Van Wyck*, 83 Va. 733, 8 S. E. Rep. 387; *Chapman v. Chapman*, 90 Va. 411, 18 S. E. Rep. 513; *foot-note* to *Harrisons v. Harrison*, 2 Gratt. 1; *foot-note* to *Corbin v. Mills*, 19 Gratt. 440. See also, *foot-note* to *Martin v. Kirby*, 11 Gratt. 67; *McComb v. McComb*, 96 Va. 779, 32 S. E. Rep. 453.

**Executors De Son Tort.**—See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

distributees or legatees, like other ex'ors, and cannot rely on the statute of limitations to protect them from such accountability.

**Limitation of Actions—When Statute Begins to Run against Claim for Decedent's Estate.\***—The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an ex'or or adm'r of the decedent.

**Chancery Practice—Suit to Assert Rights in Decedent's Estate—Parties.†**—Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the ex'or or adm'r of the decedent before the court as a party in the cause.

Robert Manson of York county made his will in October 1785, having, at the time, a wife and three sons and two daughters, and his wife was pregnant of another child—and by his will, after devising a parcel of  
80 \*land to each of his three sons, he devised and bequeathed as follows: "My will and desire is, that after my just debts and funeral charges are paid, that the remainder of my estate, of what kind, quality or condition soever, with the profits thereon arising, for the support and comfort of my loving Mary Manson, and my children hereafter mentioned, during the time she continues my widow, but in case she marrieth, then to have but one third part of my estate during her life; and further my desire is, that she continue on the plantation I now live on; and at her death, for the whole of my personal estate to be equally divided amongst my surviving children hereafter named, viz. Anna Manson, John Manson, Polly Manson, Thomas Manson and Robert Manson; and, in case my wife be now with child, for that child to have an equal part of my personal estate with the rest of my above mentioned children." The testator's wife was pregnant of a daughter, who was called Elizabeth, and who afterwards married Thomas Hansford. And between the date of the will and the testator's death, he had, besides Elizabeth, two other children, named Richard and Peter. The testator died in 1796. His will was proved and recorded in the month of September in that year; and his wife qualified as the executrix. All the testator's children named in his will, and all his afterborn children, were living at his death, except, perhaps, his son Robert; as to

\*Limitation of Actions—When Statute Begins to Run against Claim for Decedent's Estate.—The principal case is cited with approval in *Bowles v. Elmore*, 7 Gratt. 393.

†Chancery Practice—Suit to Assert Rights in Decedent's Estate—Parties.—The principal case is cited with approval in *Miller v. Jeffress*, 4 Gratt. 477. And in *Robertson v. Gillenwaters*, 85 Va. 118, 7 S. E. Rep. 371, the principal case, *Samuel v. Marshall*, 8 Leigh 567, *Frazier v. Frazier*, 2 Leigh 643, and *Moring v. Lucas*, 4 Call 577, were cited as authority for the proposition that the distributees of a decedent may maintain a bill to settle decedent's estate, though they cannot have a decree for distribution among them without making the personal representatives of the decedent parties.

whom the bill in this cause stated that he died in his father's lifetime, and it was not denied; but there was some evidence that made it doubtful whether he died before or shortly after his father; however, he died in infancy, and the time of his death had no effect on the rights of the parties.

The testator's widow, Mary Manson, died in 1814; leaving only two of the testator's children her surviving, namely, his daughter Elizabeth (now the wife of Hansford) of whom his wife was pregnant when the  
81 will \*was made, and his afterborn son Peter Manson. All the other children of the testator, who survived him, but did not survive the testator's widow, had been married, and left children. His daughter Anna Manson married John Haughton, and died in 1806, leaving her husband her surviving, and a daughter named Mary, who married Robert Jennings. His son John Manson died in 1801, leaving two children, Elizabeth and Robert; Elizabeth married Kemp Elliott; Robert died in 1824, leaving a widow Mary (who is his administratrix) and two children, John and Edward, who were infants when this suit was brought. His daughter Polly Manson married James Moss, and died in 1808, leaving her husband her surviving, and two children, Mahala and John Moss, infants when this suit was brought. And his son Thomas Manson died in March 1813, leaving three children, two of whom, Wilhelmina and Maria, are yet living, and were infants when this suit was commenced.

About a year after the death of the testator's widow, namely, in November 1815, the testator's son Peter Manson and Thomas Hansford and his wife Elizabeth obtained an order from the county court of York, appointing commissioners to divide the slaves of the testator which had been held by his widow during her life under his will, between them, the only children of the testator that survived the widow; and in December 1815, the division was made between them accordingly. to the exclusion of the families of the testator's other children, who survived him, but died before his widow.

In June 1825, the bill in this cause was exhibited, in the court of chancery of Williamsburg (whence it was transferred to the circuit superiour court of James City), by Kemp Elliott and Elizabeth his wife, daughter of the testator's deceased son John Manson, of whom the bill stated there was no known representative,—Mary the widow and administratrix, and John and Edward the infant children, of Robert the deceased son of  
82 the same \*John Manson,—Robert Jennings and Mary his wife, the daughter of the testator's daughter Anna Manson (afterwards mrs. Haughton) of whom it was stated there was no known representative,—Wilhelmina and Maria Manson, infant children of the testator's deceased son Thomas Manson, of whom it was stated there was no known representative,—and John and Mahala Moss, infant children of the testator's deceased daughter Polly Manson (afterwards mrs. Moss) of whom it was stated there was

no known representative,—against Thomas Hansford and Robert Sheild in his own right, and as administrator of Peter Manson, who it was alleged died in 1824, intestate, and without wife or child. The testator's son Richard, who was born after the making of his will, was not made a party, the bill stating that he died in 1814, intestate, without wife or child, and had no known representative.

The bill set forth all the facts above stated; and then alleged, further, that the defendant Hansford had sold and disposed of all the slaves which he acquired by the division of December 1815, except eight, and of these eight he had conveyed five to Samuel Sheild by deed of trust to secure a debt to the defendant Robert Sheild; that the trustee had advertised those five slaves for sale, so that the same, if sold, might not be within reach of process of the court; and that the plaintiffs apprehended, that Hansford would sell and dispose of the other three slaves still held by him, and so put them beyond reach: that the slaves which Peter Manson acquired at the division of December 1815, were now in the hands of the defendant Robert Sheild, his administrator; but that Sheild intended to sell some of them to discharge debts due from his intestate's estate. The bill, therefore, prayed an injunction, in the first place, to restrain the defendants from selling the slaves, and that security should be exacted from them to have the property forthcoming, or that it should be committed to

83 \*the care of the marshal of the court; and finally, a decree for the just shares to which the plaintiffs were entitled of all the property of the estate of the testator Robert Manson that had come to the hands of the defendants, and of the profits thereof, of which accounts were asked.

The injunction was awarded.

Hansford and wife answered, that before this suit was brought, Hansford had sold two of the slaves mentioned in the injunction, and the other had run away. They insisted, that the division of December 1815 was made according to the just rights of the parties under the will of the testator Robert Manson: they relied on Hansford's possession of more than five years, and on the statute of limitations; and submitted whether there were proper parties before the court.

The defendant Sheild made default; and the bill was taken pro confesso against him.

The plaintiffs afterwards filed an amended bill, shewing administrations, granted since the filing of the original bill, of the estates of the several decedents therein mentioned as having no known representative: that the estate of Anna Haughton was now represented by the plaintiff Jennings; that the estate of John Manson deceased had been recently committed to the sheriff of Warwick, the estate of Thomas Manson deceased to the coroner of Norfolk, and the estate of James Moss, the deceased husband of Polly Manson, that of the testator's son Richard Manson, and that of Robert Manson the elder (the testator), had been committed to the sheriff of York; all of whom were made parties defendants.

The sheriff of York, administrator of the three estates above mentioned, put in an answer, which, however, was merely formal. As to all the other defendants, the bill was taken pro confesso.

It appeared, that administration of John Manson's estate was granted in 1801 to one Camm, who died before \*Mrs. Manson, the testator's widow, as early as February 1808, and thenceforward there was no personal representative of John Manson's estate, till it was committed to the sheriff of Warwick since the commencement of this suit; that there was never any personal representative of Thomas Manson's estate, or of that of Anna Manson who married John Haughton, till after the commencement of this suit, but Martha Haughton took administration of John Haughton's estate in April 1810; that there never has been any personal representative of Polly Manson who married James Moss; that the only personal representative of James Moss, previous to the commencement of this suit, was Peter Manson, the same Peter who appropriated half of the estate of the testator Robert Manson to his own use, and whose representative, the defendant Sheild, the bill seeks to charge on account of that appropriation; and that the same Peter Manson was the only personal representative of his deceased brother Richard Manson.

By interlocutory orders in the cause, the defendants Hansford and Sheild were directed to surrender to the marshal of the court, the slaves by them respectively held, (being either slaves mentioned in the report of the division of December 1815, between Peter Manson and Hansford and wife, or the increase thereof); and the marshal was directed to hire those slaves out from year to year, take bonds with security for the hires, collect the same when due, and deposit the proceeds of collections in the bank of Virginia at Norfolk. Hansford and wife were ordered to render accounts of all the slaves and other property of the estate of the testator Robert Manson, which came to their hands, with an account of the value of what had been sold by them, the hires of the slaves they had kept, and interest on the money received for those sold. And Sheild, as administrator of Peter Manson, was ordered to render similar accounts, together with an account of administration of his intestate's estate.

85 \*The accounts ordered were taken accordingly, and reported by the commissioner of the court. And the marshal returned an account of the hires of the slaves by him collected.

The cause coming on to be heard on the report of the commissioner, to which there was no exception, the same was approved and confirmed. And the court appointed commissioners to sell the slaves, and to deposit the proceeds of sales in the bank of Virginia at Norfolk; and further ordered and decreed (without intending to settle the principles of the division) that the commissioner of the court should make a special statement, dividing the balances reported to be due from Hansford and Sheild the admini-

istrator of Peter Manson, and the amount of hires collected or to be collected, among all the parties entitled, according to their apparent interests; charging the two daughters of Thomas Manson deceased with 400 dollars, the agreed value of advancements to their said father from the estate of his father the testator Robert Manson.

The sale was made in pursuance of the order, and a report thereof returned. And in this state of the case, the defendants applied by petition to this court for an appeal, which was allowed.

The cause was argued here, by Johnson for the appellants, and by Robinson and Harrison for the appellees.

I. The first and main point debated, was the question upon the construction and effect of the will of the testator Robert Manson: Whether, in the bequest therein contained, that after the death of the testator's wife, the whole of his personal estate should be divided among his surviving children thereafter named, the word surviving referred to the death of the wife, when the division was to be made? or to the death of the testator?

The appellants' counsel contended for the former construction; and he insisted, 86 that it was a general principle \*of construction applicable to all cases like the present, that words of survivorship should be referred to the period of division and enjoyment, unless a special intent appeared to the contrary, according to the decision of sir John Leach in *Cripps v. Wolcott*, 4 Madd. Ch. Rep. 11.

The counsel for the appellees maintained, that the words of survivorship, here, had reference to the death of the testator. They denied, that the general principle of construction stated by the vicechancellor in *Cripps v. Wolcott*, was sustained by authority: and they insisted, that the general principle was the direct reverse; that, in bequests like this, the words of survivorship must be referred, not to the death of the tenant for life when the division was to be made, but to the death of the testator, so as that the legacy should vest in all the legatees that survived him, unless there was something special to shew that the period of division was intended.

The following authorities were cited and examined in the argument: *Brograve v. Winder*, 2 Ves. jun. 634; *Russell v. Long*, 4 Ves. 551; *Daniell v. Daniell*, 6 Ves. 297; *Jenour v. Jenour*, 10 Ves. 562; *Newton v. Ayscough*, 19 Ves. 534; *Hoghton v. Whitgreave*, 1 Jac. & Walk. 146; *Browne v. Ld. Kenyon*, 3 Madd. Ch. Rep. 410, in which cases, the construction that referred the words of survivorship to the event upon which the division was to be made, prevailed. *Earl of Bindon v. Earl of Suffolk*, 4 Bro. P. C. 574; *Wilson v. Bayly*, 3 Id. 195; *Roebuck v. Dean*, 2 Ves. jun. 265; *Perry v. Woods*, 3 Ves. 204; *Maberly v. Strode*, Id. 450; *Brown v. Bigg*, 7 Ves. 280; *Edwards v. Symonds*, 6 Taunt. 213, 1 Eng. C. L. Rep. 361; *Doe d. Long v. Prigg*, 8 Barn. & Cress. 231; 15 Eng. C. L. Rep. 206; *Drayton v. Drayton*, 1 Desaus. 324; *Bass v. Russell*, 1 Taml. 18, 5

Cond. Eng. Ch. Rep. 263, cases in which the construction that referred the words of survivorship to the death of the testator, prevailed. But the counsel for the appellees insisted, that whatever might be the general rule of construction, or

87 \*whether there was any such general rule or not, upon the plain intent of this will, the testator's children who survived him, took a vested interest in the remainder expectant on the wife's life estate; in arguing which proposition, they cited *Walley v. North*, 3 Ves. 364; *Halifax v. Wilson*, 16 Ves. 168; *Woodstock v. Shillito*, 6 Sim. 416; 9 Cond. Eng. Ch. Rep. 337. They also cited the opinion of Denman, C. J., in *Doe d. Pilkington v. Spratt*, 5 Barn. & Adolph. 731, 27 Eng. C. L. Rep. 166, that "the law favours the vesting of estates, and that it is an established rule of construction, not to read a limitation in a will as being a contingent remainder, unless such clearly appears to have been the testator's intention; if it admits of being considered a vested remainder, it will always be read as such;" and to shew that this rule was peculiarly applicable to bequests of personal estate, and especially to residuary bequests, they cited *Bolger v. Mackell*, 5 Ves. 509. So, they said, in the construction of deeds of settlement, the courts always strove to find a construction whereby descendants should be provided for; *Woodstock v. Duke of Dorset*, 3 Bro. C. C. 569; *Hope v. Ld. Clifden*, 6 Ves. 499; *Powis v. Burdett*, 9 Ves. 428; *King v. Hake*, Id. 438; *Howgrave v. Cartier*, 3 Ves. & Beam. 79; *Perfect v. Ld. Curzon*, 5 Madd. Ch. Rep. 442; *Maitland v. Chalie*, 6 Id. 244.

II. The counsel for the appellants contended, that, if the construction of the will under which the appellees claimed was correct, yet, as their rights as next of kin and distributees of their deceased parents, accrued in 1814 when the testator's widow died, and the possession of the defendants commenced in 1815, and this suit was not brought till 1825, the statute of limitations was a bar to it. The objection supposed that the appellees could, as next of kin and distributees, maintain this bill; for if they could, he said, it did not appear that they, or at least several of them, were under any legal disability which would avoid the operation of the statute as a bar to their claim and suit.

88 \*The counsel for the appellees answered, that Peter Manson, the intestate of the defendant Sheild, was himself the representative of Richard Manson and James Moss, so that the statute could not be a bar to the claim of their distributees; and that the other parties were all under disabilities of coverture or of infancy at the time their title accrued, which prevented the bar of the statute as to them. Besides, they said, the statute of limitations could not have been a bar to a suit brought by the administrators of the decedents whose next of kin and distributees had filed this bill, because the statute could not have begun to run against the estate of those decedents, till there were administrators to represent them; which was not the case till after the commencement of



this suit, except as to two of them, of whom Peter Manson himself, whose unjust possession is complained of, was the administrator. *Murray v. East India Company*, 5 Barn. & Ald. 204, 7 Eng. C. L. Rep. 66; *Clark v. Hardiman*, 2 Leigh 347. And as the statute would have been no bar to the suit of the administrators, so it was no bar to the suit of distributees, who claimed through the administrators.

III. The appellants' counsel objected, that the next of kin and distributees of the deceased legatees could not maintain this bill to recover personal property belonging to the estates of those decedents: that administrations should have been taken of the estates of the decedents, and the claim should have been prosecuted by the administrators.

The answer was, that the next of kin and distributees could maintain the bill, though they could not have a decree for distribution among them, without making the personal representatives of the decedents parties; and here, the personal representatives were convened before the court as parties defendants. *Frazier v. Frazier's ex'ors*, 2 Leigh

642; *Samuel v. Marshall*, 3 Leigh 567.

89 \*PARKER, J. The main question in this cause arises on the bequest in the will of the testator Robert Manson, that at the death of his wife, the whole of his personal estate (which he had bequeathed to his wife for life) should be equally divided among his surviving children thereafter named, &c. And the question is, whether the words surviving children shall be taken to refer to the period of the testator's death, or to that of the death of his widow the tenant for life? If to the former, the interest vested in all the testator's children living at his death, and passed to their representatives; the time of distribution among them being alone postponed: if to the latter, then Elizabeth and Peter Manson, who alone survived the tenant for life, were entitled to the whole property; and the decree must be reversed.

After an attentive examination of all the authorities cited at the bar (which include, I believe, all that have any material bearing on the subject) I am of opinion, that although the children of the testator were not to take in possession until the death or second marriage of the widow, they took an interest at the period of the testator's death; that wherever the words survivors and surviving are used in a will, especially by an unlearned man inops consilii (as this testator evidently was), without manifesting any special intent to the contrary, the safest and soundest construction, that most consonant to the intention of the testator and best supported by the authorities, is to refer them to the death of the testator, and not to give the whole estate to such legatee as happens to survive the tenant for life, or, if none survives, to declare a total intestacy. The only authority directly opposed to this construction is the case of *Cripps v. Wolcott*, decided by sir John Leach in 1819—where the vice-chancellor laid down as the general rule, that words of survivorship are to be referred to the period of division and enjoyment, if

there be no special intent to the contrary; and that if a previous life estate  
90 \*is given, the period of division being the death of the tenant for life, the survivors at such death will take the whole legacy—which, he said, was the principle of *Russell v. Long*, *Daniell v. Daniell*, and *Jenour v. Jenour*. But I think it will be found, that those cases do not sustain the proposition; while the cases of *Wilson v. Bayly*, *Roebuck v. Dean*, *Perry v. Woods*, *Maberly v. Strode*, *Brown v. Bigg*, *Doe d. Long v. Prigg*, are manifestly in opposition to it. The last case I consider as directly in point, or rather as going beyond the case at bar, because the remainder there was to a class, and here it is to children named.

In the case of *Russell v. Long*, the three sisters among whom and "the survivor or survivors of them" the legacy was to be divided after the death of the tenant for life, all outlived their mother the tenant for life, as well as the testator; and the bill was brought by the executors of Christiana, one of the surviving sisters; the only question being, whether the sisters were tenants in common or joint tenants. The chancellor, on the authority of *Stringer v. Phillips*, decided that upon the death of Christiana, her third part passed by her will. So far, the case is opposed to the principal stated by sir John Leach. But lord Alvanley added this observation—"If all the sisters had not survived their mother, possibly I might have adopted the construction, that the survivorship related to the death of the mother, and not of the testator; for I think that construction is not to be adopted, if any other can be." It will be found that this loose dictum of lord Alvanley not only misled sir John Leach, but betrayed sir William Grant in the case of *Brown v. Bigg*, into the observation (whilst the argument was going on) that the general leaning of the court was against construing the words of survivorship to relate to the death of the testator, if any other period could be fixed upon. In the case of *Shergold v. Boone*, 13 Ves. 375, he retracted that remark; and stated, that

91 \*in regard "to the effect of a general clause of survivorship, he had found the result of the authorities contrary to what had fallen from the court during the argument of *Brown v. Bigg*, founded upon what lord Alvanley had said in one of the cases; and that, in a great majority of them, the survivorship had been referred to the period of the testator's death."

In *Daniell v. Daniell*, there was a clear, special intent to refer the survivorship to the period of the death of the tenant for life, not only by the effect of the words "to be paid equally between the two sons James and Francis, or the whole to the survivor of them," but more conclusively by the mode in which the testator disposed of the other sum of £1000. to the same persons, in which the period of division was, beyond all doubt, the period at which he intended it to vest; a circumstance relied on strongly by sir W. Grant, as confirming his construction of the clause on which the question arose.

The case of *Jenour v. Jenour* was one of



considerable doubt and difficulty, and in the course of it lord Eldon intimates an opinion, but does not decide, as to the effect of two clauses in the will; one giving £200. per annum, after a previous estate for life, equally to be divided between the testator's nephews and nieces, and the survivors of them; and the other giving £200. per annum, after a previous estate for life, to be equally divided between his two nephews, and "to go to the survivor of them." But no such question was before the court; and, in point of fact, all the nephews and nieces survived the tenants for life. The question argued and determined arose out of a clause in the will giving £92. long annuities, to be equally divided between his two nephews, and to go to the survivor of them, after the death of the testator's brother and sister; and really turned upon the point whether they were to

take as joint tenants, with benefit of survivorship between themselves,\* or as tenants in common. Lord Eldon determined, that the plaintiff should take the moiety of the £92. per annum absolutely, as tenant in common. The case seems, therefore, to belong to the same class to which *Stringer v. Phillips* and *Russell v. Long* may be referred; and thus, like the two former, it affords no support to the principle it was cited to sustain.

I have looked into the other cases cited by the appellants' counsel, to shew that a general clause of survivorship after a previous estate, is to be referred to the period of division, unless a special intent to the contrary appears—*Brograve v. Winder*, *Hoghton v. Whitgreave*, *Newton v. Ayscough*, and *Browne v. Ld. Kenyon*. In the three first cases, the intention was very clear to refer the survivorship to the death of the tenant for life. The estate, at that time, was to be sold by trustees and divided. That naturally pointed to the period of sale, as the period to ascertain who were the persons to take. In two of the cases, it was real estate to be converted into money by trustees, who were not themselves to take until after the death of tenant for life; so that (as the master of the rolls observed in one of them) the subject matter did not, until the death of the tenant for life, exist in the form in which it was given. *Newton v. Ayscough* is distinguished by sir W. Grant from *Perry v. Woods*, and likened to the cases of *Brograve v. Winder* and *Hoghton v. Whitgreave*; in the former of which lord Loughborough admitted it to be generally true that the words "survivors or survivor," or "surviving," after a previous estate, would not prevent the vesting of the estate at the death of the testator. The remaining case of *Browne v. Ld. Kenyon* turned on a bequest, after a life estate, to the testator's two brothers in equal shares, "or the whole to the survivor." Sir John Leach was of opinion that it was the meaning of the testator, that if one only survived the tenant for life, he should take the whole; that it was a

vested gift to the two as tenants in common, subject to be divested if one alone survived; but as both brothers died in the lifetime of the tenant

for life, the estate never was divested, and the money was divisible between the representatives of the two brothers. In this case, it is manifest, there was a special intent that the survivor should take the whole; and the opinion of the vicechancellor, that the estate vested in both, shews that it does not interfere with the rule I have indicated as the true one, in the first part of this opinion.

That rule is sustained by the cases I mentioned before, and several others unnecessary to be cited. *Brown v. Bigg*, (divested of the hasty observation of sir W. Grant, which he afterwards retracted in *Shergold v. Boone*) is in point; and so is *Long v. Prigg*, decided in the year 1828. Sir John Leach said that *Roebuck v. Dean* and *Perry v. Woods* did not square with the other authorities; but the first is cited and approved in *Halifax v. Wilson*, the latter in *Newton v. Ayscough*, and both by Bayley, J., in delivering the judgment of the court in *Long v. Prigg*. After this, I cannot doubt the soundness of the observation made by lord Loughborough in *Brograve v. Winder*—that it is generally true the word survivors will not prevent the vesting of the estate at the death of the testator; or, as lord Alvanley expressed it in *Maberly v. Strode*, "the blind words 'with benefit of survivorship' &c. mean the survivors at the death of the testator."

But if the general rule were as sir John Leach states it to be, I should still be of opinion, that the words of this will shew a special intent that the interest should vest in the children surviving at the testator's death, and the child his wife might have. For, 1st, the profits are given for the comfort and support of his wife and children thereafter named, during the wife's life; which is indicative of his intention to vest the estate in the children to be supported. 2ndly, If

the wife married again, she was to take but one third of the estate, and unless the whole vested in interest in the children, there would be a partial intestacy as to the two-thirds; which ought not to be presumed; it being clearly the intention of the testator to dispose of his whole estate. 3rdly, The bequest is to children specially named; and I cannot believe the testator meant to make a tontine among them, and if all but one died before the mother, for that one to take all, in exclusion of grandchildren or their descendants. This would, I believe, in ninety-nine cases out of a hundred, defeat the intention. 4thly, The estate is to be equally divided amongst children named, as individuals, not as a class: equality between them is the obvious intent; and this equality would be defeated by allowing a survivor to take the whole. 5thly, If none survived the tenant for life, a total intestacy is the consequence, which this testator manifestly did not intend. And, lastly, the provision that if his wife was then with child, that child was to have an equal part of his personal estate with the rest of his above mentioned children, shews that the testator meant that each of his children named should have an equal part in any event. He does not make the interest of the child to be born, dependant upon his surviving the mother, although his pos-

session is necessarily postponed; and, therefore, it ought not to be presumed, that he intended to make the interest of his other children dependant on that event. If, therefore, the period to which survivorship relates is to be ascertained, "not by any technical words, but by the apparent intention of the testator, collected either from the particular disposition, or from the general context of the will," (19 Ves. 536,) I feel no doubt upon this will, that the testator meant all his children to take a vested interest at his death; and, consequently, that the decree in this particular is right.

Upon the other points argued at the bar, I shall touch very briefly, there being no difference of opinion among the members of the court in regard to them.

95 \*As to the length of possession, and the statute of limitations, it was not contended that they would have protected the defendants in the court below, against the claims of the legal representatives of the deceased legatees, if a suit for the property had been brought in their names. But it was argued, that they protect the defendants against the equitable right of the next of kin or distributees of those decedents to sue; an equitable right being barred by the same length of time that would bar a legal right. No authority was cited to shew that a person under the disability of infancy or coverture, who might, at the commencement of such disability, have sued by prochein amy, may not sue during its existence, in the same manner, although more than five years have elapsed. The action belongs to the infant or feme covert, not to the next friend; his or her rights are saved, till the disability ceases. Here, the plaintiffs having been under the disability of infancy or coverture, their case was not within the statute; nor will equity carry the statute beyond the law. Moreover, at the time when Hansford and Peter Manson took possession of and divided the estate of the testator Robert Manson, there was no representative of that estate in being: they ought to be considered as executors in their own wrong, liable, like all other executors, to legatees and distributees.

The last point is, I think, settled by the cases of *Frazier v. Frazier*, and *Samuel v. Marshall*, cited at the bar, and by another case, *Moring v. Lucas*, 4 Call 577, all of which proceed upon the assumption, that legatees or distributees may sue in equity, but they are bound to bring the executor or administrator before the court, in order to a decree for distribution. It would be productive of much inconvenience and injustice, if they could not avail themselves of their equitable rights to injoin a sale (as in the present case) or to prevent other irreparable mischief, before an administration of the estate  
96 \*could be obtained, or where an executor or administrator should be indisposed to interfere.

I think the decree should be affirmed.

BROCKENBROUGH, CABELL and BROOKE., J., concurred.

TUCKER, P., dissented on the first question. He said—Robert Manson, by his

will dated in 1785, devised his estate for the support of his wife and children during her widowhood, but in case she married, then she was to have only a third part during life: he then proceeds, "and further my desire is, that she continue on the plantation I now live on, and at her death for the whole of my personal estate to be equally divided among my surviving children hereafter named, viz. Anna" &c. All the children named (besides three others born after the date of the will) survived the testator, but Elizabeth and Peter alone survived the widow. And the question is, whether they are exclusively entitled to the personalty? I am of opinion that they are.

If it appeared in this case, that the testator had lost a child or children before the date of his will, the natural construction of the word surviving would be to refer it to that event. But there is no proof of such fact, and the contrary inference may be drawn from the testimony. It has accordingly been contended, that the word surviving must refer either to his own death or to the death of his widow.

In deciding upon this alternative, we must bear in mind that the law has given to the testator the absolute disposition of his property, and that his will in relation to it is the law which must govern it, provided the provisions of it are not in violation of the laws of the land. The only legitimate object of inquiry, therefore, is, what was the intention of the testator? and that intention is better discerned by looking to his language and the provisions of the instrument, than

97 by a resort to adjudicated \*cases upon other wills, or to rules of construction often arbitrary, and very often irreconcilable with the true meaning of any other will than that upon which they have been founded. Let us then endeavour, in this case, to get at the testator's intention from his very words. His desire is, that "at the death of his wife his whole personal estate be equally divided among his surviving children hereafter named, viz. Anna" &c. Surviving whom or what? The word surviving is a relative term. It means, *ex vi termini*, a person who outlives another person, or who outlives some certain event. To what, then, does this relative term relate? what is its antecedent? We have seen, that it does not refer to the previous death of other children. Neither does it refer to the testator himself: his death had not been spoken of; no reference had been made to it, nor is it natural, or customary, or necessary, that the testator should provide that his legatees must survive himself. At the date of this will, the law provided that; for, at that time, all legacies lapsed if the legatee died in the testator's lifetime. To what, then, does this word relate? It relates to his wife, of whom he was then speaking, and to the event of her death, which he had then just mentioned. Surviving whom? Surviving her. Surviving what? Surviving her death. Herself, or her death, are the immediate objects to which this relative expression refers. Nothing can be more plain; and nothing can obscure

the meaning, but an attempt to elucidate it by a multiplicity of cases. Of these cases I shall say but little. If a rule is to be laid down, I conceive that which is stated by sir John Leach, somewhat modified, to be the proper one; that if there be a previous limitation of the property to another, with a limitation over to the survivor or survivors of a class or of certain individuals, the survivorship must be referred to the period of division, if there be no intent to the contrary discoverable in the will. On the other hand, it

98 is contended, that by the "later decisions the testator's death is the period, unless an intent to the contrary is to be deduced from the will. Thus, both rules are found to refer themselves, at last, to the matter of intention; and, of course, they in fact offered no certain rule whatever for our direction. We must, at last, look to the will itself, and interpret, as we best may, that governing principle which is to be our guide.

Some objections which have been suggested to my construction of this will, require notice. It is said, that by this construction the children of those who are dead are not provided for, and that it cannot be supposed the testator intended to disinherit them. To this it was well replied, that if the survivorship be referred even to the death of the testator, the same difficulty would have occurred, in case of the death of a child in his lifetime, leaving children. We must take it, therefore, that he had no design to provide against such contingency; and as the objection is equally applicable to either hypothesis, it can have no influence in inducing us to adopt the one rather than the other.

Again, it is asked, how would it have been if the widow had married? would not the estate have been at once distributable among all the children? I think not. Even in that event, I incline to think the testator intended all but her third to be kept together for the support of the children; for there can be no question that there was to be no division till her death. But admit it were otherwise, it brings us only to this, that in one alternative (her marrying) the estate would be divisible at once, and would comprehend all the children then alive; and in the other alternative (her remaining a widow) the division would be postponed until her death, because she was during life to have the use of the whole.

It may be said, however, that here the division is to be between persons expressly named. But, according to my construction, the words "among my surviving children hereafter named, viz. Anna" &c. are 99 to be understood "thus, "among the survivors of my children hereafter named," &c. and then there is no difficulty.

It seems to have been thought unnatural for the testator to exclude the families of those dying in his wife's life. About this, opinions might well differ. Admit the interests to have been vested, and then the husbands of the daughters, and not their children, would at their deaths have taken their interests. It is certain that every testator would be satisfied with such a result? Would every testator have been willing, that these vested interests of his daughters should,

upon the division at his wife's death, have gone into the hands of their husbands, rather than to his surviving children? May not this testator well have objected to giving vested interests to his daughters, which, even before they came into possession, might have been made chargeable with their husbands' debts? May he not even have chosen to postpone the vesting in interest of his sons' portions, to prevent the sacrifice of such remote and unsaleable interests by their imprudence? These things seem to me very possible; and if we can suppose any testator might intend such provisions, I think we must say this testator did intend then.

I am therefore of opinion, that by the will, the children who survived the widow were alone entitled; and I should think it proper to dismiss the bill, but for the interest of Richard, who was born after the date of the will, and pretermitted. He is not comprehended by the will; *Armistead v. Dangerfield*, 3 Munf. 20. And he is therefore entitled, under the statute, to the same portion of his father's estate as if he had died intestate, which he is to have by way of charge upon the other legatees; *Ibid*. This interest, upon his death, devolved upon his personal representative for the benefit of his next of kin, many of whom are parties in this cause. Richard Manson's administrator is now a defendant. Under the circum-

stances of this case, I think the plain- 100 tiffs had "ground for coming into equity. They had an interest—possibly not a very large one—and the property in which they were interested was about to be wasted or eloiigned, there being at that time. it would seem, no administrator of Richard. Their equitable interest gave them a right, under these circumstances, to the aid of the court; and they might still be sustained here, with leave to shape their bill anew according to their rights.

As to the statute of limitations, it could not, I think, oppose any obstacle to their success, since the administration on Richard's estate has been recent; and the statute could not begin to run until administration, as it did not run against Richard himself, he having died before the cause of action accrued. I doubt, moreover, whether the statute would run between the afterborn child and those whom the act of assembly makes chargeable to him. The case is certainly not within the express provisions of the statute of limitations; for the remedy of the pretermitted child is only in a court of equity; and that court, I apprehend, would not rigorously apply the statute to a case partaking strongly of the character of a trust, so as to protect the children who have got possession of the whole property, against the just claims of their own brother to his portion of the inheritance. On this point, however, it is not necessary to give any explicit opinion.

Upon the whole, I am of opinion, that the decree should be reversed, and the cause remanded to be proceeded in upon the principles I have declared.

Decree affirmed.

## 101 \*Thompson's Ex'or v. Guthrie's Adm'r.

December, 1887, Richmond.

[38 Am. Dec. 225.]

(Absent BROOKE, J.)

**Contract to Convey Land—Breach—Measure of Damages.**—In covenant on an executory contract for sale and conveyance of land, where covenantee has been put in possession, and has never been evicted, and where the breach consists in the failure of covenantor to convey and in his not having the legal title in himself, and no fraud proved or imputed, the covenantee is not entitled to more damages, at the utmost, than the purchase money he has actually paid, with interest for the time for which he may be accountable for the profits to the true owner.

This was an action for breach of covenant, brought in the circuit court of Augusta, as early as October 1817, by John Guthrie against Robert Thompson; and both parties having died pending the suit, it was revived in the name of Guthrie's administrator against Thompson's executor.

The declaration set forth a covenant of Thompson to and with Guthrie, dated in September 1786, whereby Thompson covenanted to sell Guthrie a parcel of land within certain boundaries therein described, containing 50 acres, more or less, for £50, and to make him a title to the same, upon his paying the purchase money; and then averred, that Guthrie had paid part of the purchase money, and had tendered the balance with interest; and assigned the breach,

\***Contract to Convey Land—Breach—Measure of Damages.**—In *Butcher v. Peterson*, 26 W. Va. 464, it is said: "It is the settled law of this State that, where there is a sale of land with covenant of general warranty, and the purchaser is evicted by a third person holding a paramount title, the measure of damages to which the purchaser is entitled, where the vendor sold in good faith and without fraud, is the purchase money paid for the land with interest thereon from the date of the actual eviction. *Threlkeld v. Fitzhugh*, 3 Leigh 461; *Stout v. Jackson*, 2 Rand. 132; *Lowther v. The Commonwealth*, 1 H. & M. 302; *Thompson v. Guthrie*, 9 Leigh 101. The same rule obtains when the eviction is of only a part of the land sold. In such case the measure of damages is, such a portion of the purchase money, as the relative value of the land lost bears to the price of the whole land. *Humphreys v. McClenachan*, 1 Munf. 498."

Though in general, for the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money he has actually paid, and interest thereon, yet this rule will not be applied where the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall, after his contract, disable himself to perform it by conveying the land to another, he will be held liable for the value at the time of the breach; and interest may be allowed on such value from that time. *Wilson v. Spencer*, 11 Leigh 261, 376, 377, basing its decision upon the principles laid down in the principal case. See further, monographic note on "Covenants" appended to *Todd v. Summers*, 2 Gratt. 167.

that Thompson had refused to convey the land to Guthrie, and had admitted that he had no title.

Thompson took oyer of the covenant, and then pleaded, 1, that he had performed it; and 2, that Thompson being in possession of the land at the date of the covenant, delivered possession thereof to the plaintiff John Guthrie, who thenceforth continued to hold the possession till the year 1817,

102 when he transferred his interest \*in the land, and in the covenant, to James Guthrie, for whose benefit this action was brought and prosecuted; and that one Huffmire having set up a claim to the land, James Guthrie, with intent to defraud Thompson, purchased and procured a conveyance from Huffmire of his adversary claim; and afterwards conveyed the land to one Clarke, by deed of trust, to secure certain debts; under which deed of trust the land had been sold by the trustee to another John Guthrie, who now held it under that sale; and so, James Guthrie, for whose benefit this suit was brought and prosecuted, had disabled himself from restoring the land to Thompson, and had, by a fraudulent combination, prevented Thompson from regaining possession, as he was entitled to do, upon the election of the plaintiff to claim damages for breach of the covenant, instead of the land.

Issues were made up on both pleas. But upon the trial, the jury found a verdict for the plaintiff upon the issue joined on the first plea (that of performance) only, without noticing the issue on the second plea: they assessed the plaintiff's damages to 650 dollars. The defendant moved for a new trial; which motion the court overruled; and then gave the plaintiff a judgment for the damages assessed by the verdict.

The court, at the instance of the defendant, certified the facts proved at the trial; which were, in substance, as follows—1. The covenant was produced; it was set out in *hæc verba* in the record, and corresponded with the statement of it in the declaration. 2. It was proved, that John Guthrie, the plaintiff, in the year 1797, being then in possession of the land under his purchase thereof from Thompson, offered to sell the same to John Guthrie junior, who, in consequence of that proposal, mentioned the subject to Thompson; upon which Thompson told him to have nothing to do with it, if he wished to avoid difficulty; that he Thompson would not make a title. 3. That in September

103 1817, James Guthrie, son \*of the plaintiff John Guthrie, made a tender to Thompson of 178 dollars 50 cents, being the full balance with interest then due to him on account of the purchase money of the land, which Thompson refused to receive, and he also refused to make a title to the land; whereupon an arbitration of the difference was agreed upon, but Thompson afterwards declined to proceed in the arbitration. 4. That in 1805, a suit was brought by Peter Beverley against the plaintiff John Guthrie, for the land, in which Beverley was cast, but on a point not affecting the merits; and in 1817, another suit was brought by Beverley's heirs against him for

the land, and this suit was still pending. 5. That the quantity of land included within the boundaries described in Thompson's covenant for the sale and conveyance of land to the plaintiff, was, in fact, about 90 acres, instead of 50 acres as mentioned in the covenant. 6. That in 1817, when the balance of the purchase money was tendered to Thompson, the land was worth from 15 to 20 dollars the acre. 7. That the plaintiff John Guthrie had cleared about 50 acres of the land, and made some valuable permanent improvements on it. 8. That he had held the land from the date of the covenant till he transferred the same to James Guthrie, for whose benefit this suit was brought; and that James Guthrie and those claiming under him, had ever since, and still, held it; nor had there been any other disturbance of the possession, but the suits of Beverley above mentioned, and the claim of Huffmire mentioned in the second plea. 9. It was admitted, that the legal title of the land which Thompson covenanted to sell to Guthrie, was still in Peter Beverley. In addition to the facts above stated, the court certified sundry documents and proofs adduced for the defendant at the trial, for the purpose of sustaining the defence set up in his second plea; and the facts alleged in that plea seemed fully made out; but there is no occasion for any further notice of this  
104 \*part of the case here, since it did not at all affect the point on which this court decided the cause.

Thompson's executor applied by petition to this court for a supersedeas to the judgment; which was allowed.

In the argument of the cause here, by Stanard for the plaintiff in error, and Johnson for the defendant, many points were debated; but the opinion and judgment of this court determined only one of the questions argued at the bar.

Stanard insisted, that the defendant was certainly entitled to the new trial he asked, on the ground that the damages assessed by the verdict exceeded any just measure properly applicable to the case, and were, in truth, enormous and vindictive. Under the circumstances of the case, he thought, the plaintiff, if entitled to a verdict at all, ought to have had only nominal damages. But supposing him entitled to more, the utmost he could justly recover was the purchase money he had actually paid, with interest thereon from the date from which the plaintiff could be held responsible to the owner of the title for rents and profits. For that would undoubtedly have been the proper measure of damages, if this had been an action on a covenant of warranty, or any other covenant for assurance of title, in a deed executed for the conveyance of the land, and the breach alleged and proved had been an actual eviction of the purchaser: much more was it the proper measure of damages in this action on an executory contract for the sale of land and conveyance of title. *Stout v. Jackson*, 2 Rand. 132, *Threlkeld's adm'r v. Fitzhugh's ex'x*, 2 Leigh 451, *Mills v. Bell ex'or*, 3 Call 320, 326, *Flureau v. Thornhill*, 2 W. Blacks. 1078. Here, where

only a part of the purchase money had been paid by the purchaser, and where he and those claiming under him had held and enjoyed the possession for more than thirty years before the action was brought, 105 \*and still continued in possession, with little danger too of ever being deprived of it, the damages given by the verdict (as he shewed) far exceeded the amount of the whole purchase money with interest.

Johnson contended, on the other hand, that, in an action for the breach of an executory contract for the sale and conveyance of land, the proper measure of damages was the actual loss which the covenantee sustained by the breach, to be estimated, of course, with reference to the value of the land at the time of the breach. And if that was true, it nowise appeared, that the damages given by the verdict in this case were excessive. He put the case of a covenant to sell and convey land for a consideration to be afterwards paid; the covenantee making a tender of the purchase money at the time appointed for the payment of it, and the covenantor refusing to receive it, and to go on with the contract: in such case, if the purchase money paid, with interest, was the measure of damages, the purchaser would be entitled to no damages at all; and the vendor (for any remedy which the law afforded the person he had wronged) might violate his contract at pleasure. In actions upon covenants of warranty, and the like, contained in deeds of conveyance of land executed, the measure of damages had been settled upon technical reasons, which were not more applicable to executory contracts for the sale of land, than to executory contracts for the sale and delivery of personal estate; and he insisted, that there was no good reason for a distinction, in this respect, between contracts for real and contracts for personal estate.

PARKER, J. I am of opinion, that the circuit court ought to have granted a new trial in this case, on the ground, if upon no other, that the damages were excessive and vindictive. [Here, the judge recapitulated the leading facts of the case.] Al-

though Thompson had not the legal  
106 \*title, there is no evidence to shew that he had not such an equitable one, as, combined with his possession and the long possession of those holding under him, would have enabled his assignee to defend himself against the claim of Beverley. No eviction had taken place; no offer had been made to Thompson to cancel the bargain, yield the possession to him, and remit him to his original rights. The purchase money was but £50, and only part of it had been paid. The verdict of the jury for so large a sum as 650 dollars in damages, must have been rendered in consequence of its being proved that in 1817, when the balance of the purchase money was tendered, the land was worth from 15 to 20 dollars per acre in cash, and that the boundaries of the track, which was sold for 50 acres, more or less, really contained about 90 acres. A regard to both these elements, in connexion with the return of the purchase money advanced, must have influenced the

jury. But throwing out of view the probability that the title of the covenant had been perfected by the lapse of time; disregarding the fact of his neglecting for so many years to tender the balance of the purchase money, and ask for a title; and supposing him to have been actually evicted by Beverley's heirs; the jury went greatly beyond the damages to which the plaintiff was entitled.

In the case of actual eviction from land for which the purchaser has a conveyance, he can only recover the purchase money, with interest for such time as he is liable to be called on for rents and profits, and the costs of defending the title. This is the settled rule by which the damages are measured in cases of eviction under an executed contract, "whether they be claimed in an action upon a warranty, or covenant of seisin, or of power to convey, or for quiet enjoyment:" see *Stout v. Jackson*, and *Threlkeld's adm'r v. Fitzhugh's ex'x*. The same rule applies, at least with equal force, to executory contracts for land. In *Mills v. Bell*, president

107 \*Pendleton, who delivered the opinion of the court, seemed to think it applied a fortiori: for whilst he inclined to the opinion, that if a conveyance was made with warranty, the purchaser upon eviction was entitled on the covenant to the increased value of the estate, he declared, that as in that case the contract was executory, a court of equity would adjust the damages upon equitable principles; and, accordingly, he decreed the value at the time of the agreement. So in *Flureau v. Thornhill*, on covenant to convey a tract of land at a future time, which had increased in value, and the vendor had no clear title, the vendee was only allowed the purchase money and interest, for that was his real loss. And judge Green, in *Stout v. Jackson*, says, that "in all cases of executory contracts, the compensation in case of failure, when the property sold has in the mean time increased in value, should be the same as in case of an executed contract with warranty, and an eviction; for the real loss to the purchaser is the same." Judge Cabell too, in the case of *Threlkeld's adm'r v. Fitzhugh's ex'x*, draws the distinction between contracts to deliver personal property, and contracts to convey lands, at a future period, in these words: "In all executory contracts for the delivery of personal property at a future day, the established standard of damages is the value of property at the time and place when and where it ought to be delivered. In all executory contracts for the conveyance of land at a future time, the established measure of damages is the purchase money." On a covenant to make a good title, where there is no fraud on the part of the vendor, and he sells believing his title to be a good one, or that it can be made so, the rule must be the same. The vendee's loss, in case of failure, is the purchase money; the profits, as long as he receives them, standing in lieu of interest, unless so far as they are recovered. For this loss he ought to be compensated, if the land falls in value; and no more than

108 \*compensated, if it rises. Such a rule

offers no temptation to the vendor to violate his contract; because, if he has a good title, the vendee can claim specific performance in a court of chancery, instead of bringing his action at law. As to the additional quantity of land over and above that sold, the vendee has no claim whatever to compensation; and with respect to loss sustained by having put improvements on the estate, he cannot recover, for the reasons assigned by judge Green in *Stout v. Jackson*.

Hence, the plaintiff here, in case of actual eviction, would seem to have been entitled to little more than 100 dollars, which he had paid, with some interest. Under the actual circumstances of the case, I am strongly inclined to think, his damages should have been nominal: but as (if my opinion prevails) the cause must be sent back for a new trial, and its aspect may be changed by new pleadings and new evidence, I forbear to give any opinion on this point.

The other judges concurred. Judgment reversed, and cause remanded for a new trial.

#### 109 \*Commonwealth v. Clopton.

December, 1837. Richmond.

(Absent BROOKE, J.)

**Judiciary—Creation of New Circuit—Salary of Former Judge—Statute—Case at Bar.**—A judge of the general court, elected for and assigned to the seventh judicial circuit, has an additional salary allowed him in consequence of the great mass of judicial business in one of the courts of his circuit; that court is afterwards severed from the seventh circuit and formed into a new circuit, and a new judge appointed for the same; the former judge yet remaining judge of the seventh circuit: **HELD,**

##### 1. Same—Same—Same—Statute—Construction.—

That as the act establishing the new circuit, makes no mention of the additional salary allowed to the former judge, and does not in terms or by necessary implication take it away, it was not the intention of the legislature to take it away: and

##### 2. Same—Same—Same—Constitutionality.

—That if the legislature had intended to take the additional salary away, and had so enacted, such enactment would have been unconstitutional.

By an act of assembly passed 29th January 1823, entitled "an act concerning the superior court of law of Henrico county," it was enacted, that the judge of that court should hold three terms in each year for the trial of criminal causes, in addition to the two terms for the trial of civil causes; and that the judge of the general court assigned to the fourth judicial circuit (to which, according to the then existing arrangement of the courts, Henrico belonged) should receive, in addition to the salary then allowed him (which was 1500 dollars) the annual sum of 300 dollars. In the new organization of the judiciary system, made by the act of the 16th April 1831, whereby the present circuit superior courts of law and chancery were established, the commonwealth was divided into ten districts and twenty circuits, and the county of Henrico was arranged in the fourth district

and seventh circuit; and it was provided, that the circuit superiour courts should  
 110 be held by the \*judges of the general court, the number of whom was by another act of the same date increased to twenty, who should be elected for and assigned to the circuits respectively, and each of them commissioned a judge of the general court, and judge of the circuit superiour courts of the circuit for and to which he should be elected and assigned; and that "the judge of the circuit superiour court of Henrico" should receive the additional salary of 300 dollars prescribed by the act of 29th January 1823. See acts of 1830-31, ch. 7, 8, 11, Supp. to Rev. Code, ch. 106, 107, 108, and particularly § 5, 15, 27, of the last cited act.

Mr. Brockenbrough, who was the judge of the general court first elected for and assigned to the seventh circuit, and Mr. Clopton, who, upon the appointment of Mr. Brockenbrough to the bench of the court of appeals, was elected his successor as judge of that circuit, continued to receive the additional salary of 300 dollars allowed as aforesaid—Mr. Clopton until February 1837, though, during the time he continued to perform the duties of judge of that circuit superiour court, the three criminal terms originally prescribed by the act of 29th January 1823 were abolished. In February 1837, an act was passed, severing the county of Henrico and city of Richmond from the seventh judicial circuit, forming them into a new circuit, namely, the twenty-first, and providing that another judge should be added to the general court, and elected and assigned for and to the new circuit, to whom a salary of 2000 dollars was allowed. Sessions acts of 1836-7, ch. 61, p. 38. Under this act Mr. Nicholas was elected a judge of the general and circuit superiour courts, and assigned to the new circuit composed of the county of Henrico and city of Richmond. Mr. Clopton remained the judge of the seventh circuit.

In April 1837, Mr. Clopton presented his claim to the auditor of public accounts,  
 111 for his quarter year's salary \*due on the 1st of that month, at the rate of 1800 dollars per annum, including the 300 dollars additional salary, which had been allowed him as judge of the seventh circuit, while Henrico and Richmond belonged to that circuit, and he performed the duties of judge of the circuit superiour court thereof. The auditor, seeing that he was now relieved from the duties of judge of that circuit superiour court, in consideration of which the additional salary of 300 dollars had been allowed to him, refused to allow his claim to the additional salary. He appealed from this decision of the auditor to the circuit superiour court of Henrico and Richmond; which reversed the auditor's decision, and, holding that Mr. Clopton was still entitled to the additional salary, directed the auditor to settle and allow his claim at the rate of 1800 dollars salary per annum. From which judgment, this court, on the application of the attorney general, allowed the commonwealth an appeal.

Grattan, for the commonwealth.  
 Brooke, for the appellee.

BROCKENBROUGH, J. By the 5th article, section 1st, of our present constitution, the judicial power is vested (besides other courts, judges and justices) "in such superiour courts as the legislature may from time to time ordain and establish;" and the jurisdiction of the judicial tribunals, and of the judges thereof, is to be regulated by law. These provisions authorize the legislature to model the superiour courts (inferiour, however, to the supreme court) in any manner that its wisdom and experience may suggest, and to reform, alter, or even abolish them (taking care to substitute other superiour courts in their place) whenever the good of the country may require it. But lest this remodelling or abolition of those courts should be effected for the unworthy purpose of removing obnoxious judges, and that it might  
 112 \*not impair the independence of the judiciary, a restriction was imposed on the legislature. The second section ordains that "no law abolishing any court shall be construed to deprive a judge thereof of his office, unless two thirds of the members of each house present concur in the passing thereof." The independence of the judiciary is also secured by the provision, that judges shall hold their offices during good behaviour. They cannot be removed, unless by impeachment and a regular trial, on charges that they have offended against the state, either by maladministration, corruption, neglect of duty, or other high crime or misdemeanour; or by a concurrent vote of both houses of the general assembly, in which two thirds of the members present must concur; the cause of removal, in the last mentioned case, being entered on the journals of each house, and the proceeding for removal being only carried on after due notice given to the judge to be proceeded against. And their independence is yet further secured by the clause which declares that they shall have fixed and adequate salaries, which shall not be diminished during their continuance in office.

At the first session of assembly after the adoption of the new constitution, the legislature proceeded to ordain and establish the superior courts, which they invested with a certain portion of the judicial power. These consisted of the general court, and the circuit superiour courts of law and chancery. The identical judges who composed the general court, formed also the circuit superiour courts: that is to say, each judge of the general court was assigned to some one circuit composed of several counties or towns, and there were exactly as many judges of the general court, as there were circuits. So intimately were these courts blended together, that the law directed the judges of the general court to be commissioned by the executive, as judges of the general court, and of the circuit superiour courts of law  
 113 \*and chancery to and for which they should be elected and assigned. And the general law establishing their salaries



gives those salaries to them as judges of the general court and of the circuit superior courts.

The question in the present case arises from the language of the 27th section of the circuit superior court law. That section first directs that all the special powers and jurisdiction formerly exercised by the superior court of law for Henrico, and the district chancery court of Richmond, shall be exercised by the circuit superior court of Henrico. It then directs, that for the trial of criminal causes the judge of the said circuit superior court of Henrico shall hold three terms &c. and then adds, "and the judge of the said court shall receive the additional salary prescribed by the act passed January 29th 1823." It is contended by the counsel for the commonwealth, that this additional salary was given to the incumbent as judge of the circuit superior court of Henrico, and not as judge of the general court, or as judge of the seventh circuit; and that as soon as the incumbent ceased to be judge of the circuit superior court of Henrico, he ceased to be entitled to the additional salary. But this, in my opinion, is an entire misconception. The incumbent did not receive the additional salary, nor was it given to him, as judge of the circuit superior court of Henrico; he did not hold such an office, as a separate office; he was not so commissioned; but he was commissioned as a judge of the general court, and of the circuit superior courts of law and chancery for the seventh circuit, to which he was elected and assigned. He could not have received the salary as judge of the circuit superior court of Henrico, unless the law had established that as a separate court, and he had been elected to that special court, and commissioned as judge of it. This view is entirely confirmed by the act of January 1823, the language of

which is, "that the judge of the general court \*assigned to the fourth judicial circuit (now the seventh) shall receive, in addition to his present salary, the annual sum of 300 dollars:" this enactment was made, after the previous part of the law had shewn, that the increase of business in the circuit court of Henrico was the motive for making the addition. So this 27th section shews, that the motive for giving the additional salary was the special jurisdiction conferred on the circuit superior court of Henrico, consisting of appeals from the auditor, of chancery suits brought by or against the commonwealth, of identification of convicts twice sent to the penitentiary from all parts of the state &c. and the increase of the criminal business of that court. But although such was the motive for making the addition, yet it was given to, and received by, the incumbent, in the only character in which he could receive it, that of the office which he held.

Having ascertained the character in which judge Clopton received this additional salary, the next question is, could the legislature, who had given him the fixed salary of 1800 dollars, diminish it during his continuance in his office? Certainly not, without violating the letter and spirit of the constitution.

The legislature may remodel, alter or reform these courts, or any of them. Suppose then they had by law taken away from the circuit superior court of Henrico, the special jurisdiction above mentioned, and conferred it on some other court (say the general court); or suppose that the criminal business having diminished, they had again reduced the criminal terms to two instead of three; will any one say, that, as these were the original motives for making an addition to the salary, it might now be cut down to the original salary? No—because the salary cannot be diminished during his continuance in the office, that is, in the office of the judge of the general court and of the circuit superior courts of law and chancery.

115 \*The same course of reasoning will apply to the case which has actually happened, namely, the disconnexion of one of the courts from the circuit to which it has heretofore been attached, and making a new circuit of it. Perhaps I can make this more palpable by taking another circuit. It is said that in the 13th circuit, consisting of Frederick, Berkeley, Jefferson, Morgan and Hampshire, there is a vast press of business. If from that circuit the county of Frederick should be struck off, and a new circuit formed of it and one or more of the counties of the adjacent 14th circuit, and a new judge of the general court elected and assigned to the new circuit, would any one believe, that because the legislature had relieved the judge of the 13th circuit of a great part of his labour, his salary could be reduced from 1500 dollars to 1200 dollars? And yet judge Clopton's case is precisely similar. After the additional salary was given, the judge of the general court assigned to the 7th circuit had a legal right to the salary of 1800 dollars. The legislature could not reduce it to 1500 dollars by striking off the county of Henrico. If it could, then that which the constitution says shall be fixed, might easily be unfixed at the pleasure of the legislature; and the judges, instead of that feeling of independence which results from the consciousness of a certain support that cannot be taken from them, would be liable to the continual apprehension of a state of dependance.

I am happy to say, that, in this case, no such attempt has been made by the legislature, nor have I any reason to believe it ever will be made. In the act of 25th February 1837, establishing the new twenty-first judicial circuit, composed of the county of Henrico and city of Richmond, there is not one word which takes away from the judge assigned to the seventh circuit, any part of his salary, nor is there any intimation that such was the intention of the legislature.

116 \*I am for affirming the judgment, which reversed the decision of the auditor.

PARKER and CABELL, J., concurred.

TUCKER, P. By the act of 1823, the judge of the general court assigned to the fourth judicial circuit was entitled to an additional salary of 300 dollars. By the act



of 1831 (the new organization) the county of Henrico was made part of the fourth district and seventh circuit; and it was declared that the judge of the circuit superiour court of Henrico should receive the 300 dollars additional salary prescribed by the act of 1823. Thus far there can be no doubt. Judge Brockenbrough, the predecessor of judge Clopton, was entitled to receive and did receive the 300 dollars additional salary. Upon his promotion, judge Clopton was appointed and commissioned judge of the general court and of the circuit superiour courts within the seventh circuit in the fourth district: and as Henrico county was within that circuit, his commission extended to that, and he was, to every intent, judge of that circuit superiour court, and entitled to the 300 dollars additional to the general salary of the judges of the general court. On the faith of these rights, he accepted the office; and in 1837, the legislature severed Henrico from the seventh circuit. This act, however, did not, in terms, take away the 300 dollars additional, nor did it intimate that it should be paid to the new incumbent, judge Nicholas. On the contrary, it gives him 2000 dollars, without abolishing the additional 300 dollars to judge Clopton. If, therefore, the legislature had had full power to take from him that part of his salary, it has not done so.

But, in truth, it could not constitutionally do so. Judge Clopton accepted a commission which made him judge of the whole seventh circuit, and entitled him to all the emoluments of the judge of that circuit; that is, \*to the general salary of 1500 dollars, and the additional salary of 300 dollars given to the judge of the superiour court of Henrico. Now, by the 5th section of the 5th article of the constitution, the legislature had no power to diminish judge Clopton's salary during his continuance in office, and by the 2nd section it had no power to deprive him of his salary by abolishing the court; and a fortiori it had no right to remove him from office by a legislative act. In any aspect of the case, therefore, it would have been unconstitutional to take away his 300 dollars. If he had continued in the discharge of the duties of judge of the superiour court of Henrico, it would be admitted on all hands, that the taking away of the 300 dollars would have been unconstitutional under the 5th section. It is true, however, that he no longer discharges those duties: they have been assigned to another. This the legislature had a right to do, but it had no right to take away his salary. For the act of 1837 has either abolished the court, or it has not. Suppose the court to be abolished by the erection of it into the twenty-first circuit: then, as judge Clopton held the office of judge of that court, and was entitled as such to 300 dollars, the abolition of the court could not, under the 2nd section, take away his office or his salary. Is the case any better, if we consider the court as not abolished? If it be not, then judge Clopton is removed from that office by a mere legislative act, whereas he could only be constitutionally removed by a

vote of two thirds of both houses. In every aspect of the case, therefore, it would have been unconstitutional in the legislature to take away from him his additional salary.

But in fact it has not done so. There is no provision repealing the salary of 300 dollars. Nor is the salary given to judge Nicholas; for he has an independant salary of 2000 dollars, having neither connexion with nor reference to this 300 dollars. It still remains on the statute book, a salary to be given to somebody. Shall \*it go to judge Nicholas? Surely not. His salary was raised to 2000 dollars, without an idea of his having this 300 dollars also. To whom then does it go? To judge Clopton, from whom it could not constitutionally be taken away.

Judgment affirmed.

# 119 \*Fisher v. Bassett and Others.

December, 1837, Richmond.

[33 Am. Dec. 227.]

(Absent BROOKE and BROCKENBROUGH,\* J.)

**Administration Granted—Wrong Exercise of Jurisdiction—Effect—Case at Bar.**—A county or corporation court grants administration of the estate of a foreigner, who died abroad, and who had no residence in the county or corporation at the time of his death, and had no estate of any kind there, so that in truth the state of facts is not such as to give the court jurisdiction to grant administration in the particular case, according to the provisions of the statute, 1 Rev. Code, ch. 104, § 12, 32, yet held.

\*He decided the cause in the circuit superiour court of Henrico.

†**Administration Granted—Wrong Exercise of Jurisdiction—Effect.**—Where a court has general jurisdiction to grant letters of administration, an order granting administration, in a case in which the state of facts is not such as to give it jurisdiction in that particular case, is not a void but only a voidable act, and cannot be questioned in any collateral proceeding. For this proposition, the principal case was cited with approval in *Cox v. Thomas*, 9 Gratt. 328; *Schultz v. Schultz*, 10 Gratt. 378, 382; *Hutcheson v. Priddy*, 12 Gratt. 90 (in this case, *MONCURE, P.*, in his dissenting opinion, p. 92, distinguishes the principal case from the case at bar); *Andrews v. Ivory*, 14 Gratt. 229, 236, 238, and *foot-note* (see somewhat extended discussion of the subject in this *foot-note*); *Gibson v. Beckham*, 16 Gratt. 326; *Smith v. Henning*, 10 W. Va. 615; *Leach v. Buckner*, 19 W. Va. 42; *Holmes v. O. & C. R. Co.*, 5 Fed. Rep. 530, 532; *foot-note* to *Burnley v. Duke*, 2 Rob. 102. See also, *monographic note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

For, where a court has general jurisdiction over a given subject-matter, *i. e.*, over a certain class of cases, its judgment in a case which falls within this class is conclusive until set aside by some proceedings in the same or an appellate court; it cannot be questioned in any collateral proceedings; and this is true although the facts of the particular case are not such as to give the court jurisdiction in that case. For this more general proposition—of which the rule laid down in the first paragraph is a subdivision—the principal case was cited with approval in *Ballow v. Hudson*, 13 Gratt. 681; *foot-note* to *Ballard v. Thomas*, 19 Gratt. 14; *Davanaugh v. De-*

that such a grant of administration is not a void but only a voidable act; and, therefore, rightful acts of, and fair dealings with, the administrator, consummated before his administration is revoked or superseded, cannot be impeached.

**Same—Same—Same.**—Quere, whether, if a county or corporation court grant administration of a decedent's estate. In a case where the true state of facts is not such as to give such court jurisdiction to grant administration, and yet such grant is only voidable, not void, the general court can make a valid grant of administration, until the former irregular grant by the county or corporation court shall have been duly revoked or superseded?

**Administrators—Sale of Bond at Sacrifice—Assignee Must Show Fairness of Transaction.**—An administrator takes a bond to himself individually for a debt due to his intestate's estate, payable at a

distant day, and then sells this bond at a discount of 25 per cent. to an assignee, who knows that the consideration of the bond was a debt due to the intestate's estate, but is informed, and so informed as to justify him in believing, that the administrator has acquired the full property in the bond in his own right: **HELD**, this is such a dealing with the assets of the intestate's estate, such a concurrence of the assignee with the administrator in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the administrator's conduct on the assignee; and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee cannot, in equity, avail himself of the transfer.

Philip Grimes deceased, of Middlesex, was, in his lifetime, the executor of John Robinson deceased. That \*testator, by his will, bequeathed a legacy to Robert Robinson, who survived the testator and died; and though sufficient assets to pay the legacy came to Grymes's hands, he died without having paid it; so that his estate was, acknowledgedly, liable to the representatives of the legatee for the amount of the legacy.

Grymes's estate was an ample one. Administration of it was committed by the county court of Middlesex to George Healy of that county; and John Bassett deceased, the father of George Bassett, the appellee in this cause, who was his executor, was one of the sureties of Healy in his administration bond. Healy wasted Grymes's estate to a very considerable amount; and his letters of administration were revoked by the county court of

vaughn, 19 Gratt. 566; Cline v. Catron, 22 Gratt. 304; Durrett v. Davis, 24 Gratt. 316; Shelton v. Jones, 26 Gratt. 396; Quesenberry v. Barbour, 31 Gratt. 500; Woodhouse v. Fillbates, 77 Va. 321; Lemmon v. Herbert, 92 Va. 657, 24 S. E. Rep. 249; Hall v. Hall, 12 W. Va. 13, 15; Patton v. Merchants' Bank, 13 W. Va. 587; *In re Sawyer*, 194 U. S. 200, 8 Sup. Ct. Rep. 493; *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. Rep. 660; Noble v. Union, etc., R. Co., 147 U. S. 165, 13 Sup. Ct. Rep. 274; Holmes v. O. & C. R. Co., 9 Fed. Rep. 242; *In re Eaton*, 51 Fed. Rep. 805; Cardoza v. Epps, 2 Va. Dec. 187. See also, *foot-note* to Gibson v. Beckham, 16 Gratt. 321.

**Fiduciaries—Breach of Trust—Participators—Liability.**—It has been long settled that whenever a fiduciary does any act in violation of his duty or commits a breach of trust, that he and all who willingly and knowingly aid him in the execution of these purposes are, in the eyes of the law, participators in the offence, and all stand upon the same footing. *Boisseau v. Boisseau*, 79 Va. 77, citing principal case, *Jackson v. Updegraffe*, 1 Rob. 107, *Pinckard v. Woods*, 8 Gratt. 140, *Jones v. Clark*, 25 Gratt. 658, and *Asberry v. Asberry*, 33 Gratt. 463. To the same effect, the principal case was cited in *Hunter v. Lawrence*, 11 Gratt. 184; *Edmunds v. Venable*, 1 Pat. & H. 140; *foot-note* to *Barksdale v. Finney*, 14 Gratt. 338; *foot-note* to *Jones v. Clark*, 25 Gratt. 647.

Thus, in *Utterback v. Cooper*, 28 Gratt. 286, it is said: "If there is any proposition which ought to be regarded as settled law in Virginia, it is that a party concerting with an executor or administrator in a breach of trust, cannot claim credit for the money actually advanced by him. It is not for him to say the fiduciary ought to have applied the money to the purposes of the estate. When he aids him in any manner contrary to the duty of the executor, he takes upon himself all the hazards of a misapplication of the fund. All the cases, including *Graff v. Castleman*, 5 Rand. 195; *Pinckard v. Woods*, 8 Gratt. 140; *Fisher v. Bassett*, 9 Leigh 119; *Cocke v. Minor*, 25 Gratt. 246, and *Jones v. Clark*, 25 Gratt. 642, established that proposition. In *Fisher v. Bassett*, the purchaser was informed that the bond belonged to the administrator, and was so informed as to justify him in believing it; and yet he was decreed to surrender the security. In the case of *Jones v. Clark*, 25 Gratt., all the authorities are reviewed at great length by the president of the court, and the result of all of them, as there announced, is: If a person buying a bond from an executor has good reason to believe that the executor intends to apply the proceeds of sale to his own use, and thus commit a devastavit, it is incumbent upon him to stay his

hand until he can ascertain by regular inquiries that the sale is to be made for the purposes of the estate. In all such cases the party dealing with the executor does not gain credit even for the money advanced, but is decreed to surrender the securities and account for the full value of the property received by him."

It is also a well-established proposition that the conversion into money by a trustee of well-secured bonds belonging to a trust fund, by a sale thereof at a large sacrifice to a purchaser, with full notice of the trust, constitutes such an improper dealing with, and devastavit of, the trust subject as will render both trustee and purchaser *prima facie* responsible therefor. *Cocke v. Minor*, 25 Gratt. 254; *Jones v. Clark*, 25 Gratt. 661, 662, 671, both cases citing the principal case; *foot-note* to *Pinckard v. Woods*, 8 Gratt. 141, setting forth reason for this rule. And while the belief by the purchaser, honestly entertained on sufficient ground, that the administrator has a right to transfer the bonds, will acquit him of intentional wrong in acquiring the bonds, it constitutes no defence to the claims of those entitled to receive or charge the fund. At his own peril, the purchaser is bound to know that the fact existed which he believed to exist, and further the onus is on him to prove the existence of this fact. *Cocke v. Minor*, 25 Gratt. 266, citing the principal case. In other words, where the purchaser buys the bonds at a heavy discount, the burden rests upon him to show that the administrator was the real owner of the bonds or that the necessities of the estate justified the sacrifice. *Brockenbrough v. Turner*, 78 Va. 447, 448, 450; *Jones v. Clark*, 25 Gratt. 658, both citing the principal case.

Middlesex, and administration de bonis non was granted to Carter Braxton, the husband of the granddaughter and sole heir and distributee of Grymes. Braxton as the administrator de bonis non, and Braxton and his wife as distributees, of Grymes, brought a suit in chancery against Healy the former administrator, and the sureties bound in his administration bond who were yet living, and the representatives of such of them as were dead, and among the rest George Bassett executor of John Bassett, for the purpose of having an account of Healy's administration, and of charging him, and if necessary his sureties, for his devastavit of Grymes's estate. And in that suit it was made apparent, that the estate of the surety Bassett would be responsible to Grymes's administrator de bonis non and distributees, in consequence of Healy's waste of Grymes's estate and of his insolvency, to a much greater amount than the sum due by Grymes's estate to the representatives of Robert Robinson, on account of the legacy bequeathed to him by Grymes's testator John Robinson.

Robert Robinson was, in his lifetime, a resident of Nova Scotia: he died there; and he had no other estate in Virginia, except his claim upon the representatives \*of Grymes for the legacy above mentioned; and Grymes himself, his first administrator Healy, and his administrator de bonis non Braxton, who had been successively responsible for the legacy, had all resided in the county of Middlesex. Yet Robert G. Scott, with the sole view, as it appeared, of recovering this debt due from residents of Middlesex to the estate of Robert Robinson, made application to the hustings court of the city of Richmond, within the jurisdiction of which that decedent had no estate whatever, for administration of his estate, which the hustings court, unwarily without doubt, granted. Scott being thus appointed the administrator of Robert Robinson, applied to Braxton, the administrator of Grymes, for the legacy which Grymes as the executor of John Robinson had become bound to pay to Scott's intestate. Braxton, finding that that legacy was still certainly due from Grymes's estate, and being disposed to provide for the payment of the legacy out of the assets of that estate in the most convenient manner he could, was therefore willing to apply to the satisfaction of the legacy, so much as would suffice for the purpose, of the balance which was understood, and indeed ascertained at the time, to be chargeable on the estate of John Bassett, as one of the sureties of Healy the first administrator of Grymes, on account of Healy's devastavit: Scott was desirous to get payment of the debt due his intestate's estate, out of that part of the funds of Grymes's estate: and the executor of Bassett, knowing that his testator's estate was indebted to that of Grymes, had no objection to the application of the money for which he was responsible, in any manner that Braxton should wish and direct. Neither Braxton nor Bassett's executor, certainly, nor, probably, Scott himself, had as yet the least doubt of the regularity and validity of the letters of administration of Robert

Robinson's estate, granted to Scott by the hustings court of Richmond.

122 \*Such being the state of things and the disposition of all the parties, Braxton sent an open letter by Scott, to George Bassett the executor of John, dated the 1st February 1828, in these words: "Any arrangement you can make with mr. Scott relative to the claim of Robert Robinson's administrator against the estate of Philip Grymes, will meet with my approbation; and will be allowed by me in part discharge of the amount you may be compelled to pay me, as the administrator of your father who was the surety of George Healy for his administration of Philip Grymes's estate. I think the amount of the claim against mr. Grymes's estate will be between 3000 and 4000 dollars. (Signed) Carter Braxton."

This letter was enclosed by Scott in a letter of the same date to Bassett, in which Scott very earnestly importuned Bassett to come into the arrangement, which it appeared by that letter he had previously proposed to him, of giving his bonds to Scott, payable in three equal annual instalments, for the amount of the legacy due from Grymes's estate to the estate of Robert Robinson, and thereby getting a credit for the same amount, for his testator's estate against Grymes's representatives. Bassett came into the arrangement accordingly; and, in February 1828, executed three bonds to Scott (individually, not describing him as administrator of Robinson) for 1316 dollars 90 cents each, payable on the 1st days of March 1829, 1830 and 1831—the aggregate, 3950 dollars 70 cents, being the amount that was due from Grymes's estate to that of Robert Robinson; and Bassett also executed a deed of trust conveying land to Herbert Claiborne, trustee, to secure punctual payment of the bonds as they should come due.

Scott, having thus procured these bonds to himself, in satisfaction of the claim of his intestate's estate upon Grymes's estate, and being desirous to raise money upon them, very shortly afterwards offered 123 them to Bassett, \*upon the following terms—that Bassett should give him his note, with certain persons as indorsers, for 3600 dollars payable on the 15th June 1828, and Scott should, for such more prompt payment, discount 350 dollars from the aggregate of the bonds, and surrender them to Bassett. To this proposal Bassett did not accede, not because he doubted Scott's right to dispose of the bonds, but, as he said, because a compliance would not be convenient to him. Scott then, on the 6th March 1828, wrote a letter to Bassett, inclosing a certificate which he requested Bassett to sign, in order to enable him to sell the bonds in the market to better advantage: the proposed certificate was in these words—"Robert G. Scott holds three bonds executed by me, each bearing date the 11th February 1828, one payable March 1st 1829, one March 1st 1830, one March 1st 1831, and amounting in the aggregate to 3950 dollars 72 cents:—these bonds are executed for a valuable consideration; there is no legal or equitable objection to their payment, and when due will

be discharged. This I have said, with a view that Mr. Scott may make any arrangement in relation to them he may desire. Given under my hand this day of March 1828." Bassett prudently refused to sign the proposed certificate—"declining (as he said) in any manner to express his faith, further than was, and he thought sufficiently, shewn by his signing the bonds."

Scott now offered the bonds for sale to the appellant Fisher, who, without being at all apprized of the recent correspondence between him and Bassett just mentioned, hesitated to purchase them, until he could have some assurance that there was to be no objection to the payment of them. He was referred, and he applied, for information on the subject, to Herbert Claiborne, a lawyer, who had been the adviser of Bassett; and Claiborne stated in writing, that the bonds had been executed

by Bassett to Scott, for a claim of the 124 latter as administrator of Robert Robinson deceased; that he Claiborne "was conversant with the whole transaction, and thought there could be no doubt but that the debt was a bona fide one, due now to Scott alone;" that Bassett had entered into the arrangement in consequence of which he had executed the bonds, advisedly, and "upon the most mature deliberation," and Claiborne himself, after both he and Bassett had paid much attention to the nature of the claim, had prepared the bonds, and the deed of trust (in which he was the trustee) to secure the payment of them; and that, since the bonds and the deed were executed, Bassett had informed him, that he was endeavoring to make arrangements to raise a sufficient sum of money to pay off the bonds to Scott.

Fisher still hesitated to purchase the bonds, till it should be ascertained from Bassett himself, that there would be no objection to the payment of them, when they should fall due. On the 14th March 1828, Scott wrote a letter to Bassett, informing him, that he had on that day assigned the bonds to Fisher (though, in fact, no such assignment had yet been made); and this letter was sent by a special messenger to Bassett. On receiving notice of this actual assignment (as he had reason to suppose it was) Bassett, while he declined to give any written assurance of payment to the assignee, told the messenger, verbally, "that the bonds were really and bona fide due, and that he would pay them to the assignee of the same." The messenger stated this verbal declaration of Bassett in an affidavit, which was handed to Fisher; but Bassett's care to avoid giving a written assurance, was not communicated to him. Fisher then completed the purchase, and took an assignment of the bonds. He paid Scott 3000 dollars in cash, for the three bonds, which amounted in the aggregate to 3950 dollars 72 cents.

Of the fairness and sincerity of the representations made by Bassett in respect 125 to these bonds, as well as of those made by his friend and adviser Claiborne, there was not the least reason to doubt. Neither of them, at the time, any more than Fisher, suspected that there was, or could be, any such equitable objection to the payment

of the bonds, as shortly afterwards appeared.

James Lyons, one of the sureties of Scott in his bond for the due administration of Robert Robinson's estate, gave notice to Bassett, in July 1828, that he regarded the letters of administration which Scott had obtained of that decedent's estate as illegal, and that he should take steps to relieve himself from any responsibility as Scott's surety. Of this Bassett immediately informed Fisher; and added, that the consideration of the bonds he had given to Scott and Scott had assigned to Fisher, was the claim which Scott as the administrator of Robinson's estate had on Philip Grymes's estate, and that, therefore, the bonds would not be paid to any one but upon the special order of the court of chancery.

The general court, at November term 1828, made the following order: "On the motion of James Lyons, to commit the estate of Robert Robinson deceased to the sheriff of the county of Middlesex: This day came the said James Lyons by his attorney, and the court having maturely considered the evidence adduced in support of the said motion, it seems to the court from the said evidence, that the said Robert Robinson died out of this commonwealth, and had not at the time of his death any place of residence therein, and had not any lands or any other estate in the city of Richmond; and that, therefore, the letters of administration on the estate of the said Robert Robinson, which were granted to Robert G. Scott by the hustings court for the said city of Richmond, are void; and it appearing to the court, that the said Robert Robinson had, at the time of his death, some estate in the county of Middlesex, and he having died intestate more than three months ago, and no person applying for administration of his goods and chattels the

126 \*court doth, in pursuance of the motion of the said James Lyons, order the sheriff of the said county of Middlesex to take the estate of the said Robert Robinson into his possession, and administer the same according to law."\*

Braxton and wife, the distributees of Philip Grymes deceased, upon being apprized of the above proceeding of the general court, served a notice on Bassett, in January 1829, to the following effect: "That no payment which Bassett should make to Robert G. Scott, who had been lately considered the administrator of Robert Robinson deceased of Nova Scotia, would be allowed or admitted as a set-off or credit against the balance due from Healy the former administrator of Grymes to Grymes's estate."

The first bond executed by Bassett to Scott and by Scott assigned to Fisher, having fallen

\*The reasons for the opinion expressed in this order, that the grant of administration of Robinson's estate to Scott, by the hustings court of Richmond, was void, and for the consequent grant of the administration by the general court to the sheriff of Middlesex, are to be found in the provisions of the statute on the subject, 1 Rev. Code, ch. 104, § 12, 32, 67, p. 377, 382, 390, and in the judgment of the general court in *Ex parte Barker*, 2 Leigh 719.—Note in: Original Edition.

due, and Bassett having refused to make payment thereof, Claiborne, the trustee in the deed of trust which Bassett had executed to secure punctual payment of the debt, at the instance of Fisher the assignee, advertised the trust subject for sale, in pursuance of the deed, to satisfy the debt.

Whereupon, Bassett exhibited his bill in the superiour court of chancery of Richmond, against Scott, Fisher the assignee of the bonds, Braxton and wife the distributees of Grymes, the sheriff of Middlesex to whom the general court had committed administration of Robert Robinson's estate, and Claiborne, the trustee in Bassett's deed of trust to secure the debt in question,—setting forth the transactions, as above narrated : charging particu-

127 larily, that Fisher was apprized of the consideration of the \*bonds executed by Bassett to Scott, and assigned by Scott to him, at the time he took the assignment thereof ; namely, that the consideration was a debt claimed by Scott as the administrator of Robinson's estate : representing that Bassett could have no interest to withhold payment of the bonds to the assignee who held them, provided such payment would, according to the true design of the transaction, entitle him to a credit pro tanto against the claim which Grymes's representatives had against the estate of his father and testator, as one of the sureties of Healy the former administrator of Grymes's estate, on account of the waste thereof that Healy had committed : and praying, that the defendants should litigate among themselves, and that the court should decide, whether, under the circumstances of the case, Bassett should pay the money to Scott's assignee Fisher, or not ; that, in the mean time, Claiborne, the trustee, should be enjoined from proceeding to sell the trust subject mortgaged by Bassett, to satisfy the bond which had become due ; and general relief.

Fisher, in his answer, said, that the bonds were offered to him by an agent of Scott, and he declined purchasing them till he should be exactly informed of the rights of the parties in the transaction ; upon which the agent told him, that the representatives of Philip Grymes had a claim against Bassett, as the executor of his father, who was a surety of Healy the former administrator of Grymes's estate ; and Scott had a claim on Grymes's estate for a legacy due to Robert Robinson ; that Scott was the owner of this claim, having purchased it, and had a further right to it as administrator of Robinson ; that Braxton, who was now the person principally interested in Grymes's estate, had, after consulting counsel, admitted Scott's right to the claim, authorized Bassett to settle it with Scott, and agreed to allow Bassett a credit against Grymes's estate for so much as he should pay Scott ; and that thereupon

128 Bassett had executed these bonds to Scott, \*and given him a deed of trust to secure the payment. That this representation was confirmed to Fisher, by the written statement of Claiborne (who had been Bassett's adviser and agent in the business) that "he was conversant with the whole transaction, and thought there could

be no doubt that the debt was a bona fide one, due now to Scott alone ;" and by the fact that the bonds were executed by Bassett, in his individual character, to Scott, in his individual character. That Fisher, though he did not doubt the truth of this information, still refused to purchase the bonds, until he should ascertain from Bassett himself, whether or no he had any objection to the payment of them when they should fall due ; upon which a messenger was sent to Bassett to inform him of Fisher's design to purchase the bonds ; and the messenger made an affidavit, which was handed to Fisher, that Bassett said the bonds were really and bona fide due, and he would pay them to the assignee of the same. That upon this assurance, Fisher purchased the bonds from Scott, and paid him the money for them. That both Braxton and Bassett knew, that Scott intended to raise money on this claim, and concurred in the arrangement to enable him to do so ; Braxton, with this knowledge, gave Scott the open letter to Bassett, authorizing Bassett to settle the claim with Scott, and promising him a credit pro tanto ; Bassett, with the same knowledge, executed his bonds to Scott in his individual character ; they both thus recognized, and held out to the world, Scott's right to make what disposition he pleased of the claim of Robinson's estate on that of Grymes. And that, under all the circumstances of the case, neither Bassett nor Braxton had any ground of equity, on which the former could withhold, or the latter interfere to prevent, the payment of the money to him.

Braxton and wife, in their answer, stated, that Braxton's letter to Bassett of the 1st February 1828, in which he promised to allow

129 Bassett a credit against Grymes's estate, for so much as he should make an arrangement to pay to Scott, as the administrator of Robinson, on account of the claim of Robinson's estate against the estate of Grymes,—was written under the impression, that Scott was the rightful administrator of Robinson, and had authority to receive the debt due that intestate : that the object was, simply, to apply a portion of the funds of Grymes's estate, to the payment of a debt justly due from it, to the person who had a right to receive payment of it and give an acquittance : but that, if the judgment of the general court was right, if Scott's letters of administration of Robinson's estate were merely void, if he had no authority to receive the assets of that decedent, and if a payment to him would leave Grymes's estate still responsible to the legal representative of Robinson ; then, they insisted, Bassett ought to be enjoined from making the payment to Scott's assignee Fisher, as (under the circumstances) he would have been inhibited from making the payment to Scott himself, if he still held Bassett's bonds.

The sheriff of Middlesex, to whom the general court had committed the administration of Robinson's estate, in his answer, said he had heard, that his intestate had a large claim against the estate of Grymes, which still remained unsatisfied ; but he disclaimed all knowledge of the transactions stated in

the bill; and concluded with asking "to be dismissed with his costs."

As to the defendant Scott the bill was taken pro confesso.

The defendant Claiborne, having no interest in the controversy, was examined as a witness in the cause. It appeared from his deposition, that, though it was certainly Braxton's object to apply the money due from the estate of Bassett to that of Grymes, to the payment of the debt due from Grymes's estate to that of Robinson; and though Bassett's object was to get a credit against

Grymes's administrator for so much as he should pay \*to Robinson's administrator; and though they both believed, that Scott was the administrator of Robinson duly appointed and qualified; yet, in making the arrangement with Scott, they both wished and intended to accommodate him personally; and both probably thought, as Claiborne thought at the time, and as he informed Fisher, that Scott was the real owner of the claim of his intestate Robinson on Grymes's estate. It appeared also, that the only advantage which Bassett promised himself, was the credit he obtained from Scott for the payment of the money in three annual instalments.

There was no proof whatever, that Scott had purchased from the next of kin of Robinson, their interest in the claim upon Grymes's estate, or that he had any right in the claim but as the administrator. At the same time, it was certain, that Fisher understood and believed that Scott was the absolute owner of the claim.

The cause was transferred to the circuit superiour court of Henrico. And that court, upon the hearing, decreed, that the injunction awarded to restrain the trustee Claiborne, from proceeding to sell the subject mortgaged by Bassett's deed of trust, should be perpetuated; that Fisher and Claiborne the trustee should release to Bassett all right and claim under the deed of trust; that Fisher should bring Bassett's three bonds into court to be cancelled; that Scott should pay Fisher the 3000 dollars he had received from him, with interest; and that Fisher should pay the plaintiff's costs, which Scott should reimburse to Fisher, and should also pay him his costs.

Fisher applied to this court for an appeal from the decree; which was allowed.

The cause was argued here, by counsel for all the different parties interested; by the attorney general and J. M'C. Wickham for the appellant; by Robertson and Robinson for the appellees Braxton and wife; by

131 Stanard \*for the appellee Bassett; and by Johnson, who represented the interest of the sureties of Scott, but (they not being parties to the suit) appeared nominally as the counsel of Bassett.\*

TUCKER, P. Upon the first question which arises in this case, and which involves

the validity of the arrangement of the debt due from Grymes's estate to Robinson's estate, made with the defendant Scott, I am of opinion, that Scott being de facto administrator of Robinson, under the appointment of a court of record having jurisdiction of the probate of wills and the granting of administration, any payment made to him by any debtor of that estate, before his authority was superseded, would have been a good payment, and, of course, every irrevocable arrangement made with him by such debtor, would be good and valid against any subsequent administrator. I do not consider a county or hustings court, in relation to the grant of administration, as standing on the same footing with the ordinary in England. The county court is a court of record, and its judgments or sentences cannot be questioned, collaterally, in other actions, provided it has jurisdiction of the cause. 6 Bac. Abr. Sheriff. M. 2, p. 166, 3 Wils. 345. And this is to be understood as having reference to jurisdiction over the subject matter: for though it may be that the facts do not give jurisdiction over the particular case, yet if the jurisdiction extends over that class of cases, the judgment cannot be questioned; for then, the question of jurisdiction enters into and becomes an essential part of the judgment of the court. Thus, if a county court were to give judgment of death against

132 a white man, the sheriff would have no lawful authority to execute him: or, if a court of chancery were to grant probate of a will, it would be ipso facto void, since that court has no jurisdiction in any case of probates. It is held void ipso facto, because no inquiry is necessary to ascertain its invalidity. But where the court has jurisdiction of cases ejusdem generis, its judgment, in any case, is not merely void; because its invalidity cannot appear without an inquiry into the facts; an inquiry, which the court itself must be presumed to have made, and which will not therefore be permitted to be revived collaterally. Thus, in *Prigg v. Adams*, 2 Salk. 674, in an action for false imprisonment, the officer justified under a ca. sa. on a judgment in the court of common pleas, upon a verdict for 5 shillings, for a cause of action arising in Bristol: the plaintiff replied an act of parliament erecting a court in Bristol, and declaring that if any person brought any such action in any court at Westminster, and it appeared upon trial to be under 40 shillings, no judgment should be entered upon it, and if entered it should be void: yet the court held it only voidable, and sustained the plea. So, if an action of debt were brought against a resident of Hanover in the county of Henrico, and judgment should be rendered against him, a sheriff could not refuse to levy a ca. sa. issued upon the judgment, nor would he be liable for false imprisonment; for the plaintiff in the action of false imprisonment would not be received, collaterally, to allege that the court had no jurisdiction. Were it otherwise, the whole system of jurisprudence would be subverted: the sheriff would be converted into an appellate tribunal; and instead of the defendant's being compelled to plead to the

\*The questions involved in the cause were very interesting and important, and the reporter regrets, that he cannot give a report of the argument. He was not present at the argument, and no such note of it was preserved, as would enable him to give any clear account of it.—Note in Original Edition.

jurisdiction at an early stage of the cause, he would be permitted to put it in issue in another case, after the termination of the first. As, therefore, the defendant might have been a resident of Henrico instead of Hanover, and even if not, as he might  
 133 \*nevertheless have been suable in Henrico if the cause of action arose there, the judgment of the court is conclusive upon the point of jurisdiction; and although, in point of fact, the defendant might have been a nonresident, and the cause of action might not have arisen in Henrico, yet the judgment is valid; for the court had general jurisdiction over matters of that description, and the question whether that general jurisdiction embraced the particular case, having been decided by its judgment, can never be again raised, except by a proceeding in error, upon a case properly appearing upon the face of the record.

Such would clearly be the law, in the case of a *lis contestata*, where both parties appeared, and the defendant either submitted to the jurisdiction, or upon plea it was decided against him. How then is it, where there is a proceeding *ex parte*, and of course where the party interested, who denies the jurisdiction, was not before the court which assumed it? And here I conceive, as before, that as to all the world except the party interested, whose rights are invaded or are to be affected by the sentence, that sentence is conclusive. Thus, if administration be granted by the county court of Henrico, when the jurisdiction in fact belonged to Hanover, within which county was the mansion house of the intestate, yet no debtor of the estate could be received to plead ne unques administrator, in bar of an action for the recovery of a debt due to the estate. The greatest confusion and mischief would ensue, if such were the law; for then, wherever delay was desired, every debtor would deny the jurisdiction, and arrest the recovery of a just debt, by embarrassing inquiries as to the decedent's domicile or the place of his death, or whether the greater part of his lands or estate lay in this or that county. I take it, therefore, to be perfectly clear, that Bassett or Braxton could not have controverted Scott's powers, and that payment to him, or an

134 \*irrevocable engagement with him, must, consequently, be sustained as good and valid.

Before I pass to other points, let us see how far other persons claiming administration are bound by the irregular grant of a court not having jurisdiction in the very case. Thus, how far was the sheriff of Middlesex concluded by the grant of administration of the hustings court of Richmond, supposing it not to have had jurisdiction in this particular case? And here observe, that the proceeding in the hustings court having been *ex parte* instead of *inter partes*, it could conclude the rights of no person claiming against it. The general court, moreover, having jurisdiction in all cases of administration, any person authorized to take it, whether next of kin, creditor or sheriff, might in that court move for and obtain administration as of right, unless it was excluded by some other

court of concurrent jurisdiction. When, therefore, such motion is made, is it competent to arrest the proceeding by shewing that the hustings court had, without jurisdiction, granted administration to another? I think not. It is admitted, that the order might be repealed by citation or rule upon the party in the hustings court. Of course, no one is concluded by it, and the only question is, by what proceeding it can be rendered inoperative. Now, I think, the principles of law, and the reason and convenience of the thing, all conspire to prove that the court of general jurisdiction, upon application for administration, is not concluded by a grant of administration by a court having no jurisdiction. For it is a universal rule, that no man's right of action (and such is an application for administration) can be barred or impeded by a proceeding to which he was not a party. And if the general court could not grant administration to the person really entitled to it, because the hustings court, without jurisdiction, had granted it to another, the party entitled would be barred and precluded of his rights by a sentence which he had no opportunity of contesting.

135 \*It is objected, however, that thus there might be two administrations. Admitted. Such a state of things may well occur under our law; and this not only where one of the courts granting administration has no jurisdiction, but even where both have jurisdiction. Thus the county court, the circuit superior court, and the general court, have concurrent jurisdiction. They may all sit on the same day, and each may grant administration to a different creditor, upon application after the lapse of time in such case required by law. Suppose two such concurrent jurisdictions should grant two administrations. It may not be easy to decide how the difficulty of these conflicting rights would be avoided. But where one of the courts has jurisdiction, and the other has not, there can be no reason to doubt, that that which is granted by the court having jurisdiction is valid, and that which emanates from the court having no jurisdiction is, as to the former, a nullity. So, although the latter is first granted, yet upon application to the proper jurisdiction, that jurisdiction must treat as a nullity the intrusion of a tribunal having no jurisdiction. How can it do otherwise? Shall it acquiesce in the invasion of its own authority and the rights of the applicant, by dismissing him from its forum, and turning him around to the tribunal which has done the wrong, for redress by way of citation? and this too, when the proceeding had been *ex parte*? Shall it consider itself *functus officio*, and barred of the right of acting on the subject, by the previous action of a body having no right to act? I think not. It must, in the nature of things, determine its own jurisdiction. Every court must do so, though if it errs, its judgment will be corrected. And in determining its jurisdiction, if it be alleged that the subject has been concluded, and the powers of the courts of probate exhausted by a previous grant, it must of necessity inquire, whether the court making



the grant had jurisdiction to make it; 136 for, the \*proceeding having been ex parte, the sentence is conclusive upon no one. I am therefore of opinion that the grant of administration by the general court was valid; that that court had a right, and was of necessity obliged, to inquire whether the hustings court of Richmond had jurisdiction; and on ascertaining the negative, it was right in treating the grant of the hustings court as a nullity. From that time, but from that time only, it became null and void, and after payments to Scott would have been invalid.

It is said, however, that debtors might be ignorant of the new grant of administration. It is not necessary now to decide, whether payments made to Scott without actual notice of the revocation of his powers, would have been good. Admitting they would not, and that the grant of the general court was notice to all the world, yet it is not more unreasonable to affect debtors with such notice, than to hold that every person entitled to administration is bound to take notice of an irregular administration. Thus, if A. dies at his mansion house in the county of Wood, and has a debtor in Elizabeth City, the jurisdiction is in Wood county court. Yet if administration be improperly granted in Elizabeth City, it is contended, that the subsequent grant by the proper court is void; that the party applying ought to have known the proceeding in Elizabeth City, and that he is bound by it. I cannot think so. It would be most strange, if a court entitled to act upon a subject should be ousted of its powers, by the unauthorized action of any one of a hundred other courts having no jurisdiction of the subject.

I had anxiously desired to avoid any remarks on this part of the subject, as there is a difference of opinion in the court respecting it. But it is impossible to avoid it, since the action of the court depends essentially on the question. I am happy in being sustained in my views by the decision of the 137 learned judges of the general \*court, cited in the argument; *Ex parte Barker*, 2 Leigh 719.

On the merits of the case, I am clearly of opinion, that unless Fisher could shew that Scott had fairly become the purchaser of the debt due to Robinson's estate, or was in advance to that estate to the amount of the debt, the transaction was such a dealing with the assets as to render the transfer void. The sale of the bonds at so large a discount was itself *prima facie* a devastavit, and the burden of proof is upon Scott or Fisher, that the necessities of the estate, and not those of the administrator, required the sacrifice. Fisher must have known Scott's embarrassments. As assignee, he naturally looked to the circumstances of the assignor; and doing so, he must have known his difficulties. Here, then, is a dealer with an administrator—consuant that the claim originally belonged to the intestate's estate—consuant of its conversion into the form of a private debt to the administrator, and without evidence of its transfer to him by those interested—consuant of the administrator's great embarrass-

ments—who unites with him in a devastavit of the estate, by discounting paper belonging to it, at the ruinous rate of twenty-five per cent., without evidence, as far as yet appears, of the necessities of the estate requiring such a sacrifice. I forbear to comment on the other circumstances which ought to have satisfied Fisher that there was something amiss in the transaction, since it is not necessary. The conversion of the estate debt into a private debt, of which he was aware, was itself a devastavit in law, and the sale of it at a sacrifice was yet more obviously a devastavit in fact. He has enabled the administrator to commit it; and, upon well received doctrines, he must be the loser. Still, as it is possible that Scott may be in advance, and as Fisher will be entitled, in that event, to stand in his shoes, as far as the reimbursement of such advance, I am content to let the cause go back, to give 138 \*an opportunity for that inquiry. The decree must, indeed, be in any event reversed, since the injunction should only have been perpetuated as to Fisher, and the bonds and deed of trust should have been delivered over to the sheriff administrator of Robinson, for the benefit of the estate.

PARKER, J. I agree with the president of the court in the opinion he has just delivered, that the grant of administration to Scott by the hustings court of the city of Richmond, was not a void, but only a voidable act. The distinction between the acts of a court having jurisdiction over the subject matter under some circumstances, and those of one which, in no possible state of things, can take jurisdiction over the subject, is a sound and sufficiently intelligible one to guide our judgments in the present case. If, under any circumstances, the hustings court could grant administration to Scott, it had jurisdiction of the subject, and must judge of those circumstances. If it erred in determining that the facts, upon which its power to grant administration in the particular case depended, were sufficiently proved, it was an error to be corrected by some competent authority; but until so corrected, it conferred upon Scott all the powers of a rightful administrator. The analogy attempted to be drawn between the grant of an administration by the ordinary in England, and such grant by our courts of record, is too imperfect to justify us in encountering all the inconveniences and mischiefs which would result from considering the grant here merely void; and it would be violating well established principles settled in other cases by the english courts themselves,—as the counsel for the appellees have clearly shewn.

I also agree in the opinion, that there was such a dealing with the assets of Robinson's estate between Scott and Fisher, as to render the transfer of the bonds by 139 \*the former to the latter, *prima facie* void. Fisher admits he knew that the claim of Scott on Grymes's estate originated in his character of administrator of Robinson. He therefore knew, that there were equities existing in third persons, which ought to have been respected. If Scott was not in advance to the estate, or had not



bought the claim from the distributees of Robinson, he could not deal with it, in the manner he did, as his own debt. Or, if the necessities of the estate did not require a sale of the bonds at so large a discount, it was a devastavit in Scott to sell to Fisher. When Fisher bought the bonds for so much less than their value, under the circumstances existing in this case, he took on himself the risk of shewing either that Scott was the real owner of them, or that the necessities of the estate justified the sacrifice. This he has not yet shewn; but I think he ought to have an opportunity of doing so, and that the court ought not to have perpetuated the injunction without ordering an account of Scott's administration of Robinson's estate. If any thing is due from that estate to Scott, Fisher is entitled to stand in his shoes; and if Scott has fairly made himself the individual proprietor of the bonds, all controversy is at an end.

I also think the court of chancery erred in directing the bonds of Bassett to be cancelled, and the deed of trust to be released. They should stand as securities for the benefit of Fisher, or of those entitled to Robinson's estate.

The only point in which, as at present advised, I am inclined to dissent from the president's opinion, is as to the effect he gives to the grant of administration by the general court to the sheriff of Middlesex. It seems to me, that this grant was itself a nullity; and that such is the necessary consequence of considering the first grant valid. By the grant to Scott, he was constituted the complete legal owner of the estate of Robinson. He was, for the purposes of administering it, as much

140 the \*proprietor of the assets, as the intestate himself in his lifetime. No court, of equal powers over the subject matter, could transfer his rights to another, without repealing and annulling the original grant; and that grant could not be annulled but by citation in the same court, or by the action of an appellate tribunal, or in the several modes prescribed by our laws. When the general court undertook to determine, that the circumstances to give the hustings court jurisdiction did not exist, it exercised an appellate power over the acts of that court. It decided, that it had erred in its judgment as to a matter within its general jurisdiction over grants of administration; and yet it did not and could not undertake to repeal or annul that grant. When the grant of administration was made to Scott, the jurisdiction of the court over the intestate's estate ceased. The statute only gives power to the court to grant letters testamentary or of administration, where there is no representative of the estate capable of exercising authority over it. The very object of the law is to constitute a legal owner of chattels left without such owner; and where there is already that legal proprietor, the foundation of the court's jurisdiction is as much taken away, as if the intestate himself was alive. The supreme court of the U. States has decided, in pursuance of these principles, that

where probate of a will has been granted to an executor, no other court having general powers to grant administration, can, whilst the executor is capable of acting, transfer his powers to an administrator, but that the latter grant would be merely void, and every act done under it a nullity. *Griffith v. Frazier*, 8 Cranch 1. The reasoning which led the court to such conclusion, seems to me to apply strongly to this case. Here, the estate was as fully represented as if there had been an executor; and I do not perceive how a court, without repealing and annulling the former grant, could undertake to transfer the estate to the sheriff of Middlesex.

141 \*Yet, as this case will go back, I do not know that it is necessary for us now to decide, to whom, if Fisher fails in establishing his rights, the money due from Bassett ought to be decreed. The court below will no doubt admit or direct such parties to be made, as are interested in that question. The sureties of Scott, and the distributees of Robinson, have a deep interest in it; and it does not follow that the court will, under all circumstances that may hereafter appear, decree the payment to the sheriff of Middlesex, even if he has the legal right to receive it, much less to Scott, who has already shown a disposition to deal improperly with the assets.

I should, therefore, be content to reverse the decree, for the reasons indicated by the president; with directions to admit all proper parties interested in the controversy, and to have an account taken of Scott's administration on Robert Robinson's estate, in order to a final decree.

CABELL, J., expressed no opinion on the point on which the other two judges differed, probably thinking there was no necessity to decide it: but he concurred in the decree proposed by Parker, J., whereby

The decree of the circuit superiour court was reversed with costs, and the cause remanded, with directions to make new parties, and to order an account to be taken of Scott's administration of Robinson's estate, in order to a final decree.

#### 142 \*Sutton v. Dickinson.

December, 1837, Richmond.

(Absent BROOKE and BROCKENBROUGH,\* J.)

**Arbitration and Award—Award Exceeds Damages Claimed—Effect.**—In an action of assumpsit, the damages laid in the writ are 300 dollars; the declaration is in blank as to the sums assumed and as to the damages; all matters in difference in the cause are referred to arbitrators; the arbitrators award to the plaintiff 443 dollars; and judgment is given according to the award: **Held**, the award is good, though the amount awarded exceeds the damages claimed.

**Same—Submission after Judgment by Default—Case at Bar.**—In assumpsit, an office judgment is entered and confirmed against defendant by default.

\*He decided the cause in the circuit court.

†See monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.

and writ of inquiry of damages awarded; then, without setting aside the judgment or writ of inquiry, the parties come by their attorneys, and submit the matters in difference to arbitrators, and this submission is entered in the record: **Held**, the submission is good and binding on the defendant.

**Same—Award—Recitals.**—Submission to arbitrators of matters in difference in a suit pending; award professing to be made, and appearing to be in fact made, pursuant to the submission, but not stating expressly that the arbitration was confined to the matters in difference in the suit; and this award held good.

A writ of *capias ad respondendum* was sued out of the county court of Caroline, by Dickinson against Sutton, in an action on the case; and the damages laid in the writ were 300 dollars. Dickinson filed a declaration in *indebitatus assumpsit* for the price of goods, wares and merchandise sold and delivered, and on a quantum valebat for the same; but the declaration was in blank throughout, both as to the sums assumed, and as to the damages. Sutton having been arrested on the writ, and not appearing, judgment was entered against him by default, and a writ of inquiry of damages awarded. At a subsequent term, as the record stated, the parties came by their attorneys, and (without setting aside the

judgment or the writ of inquiry) mutually submitted all matters \*in difference between them in the case, to the final determination of two arbitrators and such umpire as they should choose in case they should disagree; the arbitrators to proceed *ex parte*, in case either party should fail to attend, after receiving ten days previous notice of the time and place appointed for the arbitration &c. The arbitrators made and returned an award, in these words: "Pursuant to the annexed order of arbitration from the county court of Caroline to us directed, we have proceeded, at Golansville, agreeably to notice, to make up an award in the case of W. W. Dickinson against J. Sutton, and find a balance due to the said Dickinson plaintiff, from the said Sutton defendant, of 443 dollars, exclusive of costs. Given under our hands &c." And this award being returned to the court, at its next succeeding quarterly term, the court ordered, that it should be made the judgment of the court; and that the plaintiff should recover against the defendant the sum of 443 dollars, and his costs of suit. Sutton applied to the circuit court for a supersedeas to the judgment; which was allowed; but the circuit court afterwards affirmed the judgment of the county court; and to this judgment of affirmance, a supersedeas was allowed to Sutton by a judge of this court.

The cause was argued here by Stanard for the plaintiff in error, and Johnson for the defendant, upon the following objections taken by the former—

1. That as the defendant had not entered an appearance to the action, he could have no attorney in court; and, if the authority of an attorney at law were a warrant to him, in any case, to submit his client's cause to

arbitration, yet he could only be authorized to make such reference after an appearance in court.

2. That as the blank left in the declaration for the damages could only be supplied from the writ, and thus the damages were but 300 dollars, the matters in difference 144 \*in the action, which were the only subject of reference, could not exceed that sum; and the arbitrators, in awarding a larger sum, exceeded their authority, and so their award was void. He cited *Bonner v. Charlton*, 5 East 139, *Pearse v. Cameron*, 1 Mau. & Selw. 675.

3. That the award did not profess to be confined to the matters in difference between the parties in the particular suit, to which the authority of the arbitrators was limited.

**PER CURIAM.** The judgment is to be affirmed.

### Wilcox v. Pearman.

January, 1838, Richmond.

(Absent BROOKS, J.)

**Assignments—Evidence against Assignee—Receipt of Assignor—Case at Bar.**—A legatee assigns his claim for the legacy by deed; the assignee brings suit for it against the executor and his surety, who produce in their defence, a receipt in full, signed by the legatee and bearing date before the deed of assignment: **Held**, such a receipt is no evidence against the assignee, without proof, that it was really executed before the assignment; nor is the date to be taken as *prima facie* true.

**Same—Same—Acknowledgment of Payment by Assignor.\***—The acknowledgment, written or verbal, of the assignor of a claim, that the same has been paid to him, is no proof against the assignee, unless it be proved to have been made before the assignment; and the burden of proof lies on the debtor.

Jeffrey Gilliam, late of Charles City, died in 1816, and by his will directed his whole estate, which was all personal, to be sold; and after directing that his debts and some small legacies should be paid out of the proceeds of the sale, he bequeathed the residue to his two sons, Edward and William, 145 to be equally divided between \*them; and he appointed his son Thomas his executor. Thomas Gilliam proved the will, and qualified as executor, in the county court of Charles City, in May 1816; and Hamlin Wilcox was his surety in his executorial bond.

Edward Gilliam, one of the testator's residuary legatees, by deed, dated the 17th Jan-

\***Assignments—Evidence against the Assignee—Acknowledgment of Payment by Assignor.**—The acknowledgment of an assignor that he has been paid his debt is no evidence against the assignee unless it was made anterior to the assignment; and this is equally true whether his acknowledgment is oral or written. And further, the burden is upon the debtor to prove that the acknowledgment was made anterior to the assignment. *Ginter v. Breeden*, 90 Va. 570, 19 S. E. Rep. 656, citing principal case. To the same effect, see principal case also cited in *Pettit v. Jennings*, 2 Rob. 676, 880, and *foot-note*. See, in accord, *foot-note* to *Smith v. Betty*, 11 Gratt. 752, and cases there cited.

uary 1820, sold and assigned all his interest in the testator's estate to Michael Pearman.

Pearman exhibited his bill in the superior court of chancery of Williamsburg, against Thomas Gilliam the executor, who was now a resident of the state of Tennessee, Wilcox the surety in his executorial bond, and the administrator of the legatee William Gilliam who was dead,—setting forth the will of Jeffrey Gilliam, the qualification of the executor, and the assignment of Edward Gilliam's share to him; charging, that the executor had never settled his account of administration; and praying an account thereof, and a decree for his assignor's share.

Thomas Gilliam, the executor, never appeared: he was regularly proceeded against by publication, and the bill was taken pro confesso as to him.

His surety, the defendant Wilcox, put in an answer, in which he stated, that Thomas Gilliam, the executor, had, before the date of the deed of assignment which was executed by Edward Gilliam to the plaintiff, and under which he claimed, paid to Edward Gilliam the sum of 385 dollars 29 cents, upon condition that he should refund any excess of that sum beyond what should appear due to him as a legatee of his father on a fair settlement of accounts; and that that sum did in truth exceed the utmost that could be due to Edward.

The only question in the cause was, Whether the payment of 385 dollars 29 cents had been in fact made by Thomas Gilliam, the executor, to his brother  
146 Edward, \*the legatee? and made before Edward's deed of assignment to Pearman of the 17th January 1820?

To prove the affirmative, Wilcox produced the receipt for the payment, which his principal had put into his hands. The receipt was in these words: "August 9th 1819. Received of Thomas Gilliam executor of Jeffrey Gilliam deceased, 385 dollars and 29 cents, on account of the legacy bequeathed to me by the last will and testament of my father Jeffrey Gilliam. It is understood and agreed by the parties here mentioned, that should the above sum of 385 dollars 29 cents, on a fair settlement of said estate, be more than my proportion, the overplus to be returned by me, and on the contrary to receive any additional amount which may be due thereon. (Signed) Edward Gilliam." The signature of Edward was proved, and indeed admitted to be genuine. And this paper was the only evidence adduced of alleged payment.

On the other hand, it was proved, that on the 9th August 1819, the date of the receipt, Thomas Gilliam the executor was in the state of Tennessee, and Edward Gilliam the legatee was in Virginia; and no attempt was made to prove, that the money was remitted by Thomas Gilliam to Edward, though, had such a remittance been really made, the fact of the remittance, and the manner of it, would probably have been easily susceptible of proof: there was, indeed, no pretence that the money had been remitted from Tennessee to Virginia. It was proved, that Thomas Gilliam left Virginia in July 1818, and returned in the spring of the year 1820;

and then, was without money to pay a just debt which he owed to a brother in law. And Edward Gilliam himself being examined as a witness, deposed, that when his brother Thomas returned to Virginia in 1820, he told him, that he had sold his interest in his father's estate to Pearman; at which Thomas was very much displeased, and insisted, 147 that Edward should nevertheless \*give him a receipt in full for his share of the estate; that Edward resisted this demand at first, but at length yielded to the importunity and the influence of his brother, and signed the receipt; that the receipt was in fact given by him in 1820, some months after his assignment to Pearman, and was antedated; and that Thomas had never paid him any thing.

The court ordered an account of the executor's administration of the estate of the testator Jeffrey Gilliam; and, in stating the account, the commissioner wholly disregarded the alleged payment by the executor to the legatee Edward Gilliam, of 385 dollars 29 cents. His report shewed a balance of 293 dollars with interest, &c. due from the executor to Pearman as assignee of the legatee Edward Gilliam; and a balance of 251 dollars with interest &c. due to the administrator of the other legatee William Gilliam. And the court approving the report, decreed, that Thomas Gilliam the executor, and the defendant Wilcox his surety, should pay those sums to the plaintiff, and to the administrator of William Gilliam, respectively, upon those parties respectively, giving the executor the usual refunding bonds. Wilcox appealed from the decree to this court.

Johnson, for the appellant.  
Stanard, for the appellee.

TUCKER, P. I am of opinion, that the decree should be affirmed. There is but one point on which I deem it necessary to make a remark: it respects Edward Gilliam's receipt for his legacy. I think it no evidence against Pearman his assignee, unless it is proved to have been given before the assignment. It cannot prove itself, neither its genuineness nor the truth of the date. The acknowledgments of an assignor that he has been paid his debt are no evidence against the assignee, unless they were made 148 anterior to the assignment; and \*this is equally true, whether his acknowledgment is oral or written. Now a receipt is nothing but a written acknowledgment, and is no evidence against the assignee, unless it is proved to have been given anterior to the assignment. The proof of this is upon the debtor. It was argued, that the date of the receipt must be taken as the true date, until the contrary is proved. I cannot think so. If it were so, every such paper would prove itself; which cannot be. Moreover, the parties to it know truly when it was given; the assignee cannot know. The parties to it must, therefore, prove it; since otherwise, however false and fraudulent it be, it will prove itself to be true, without the possibility of contradiction. Now, in this case, if we take the testimony of Edward Gilliam, the date is proved to be false; and

even if we reject it, there is no proof that the date is true. Of course there is no proof, that the acknowledgment of the receipt of the money was made anterior to the assignment, and it was therefore no evidence against the assignee. Without it, there is no difficulty in affirming the decree.

The other judges concurred. Decree affirmed.

149      \*Johnson v. Garland.

January, 1838, Richmond.

**Landlord and Tenant—Attachment for Undue Rent—When Lessor Not Entitled to.\***—Under the 9th section of the statute concerning rents, 1 Rev. Code, ch. 113, the lessor is not entitled to an attachment for rent not yet due, before the commencement of the term for which the rent is to be paid.

**Same—Same—Issuance before Commencement of Term—Rights of Lessee.\***—If such attachment for rent not yet due, be issued before the commencement of the term, and levied on the goods of the lessee; and the lessee thereupon enter into a recognizance to pay the rent: the lessee may, notwithstanding the recognizance, move the court to which the process is returned, to quash the attachment for irregularity; and on such motion, the court ought to quash the attachment, and the recognizance likewise which was founded upon it.

This was an attachment issued by a justice of Amherst, upon the application of Garland, against the effects of Johnson, for the rent of a house, which had not yet become due. The proceeding was under the statute of 1 Rev. Code, ch. 113, § 9, p. 448.

It appeared, that Garland had let the same premises to one Knight, for a term which was to end on the 1st December 1833; and during the continuance of that term, he let them to Johnson, for a year to commence on the day of the expiration of Knight's term. Then Johnson contracted with Knight for the residue of his term, and under that contract took possession of the premises.

Before the new term had commenced, namely, on the 26th November 1833,—upon Garland giving bond with surety as required by the statute, and making affidavit, that Johnson had agreed to pay him 200 dollars for the rent of the house then occupied by him, for a year to commence on the 1st December 1833 and to end on the 1st December 1834, and that he had just cause to suspect and verily believed, that Johnson would remove his effects from the rented  
150 premises before the time of \*payment of the rent,—an attachment was issued by the justice against Johnson's effects, returnable to the next term of the county court of Amherst. The attachment was levied by the sheriff on the goods of Johnson on the same 26th of November; and Johnson entered into a recognizance with surety, with condition to pay the 200 dollars rent on the 1st December 1834, together with all the costs and charges of the proceeding; upon which the sheriff restored the attached effects to him, and returned the attachment, stating in

his return, his levy of the same, the recognizance given for the rent by Johnson, and the restoration of the attached effects to him.

Johnson, at the next term of the county court, moved the court to quash the attachment; and Garland also appearing to oppose the motion, it was, by consent, transferred to the circuit superior court of Amherst. And that court, upon a hearing, overruled Johnson's motion to quash, with costs. Johnson asked and obtained from this court a supersedeas to the judgment.

Garland, for the plaintiff in error, insisted, that the attachment ought to have been quashed, because the statute gave no warrant for such a process in a case like this, where not only the rent had not become due, but the term for which it was to be paid had not commenced; and that the recognizance for the rent, having been exacted from Johnson by the coercion of this unjust process, ought to have been likewise quashed with the process; though, perhaps, if the attachment was quashed, that alone would suffice to render the recognizance nugatory.

The attorney general, for the defendant in error, endeavoured to shew, that the provisions of the statute embraced the case, and authorized the issuing of the attachment. But, he said, if the attachment was irregular, the tenant waived all objection to it by giving the recognizance for the rent. He  
151 thereby, in effect, \*cut off the inquiry he afterwards sought to raise. For, upon his giving the recognizance for the rent, the attachment was functus officio; and though it was returned to court, yet there was no cause in court upon which the court could act.

BROCKENBROUGH, J. I think it very clear, that under the 9th section of the statute concerning rents, an attachment for rent which is to become due at a future time, cannot be issued before the commencement of the term. For, until the commencement of the term, the relation of landlord and tenant does not exist. In this case, Garland had made a contract with Johnson, previous to the 1st December 1833, that he would let his house to him, for one year, for 200 dollars; the term to commence on that day, and to end on the 1st December 1834. It happened, that on the 26th November 1833, Johnson had sundry goods on the premises, probably under the lease of Knight,\* who was the tenant for that year until the 1st December 1833, when the lease of Johnson was to commence. Until then, Johnson was not the tenant of Garland; and by the very words as well as the plain meaning of the statute, Garland, not being the landlord of Johnson, had no right to sue out the attachment. Johnson having goods on the premises in the possession of Knight,\* had complete control of them; and there being

\*It is obvious, from these remarks, that the judge understood the state of the case to be somewhat different from that which the reporter has above given of it. The reporter has stated it from the record, according to his understanding of it, after a very careful examination.—Note in Original Edition.

\*See monographic note on "Attachments" appended to Lancaster v. Wilson, 37 Gratt. 624.

no attachment for rent which would thereafter become due from Knight, nor any lien which would restrain Johnson from disposing of the goods as he pleased, he had a right to remove them from the premises at any time before the 1st December.

The attachment having been irregularly issued, the defendant appeared on the 152 return thereof, and moved \*the court to quash the process. The plaintiff also appeared to contest the motion. This motion to quash was the correct mode of proceeding, and the court to which the process was returnable was the proper tribunal; *Redford v. Winston*, 3 Rand. 148.

Johnson's entering into the recognizance to pay the rent, did not take from him his right to have the attachment quashed for irregularity. He entered into that recognizance under compulsion and the vis major of the sheriff, who would otherwise have kept his goods which he had already seized; he had no other way of peaceably regaining his goods but by entering into the recognizance.

I think the judgment should be reversed, the attachment quashed, and with it the recognizance which was founded on it.

PARKER, CABELL and BROOKE, J., concurred.

TUCKER, P. I agree that the attachment was irregular. But Johnson having entered into the recognizance, it was not competent to him to move to quash it, there being no cause in court. His remedy was to plead the irregularity of the proceeding in avoidance of the recognizance, whenever he should have been sued upon it. It is indeed stated, that the parties appeared in court. But if the motion was regular, the proceeding would have been right, though the landlord had not appeared: and thus, a judgment upon his rights would have been given, when there were no parties in court. For, by giving the recognizance, the attachment was functus officio. Nothing further could be done; nothing further was to be done; for no motion lies upon such a recognizance, but the landlord's remedy is only by action upon it.

The judgment must, indeed, be reversed, because the court gave the landlord his 153 costs; which ought not to \*have been done. The court should merely have struck the cause from the docket. The costs of the attachment were included in the recognizance.

The majority of the judges, however, are of opinion, that the judgment should be reversed, and the attachment and the recognizance both quashed; thus coming at justice by a short road; which I do not regret, though I cannot concur in it.

Judgment reversed.

### Beers, Booth & St. John v. Spooner and Another.

January, 1838, Richmond.

(Absent CABELL and BROCKENBROUGH, J.)

Contract of Guarantee—No Consideration\*—Effect.—A. by contract in writing not sealed, guaranties pay-

\*Promise to Pay Debt of Another—Consideration.—The promise of one person to pay the debt of an-

ment to B. of a debt due him from a third person: no consideration for the guaranty is expressed in the contract, and none is shewn in proof: *Held*, A. is not bound by such guaranty.

Attorney and Client—Directions to Attorney to Pay Money to Third Person—Revocation.—A. having claims in the hands of an attorney for collection, gives him a verbal direction to pay part of the money when collected to B. in satisfaction of a debt due B. from a third person: *Held*, A. in his lifetime, or his adm'r after his death, may revoke this direction to the attorney, and demand the money.

Chancery Practice—Interpleader—Costs.—S. files a bill of interpleader against A. and B. in order that it may be litigated and determined between them which is entitled to a sum of money in S.'s hands; and the bill is filed in consequence of a demand made on S. by B. for the money; the court holding that A. was entitled to the money in question, decreed that B. should pay A. his costs of suit; and decree affirmed.

This was a bill of interpleader, exhibited by Spooner in the circuit superior court of Petersburg, stating, that he was the attorney of Joseph Dudley prosecuting a suit for him for the recovery of a debt, and that 154 Dudley, pending \*the suit, verbally authorized and directed him, out of the money he should collect in that suit, to pay Beers, Booth & St. John (merchants and partners) about 300 dollars. That Dudley afterwards died; and Edward Archer was his administrator. That Spooner had collected in the suit he had prosecuted for Dudley, more than was sufficient to pay Beers, Booth & St. John the money Dudley had directed him to pay them; but Archer, the administrator, had forbidden the payment. That both parties demanded the money; and Archer threatened to move against him for refusing to pay money collected as an attorney. Being thus exposed to conflicting demands, and being liable to be sued by one or the other party, however he should act, he prayed that the parties should be compelled to interplead, and that

other, though in writing, must be founded on a consideration to make it binding. *Winkler v. C. & O. R. Co.*, 12 W. Va. 707, citing principal case; *Colgin v. Henley*, 6 Leigh 85; *Moseley v. Jones*, 5 Munf. 22.

The principal case, *Parker v. Carter*, 4 Munf. 273, and *Colgin v. Henley*, 6 Leigh 85, were cited in *Winkler v. C. & O. R. Co.*, 12 W. Va. 707, 708, as authority for the proposition that, though a special count shows a consideration for the contract of one person to guarantee payment of the debt of another, yet, if it does not allege that the other has not paid the debt, it is fatally defective.

†Attorney and Client—Directions to Attorney to Pay Money to Third Person—Revocation.—In *Smith v. Lamberts*, 7 Gratt. 138, 148, 149, an attorney at law, receiving a claim for collection, brought suit upon it and obtained a judgment. The debtor then placed in his hands a note due from a third person authorizing him to collect the note and apply the proceeds to the payment of the judgment. Upon the authority of the principles declared in *Beers v. Spooner*, it was held that this was an irrevocable appropriation by the debtor of the fund arising from the collection of the note to the payment of the judgment.

the court should decide to whom the money should be paid &c.

Beers, Booth & St. John answered, that they had received a note of one John R. Archer for 300 dollars, which not having been paid at maturity, he gave them another note for 500 dollars, which they were to hold as collateral security for the payment of the 300 dollars due on the former note; but the note for 500 dollars was, at its maturity, protested for nonpayment. That afterwards, Dudley entered into a written agreement with Beers, Booth & St. John, whereby he guaranteed the payment of the said debt of 300 dollars. That Dudley represented, that Spooner had claims belonging to him in his hands for collection; and proposed, that he would order Spooner to pay, out of the first money he should collect, the amount thus due from Dudley to Beers, Booth & St. John. That Booth assenting to this proposal, he and Dudley went together to Spooner, and Dudley directed Spooner to pay Beers, Booth & St. John the amount in question, out of the first money he should collect; Spooner promised both Dudley and Booth, that he would do so; and Booth, confiding in  
155 Dudley and Spooner, did \*not require a written order. The answer concluded with a prayer, that Spooner should be decreed to pay the money in question to Beers, Booth & St. John.

Archer, the administrator of Dudley, answered, that he was ignorant of all the facts alleged in the bill, and especially of the alleged order or transfer by Dudley of the money to be collected by Spooner to Beers, Booth & St. John. He said, it nowise appeared, that Dudley was under any kind of obligation to pay Beers, Booth & St. John the money due them by John R. Archer: that the conversation between Dudley, Booth and Spooner, granting that such conversation did take place as represented, did not amount to an assignment of Dudley's funds in Spooner's hands to Beers, Booth & St. John: and that, notwithstanding that conversation, he as the administrator of Dudley was entitled to the whole amount collected by Spooner.

Dudley's guaranty mentioned in the answer of Beers, Booth & St. John, was exhibited, and was in these words: "I hereby guaranty to Beers, Booth & St. John 300 dollars due to them by J. R. Archer, and on which they (B. B. & St. J.) hold R. P. Archer's note in favour of W. B. Giles, and by him indorsed and by J. R. Archer, dated 20th May 1828, at 60 days, for 500 dollars, and which was protested when due, and now remains unpaid. And should B. B. & St. J. not be able to collect their money (300 dollars and interest) out of said note, I hereby bind myself to pay the same in twelve months from this date. Petersburg, 22nd October 1828. (Signed) Joseph Dudley." What was the consideration on which Dudley gave this guaranty, was not stated in the answer, and nowise appeared; and how he was implicated in the protested notes therein mentioned, or at all connected with that transaction, was left wholly unexplained.

The cause was heard, by consent, on the bill, the answers, and Dudley's contract of guaranty: and the court decreed, that

Spooner should pay the money he  
156 \*had collected to Archer, the administrator of Dudley; and, as it appeared that this suit was brought by Spooner, in consequence of the demand of the money of him by Beers, Booth & St. John, the court also decreed that they should pay Archer his costs of suit. Beers, Booth & St. John applied by petition to this court for an appeal; which was allowed.

The cause was argued here, by Allison for the appellants, and Macfarland for the appellee Archer, upon two questions; 1. whether the decree was right in directing the money to be paid to Archer; and 2. whether it was right in giving Archer his costs against Beers, Booth & St. John?

TUCKER, P. There is no evidence in this case, but Dudley's contract of guaranty; for as to the bill of interpleader, which it was contended was evidence, there is no pretence for so considering it. The case then is clearly against the claimants, Beers, Booth & St. John, since the answer of Dudley's administrator admits nothing. More need not be said: yet I will add, that taking the facts to be as stated in the answer of Beers, Booth & St. John, they had no title to recover. For the guaranty itself appearing to be without consideration, and having been subsequent to the contraction of the debt, and without any promise of extended credit, it was void, and Dudley was under no obligation to fulfil the engagement it implied. The guaranty may, therefore, be thrown out of the case; and then it is the naked case of a man directing another verbally to pay the debt of a third person out of his funds, without consideration. Such direction is void; and though, if complied with before countermand, the party could not complain, yet it may be countermanded at any time. Had Spooner paid over the money to Beers, Booth & St. John, or had he so far bound himself to them in consequence  
157 of the \*order, as to be irrevocably fixed for the debt to them, the payment would have been valid against Dudley. But having never paid, or bound himself to pay, Dudley had in his lifetime, and his administrator now has, full power to retract.

If Dudley had been bound for the debt, and had directed Spooner to pay, there would be more reason to regard the direction as irrevocable; particularly if Spooner had promised payment to the creditor. Then it would have resembled the case of *Sharpless v. Welsh*, 4 Dall. 279. There, the person giving the direction was the actual debtor, and the person receiving it made an express promise to apply the fund as directed: here, the party was no debtor, and there was no promise. There, the court held, that the debtor had made an appropriation of his funds to pay his debts to his creditors, which appropriation he could not revoke: here, he directs an appropriation, without consideration, to pay the debt of another, over which direction he had a complete power of revocation, until

the money was actually paid. That has never yet been done.

The other judges concurred. Decree affirmed.

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**\*Boyle v. Townes.**

January, 1838, Richmond.

(Absent CABELL and BROCKENBROUGH, J.)

**Curator and Receiver—Appointment Does Not Give Right of Property—Detinue—Surplusage.\***—A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property; but if he bring detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator &c. being surplusage.

**Detinue—By Bailee of Chattels.\***—A bailee of chattels may maintain detinue for them upon his right of possession as bailee.

**Same—Declaration—Misjoinder of Counts.\***—Two counts in a declaration in detinue; one counting on a right of property in the plaintiff, and the other on a right of possession in him as bailee: **Held**, here is no misjoinder of actions.

Detinue for a slave, by Townes against Boyle, in the circuit superior court of Petersburg. The declaration demanded the slave in question, in the name of Townes, "curator and receiver appointed by order of the hustings court of Petersburg, sitting in chancery, in the case of Patterson's administratrix against Boyle's administrator and others," and contained two counts: the first count claimed the slave as Townes's own property, and counted on a bailment by him to Boyle: the second count declared, that Townes, "as curator and receiver appointed as aforesaid, was lawfully possessed of the slave in question, as one of the slaves belonging to the trust fund in the said chancery suit mentioned, and so being possessed of the slave, casually lost the same out of his possession," and the slave afterwards into the hands and possession of Boyle by finding came: yet Boyle, "well knowing the said slave to be one of the slaves belonging to the said trust fund, and of right, by virtue of the appointment of the said hustings court as aforesaid, to belong and appertain to Townes, curator &c. as aforesaid,"

refused to deliver the slave to him &c.  
159 **\*Boyle, l. pleaded non detinet; and 2. put in a general demurrer to the declaration.** The court held, that the law on the demurrer was for the plaintiff: the jury found for him on the general issue; and the court gave him judgment for the slave. The defendant Boyle applied to this court for a supersedeas to the judgment; which was allowed.

Allison, for the plaintiff in error.

Spooner, for the defendant.

**TUCKER, P.** Both the counts in the declaration are upon the plaintiff Townes's own possession. In the first count, he states his possession of the slave as his own property; the declaration being filed in his name as

\*See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.

curator and receiver of the hustings court of Petersburg in chancery. Those words, descriptive of the character in which he sued, may well be taken as surplusage; and the rather, as it is certainly true, that he could not maintain the action upon the ground of property, merely by reason of the authority vested in him as receiver. The case is much less strong than that of Porter v. Nekervis, 4 Rand. 359, where the words "cashier of the farmers' bank of Virginia," attached to the plaintiff's name, were considered as surplusage. The first count, therefore, is good. The second count declares on the plaintiff's possession as a fiduciary: and this count also is good. For a fiduciary who has possession and is deprived of it, has a right of action against the person detaining; because of his own obligation to restore it to the owner when lawfully demanded. The plaintiff, in this case, was a bailee liable to the court, or to the owner, for the slave of which he had suffered himself to be dispossessed; and, by reason of this liability, he might maintain detinue, to enable him to comply with his own obligations, whether express or implied;

1 Chitt. Plead. 118, 2 Wms. Saund, 47 160 a. b. c. d. note 1. **\*Roberts v. Wyatt, 2 Taunt. 268.** It was argued, that this was a misjoinder of action. I do not think so. The plaintiff is the same in both counts; and though he claims the possession on two grounds, first on the ground of the right of property, and next of the mere right of possession, yet on each ground the claim is in his own right; and whether he succeed on one or the other count, the judgment must be precisely the same. Neither count sets forth a claim in *auter droit*; without which the objection is without foundation. 1 Chitt. Plead. 200. I am of opinion, that the judgment be affirmed.

The other judges concurred. Judgment affirmed.

**Walden Ex'or &c. v. Winston Adm'r &c.**

January, 1838, Richmond.

(Absent CABELL, J.)

**Revolutionary Officers—Money Received for Use of Officer's Widow—Case at Bar.**—The adm'r of a revolutionary officer of the Virginia line on continental establishment, who died in Virginia, applies to congress for commutation of five years full pay, due the decedent for military services; congress passes an act allowing the claim, and directing payment out of the treasury to the adm'r, but providing that he shall pay one fourth of the money to the widow of the decedent, who by the law of Virginia was entitled to no share of it; to which provision the adm'r gave his consent pending the bill before congress; and the adm'r receives the money from the treasury under the act: **Held**, he is bound to pay the widow one fourth of the money.

Col. John Thornton, an officer in the Virginia line on continental establishment in the army of the revolution, was entitled under the resolutions of congress, to 161 commutation \*of five years full pay in lieu of half pay for life, which he had never received, or, perhaps, even demanded,

in his lifetime. He died in Virginia; and by his will, made ample provision of real and personal property for his wife, Jane Thornton; and she abided by the will, and therefore was entitled to no part of any personal estate of her husband left undisposed of by his will; see *Thornton v. Winston*, 4 Leigh 152. Col. Thornton's claim for half pay or commutation in lieu thereof, being nowise disposed of by his will, he was intestate in regard to it. Winston, his administrator with his will annexed, presented a petition to congress, praying an act for the payment to him of the commutation of five years full pay due to his testator for his services as an officer in the army of the revolution. The house of representatives passed a bill directing the payment thereof to him, according to the prayer of the petition; but the bill was laid on the table in the senate, in order that a controversy which had arisen between col. Thornton's widow on the one part, and his administrator and distributees on the other, as to the division of the money, might be adjusted. It was proposed by a friend of mrs. Thornton, that an amendment should be made to the bill, whereby one fourth of the money claimed by the administrator and allowed by the bill of the house of representatives, should be paid to her; the administrator, at first, positively refused to give his consent to any such amendment; but one of the distributees of col. Thornton being present, in order to obviate opposition to the bill, gave his consent to the proposed amendment; and then the administrator said, that that forced him to consent to it also. Whereupon, an amendment was prepared, and proposed in and adopted by the senate, whereby the administrator was directed to pay one fourth of the money allowed him by the bill for the commutation of five years full pay due to his

testator, to mrs. Thornton, the widow  
162 of the testator, and to distribute \*the residue among the persons entitled thereto according to the laws of Virginia. And with this amendment the bill passed both houses, and was approved February 9th 1833.

Winston, the administrator, having received the money from the treasury of the U. States under this act of congress, exhibited his bill in the circuit superiour court of Culpeper, against Walden the executor of mrs. Thornton the widow, and the distributees, of col. Thornton the testator, shewing the act of congress, and stating, that the claim had been settled at the treasury, and the amount thereof paid to him; alleging that this money was, by law, assets of his testator's estate, subject, like all other assets, to debts, legacies and distribution, and that by the law of Virginia, the testator's widow, for whom ample provision was made by his will and who had accepted that provision, was therefore precluded from claiming any share; insisting, that the provision in the act of congress, whereby one fourth of the money, which belonged to col. Thornton's distributees (not being wanting for payment of debts), was taken away from them, and given to the widow who had no pretence of right to

it, was null and void, and that the whole money ought, notwithstanding that provision, to be distributed among the distributees of the testator according to the statute of distributions of Virginia, whereby the widow was wholly excluded from any share: and praying, that the distributees and the executor of the widow might interplead and litigate among themselves, and that the court should determine, whether the fourth part of the money should be paid to the executor of the widow, or the whole should be distributed among the distributees, excluding her from any share.

The distributees, in their answers, insisted on their right to the whole of the money, which they said was a part of the testator's personal estate, being a debt due to him from the government, which devolved by  
163 law to \*them in exclusion of the testator's widow. The executor of the widow insisted, on the other hand, that, as the administrator had no means of obtaining this money but by petition to congress, and an act of that body providing for the payment thereof to him, therefore, the act of congress allowing the claim was, in truth, a grant of the money to him, and that the administrator, taking under that grant, was bound to abide by the terms of it, and to pay one fourth of the money to the widow. And he stated and relied on the history of the act, and of the amendment thereof made in the senate, to which, in the progress of the bill through the senate, the administrator had given his consent.

The act of congress was exhibited, and the history of the provision in favour of mrs. Thornton, therein contained, was proved, as it is above stated.

The circuit superiour court declared, that the plaintiff received the whole sum allowed by the act of congress, in his representative character as administrator with the will annexed of col. Thornton; that the entire sum so received by him was assets of his testator's estate in his hands to be administered, according to the will of the testator, and the laws of Virginia; and that the defendant Walden, the executor of the widow, had no right to any part of the money, either under the act of congress, or the testator's will, or the law of Virginia: and therefore the court decreed, that the whole of the money should be distributed among the distributees, in exclusion of the widow. Walden the executor of mrs. Thornton applied by petition to this court for an appeal from the decree; which was allowed.

PER CURIAM. The circuit superiour court erred, in not decreeing that the appellee administrator with the will annexed of col. Thornton, should pay to the appellant executor of mrs. Thornton the widow of that testator, the fourth part of the money  
164 received by him as \*administrator of his testator, by virtue of the act of congress of the 9th February 1833, with interest from the time he received it.

Decree reversed.



**Ashby's Adm'x v. Smith's Ex'x.**

January, 1838, Richmond.

(Absent BROOKS and PARKER, J.)

**Principal and Surety—Restoration of Attached Effects to Principal—Discharge of Surety.\***—Principal debtor and surety being bound in a bond for money payable at a future day, the surety, before the debt has become payable, represents to the creditor that the principal is about to remove himself and his effects out of the commonwealth, and requests the creditor to sue out an attachment against him, under the statute, 1 Rev. Code, ch. 123, § 14, and the creditor sues out the attachment accordingly, and it is levied on goods of the principal debtor sufficient to satisfy the debt; but afterwards, the creditor accepts a mortgage from the principal debtor to secure punctual payment of the debt when due, and thereupon the attached effects are, with the creditor's consent, restored to the debtor, and the attachment no further prosecuted; and the debtor elicits the mortgaged effects: **Held**, the surety is, in equity, discharged from the debt.

**Same—Right of Surety to Require Creditor to Sue Out Attachment.**—Quere, whether, in such case, the surety has a right, under the statute, 1 Rev. Code, ch. 116, § 6, to demand that the creditor should sue out and prosecute such attachment against the principal debtor?

In 1820, Cuthbert Million, with Robert and John Ashby, his sureties, executed a bond to Thomas Chapman for 750 dollars, with interest thereon from the 11th February 1821, payable on or before the 11th February 1825; and in June 1821, Chapman assigned this bond to George Smith. Before the  
165 money was due, Smith \*the assignee died, and the appellee, Delia Smith, qualified as his executrix; and Robert Ashby, one of the sureties, also died, and administration of his estate was taken by Elizabeth Ashby, the appellant. Some four years after the date appointed in the bond for the payment of the debt, Smith's executrix brought a suit on the bond against Ashby's administratrix, in the county court of Stafford, and recovered judgment against her for the debt. Whereupon, Ashby's administratrix exhibited a bill in chancery in the same county court, against Smith's executrix, for an injunction to restrain her from further proceeding at law to enforce her judgment, upon the ground, that she had so dealt with Million, the principal debtor, in regard to the debt, and had so forborne to enforce satisfaction of the debt out of his property when it was completely in her power to do so, as, in equity, to exonerate the sureties from all liability. The state of the case appearing by the pleadings and proofs in this suit in chancery, was, in the view of this court, as follows:

Mrs. Ashby, in June 1823, represented to Mrs. Smith, that Million, the principal debtor, designed to remove himself and his effects from the commonwealth, before the debt secured by the bond would become due, and solicited her to sue out an attachment against his effects, in order to secure pay-

ment of the debt when it should become due, out of the same, under the statute concerning absent and absconding debtors, 1 Rev. Code, ch. 123, § 14, p. 478. Mrs. Smith was herself convinced of the design of Million to abscond and carry away his effects; but she referred Mrs. Ashby to her brother and agent, Murray Forbes, and her counsel, John M'Rae; and by their advice, an attachment was sued out against the effects of Million, in June 1823, returnable to the county court of Stafford; Mrs. Smith herself making the affidavit (required by the statute as the foundation of the proceeding) that  
166 she believed Million \*intended to remove himself and his effects out of the commonwealth before the debt would become due. This attachment was levied on the effects of the debtor; but it was dismissed by the county court, because, as Mrs. Smith alleged, no proof of Million's intention to abscond could be produced; whatever was the reason, it did not appear in the judgment of dismissal. But it did appear, from a letter of Forbes, the brother and agent of Mrs. Smith, which was written on the 30th June 1823 while the attachment was pending, and which was before the county court at the time it was dismissed, that he requested an interview with Million on the subject; saying, he had little doubt they could come to some agreement by which all Million's property could be turned to him; that all his sisters wished was to get the debt made secure at the time it should become due; and that it was not wished to dispose of his property.

That attachment having been dismissed, Mrs. Smith again, at the renewed request of Mrs. Ashby, and on her repeated representations that Million was about to abscond, and in the belief that he intended to do so, made the affidavit to that effect and executed the bond required by the statute, for the purpose of obtaining another attachment against the effects of Million, and, on the 5th April 1824, sued out the process; leaving the rest of the proceeding to the management of her brother and agent Forbes and her attorney M'Rae, whom she authorized to act as in their discretion they should think best for her interest. This second attachment was levied by the sheriff on slaves the property of Million, amply sufficient for the satisfaction of the debt; and return was made of the attachment, and of the levy thereof, to the county court.

But, on the 9th April, four days after this attachment had been taken out and levied, a deed of trust was executed by Million to Forbes and M'Rae, conveying to  
167 \*them ample property, part real and part personal, to secure the debt; and this deed was accepted and signed by Forbes and M'Rae as trustees, and afterwards duly recorded. The deed recited the debt due from Million to Smith's estate, the second attachment sued out by the executrix against Million, and the levy thereof on his property; and that she was willing not to prosecute the attachment, provided the property could be otherwise secured for satisfaction of the debt, reserving to herself, however, the right to proceed to judgment

\*See what is said in *foot-note* to *Humphrey v. Hitt*, 6 Gratt. 510, on this subject.

on the attachment or not, in her discretion, according to circumstances; and that this deed should not prejudice Mrs. Smith's right of action upon the bond when the debt should become payable, but was only intended as a collateral precautionary security: and then the deed assigned and conveyed to the trustees, all the property that had been taken under the process of attachment, and in addition thereto, sundry debts due to Million, and some real estate; upon trust, that if the debt should not be paid on the 11th February 1825, when it was to become due, the trustees might at any time afterwards sell the land and specific chattels thereby mortgaged, and collect the debts assigned, and apply the proceeds of sales and collections to the satisfaction of the debt due to Smith's estate, and the costs of the attachment, in case the same should be dismissed by the creditor. The property thus mortgaged was a most ample security.

Immediately after the deed of trust was executed, the property which had been attached was restored to the possession of Million, probably with the express consent, certainly with the knowledge and acquiescence, of Forbes, the agent of Mrs. Smith, and she herself was apprized that it was so restored very soon afterwards, and acquiesced. From this time, no further proceeding was ever had on the attachment, except that it was continued from time to time in the county court, and, for aught that appeared, was still pending.

168 \*Before the debt became due, Million eloiigned all the personal property which had been attached and mortgaged for the debt: the real estate, which was the only part of the trust subject mortgaged by him for the debt that could be rendered available for the purpose, was sold; and the proceeds fell far short of satisfying the debt.

It appeared, that after Million had absconded and eloiigned his property, a request was made on behalf of Mrs. Smith, to Mrs. Ashby, that she should sign an order for the dismissal of Mrs. Smith's attachment against Million, under the impression (apparently) that that proceeding had been instituted for Mrs. Ashby's benefit, and was subject to her control. Mrs. Ashby refused to sign the proposed order, or to interfere in any way, considering herself no longer implicated in any responsibility for the debt.\*

The county court was also of that opinion; and, therefore, upon the hearing, perpetuated the injunction it had awarded, to restrain Smith's executrix from farther proceeding on the judgment at law which she had recovered against Ashby's administratrix. Smith's executrix appealed from the decree, to the superior court of chancery of Fredericksburg, from which the cause was transferred to the circuit superior court of Spottsylvania; which reversed the decree of

the county court, dissolved the injunction, and dismissed the bill. And then Ashby's administratrix applied by petition to this court, for an appeal from the decree of the circuit superior court; which was allowed.

Morson, for the appellant, contended, 1.

That the acceptance by Mrs. Smith of 169 Million's deed of trust for the security of the debt due by the bond, was a new agreement, which of itself, in equity, discharged the sureties in the bond. For, he said, the deed of trust postponed the sale of the trust subject to a day far beyond the time when a sale of the attached effects would have been made, if the creditor had prosecuted her remedy on the attachment. And the execution and acceptance of the deed of trust were, in effect, an extinguishment of the attachment. On this point, he cited *Boulton v. Stubbins*, 18 Ves. 20; *Miller v. Stuart*, 9 Wheat. 680; *Bowmaker v. Moore*, 7 Price 223; *Steele v. Boyd*, 6 Leigh 547; *Hopkirk v. M'Conico*, 1 Brocken. 220.—2. That the subject mortgaged by the deed of trust for the security of the debt, had been lost to the creditor through gross neglect; and for that reason also, the sureties bound in the bond were exonerated. 3. That the mere failure of the creditor to prosecute her remedy on the attachment she had sued out against the principal debtor, was enough to exonerate the surety; since there was no doubt that that remedy, if diligently prosecuted, would have been effectual; and it was a remedy which the creditor alone could pursue, and which was not assignable to the surety. *Theobald's Princ. & Sur.* 147; *Law Library No. 1*, p. 87; *Capel v. Butler*, 2 Sim. & Stu. 457; 1 *Condens. Eng. Ch. Rep.* 543; *Law v. East Ind. Co.*, 4 Ves. 824; *Loop v. Summers*, 3 Rand. 511.—4. That the restoration of the property of the principal which had been attached for the debt, was made with the consent or at least with the knowledge of the creditor's agent, and she afterwards acquiesced in and thereby sanctioned it; and this, at all events, exonerated the surety. He suggested, that the surety for a debt payable at a future day, had the like right to require the creditor to proceed by attachment against the principal about to abscond and to carry off his effects, as the surety for a debt due had to require the creditor to bring suit against the principal, under the statute 1 Rev.

170 Code, ch. 116, § 6, p. 461. \*But however that might be, he said the creditor here

had in fact sued out the attachment against the principal, and the attachment had been levied on the principal's property, which gave the creditor the same lien on it as an execution levied would have given her; and the restoration to the principal of his property taken on the attachment, had the same effect to exonerate the surety, as a voluntary discharge by the creditor of property taken in execution would have. He cited *Mayhew v. Crickett*, 2 Swanst. 185; *Baird v. Rice*, 1 Call 18; *Bullitt's ex'ors v. Winston*, 1 Munf. 269; *Chichester v. Mason*, 7 Leigh 244.

Harrison, for the appellee, answered, 1. That the taking of the deed of trust from the principal, to secure punctual payment of the debt on the very day appointed for the pay-

It may be proper to state, that there were some contested questions of fact in the cause; but there was not much doubt about them; and in stating the facts of the case the reporter has followed the opinion of the court upon the evidence.—Note in Original Edition.

ment thereof by the bond, a deed of trust whereby a subject amply sufficient for the security of the debt was mortgaged, was indeed a new agreement, but it was one which neither took away nor suspended any right or remedy on the bond, of the creditor or of the surety, and therefore could not have the effect of exonerating the surety. The mortgage provided at the same time an indemnity for the surety, and a new security for the creditor. 2. He denied the fact that the property mortgaged by the deed of trust had been lost through any negligence of the creditor or her agents or the trustees; it was eloiigned by the debtor before the debt became due. And there was no evidence in the record to prove the imputed laches, or to shew that any diligence would have been availing. 3. He insisted, that as the attachment made the effects of the principal was sued out by the creditor at the solicitation of the surety, so it was a proceeding instituted by the creditor for the benefit of the surety, which the surety had a right to prosecute; and the creditor had taken effectual care not to debar the surety of that right, by reserving to herself the right to pursue the remedy. 4. He

denied, that, in point of fact, the  
171 attached effects \*of Million had been restored to him, by any act of the creditor of her agents: but supposing the property was restored to the principal debtor, by the act or consent of the creditor, still, in order to exonerate the surety, it must appear, that the creditor did, by that act, injure the surety, by impairing her rights or remedies; that the creditor, by the restoration to the principal debtor of his attached effects, obstructed the right of the surety to pay the money herself, and thereby to require the power of pursuing the debtor for indemnity, or her remedy by bill quia timet. He cited *Norris v. Crummey*, 2 Rand. 323, 334-8; *Hunter's adm'r's v. Jett*, 4 Rand. 104; *M'Kenny's ex'ors v. Waller*, 1 Leigh 434; *Alcock v. Hill*, 4 Leigh 622. And (referring to the language of *Green, J.*, in *Norris v. Crummey*) he insisted, that, in this case, the surety had not been deprived, by the act of the creditor, of any legal or equitable remedy for relieving herself, nor had any such remedy of the surety been impaired by the creditor.

**BROCKENBROUGH, J.** The ground on which the circuit superior court rendered its decree, was, that there was not sufficient matter in the record to shew, that *Mrs. Smith*, the appellee, was privy and consenting to the procurement and execution of *Million's* deed of trust of the 9th April 1824, or that she, by express directions, in person or by an agent authorized by her, required or allowed the sheriff to restore to *Million* the effects on which he had levied the attachment. It may be true, that she did not give those specific directions: yet if she constituted a general agent with full powers to carry on legal proceedings against *Million*, for the purpose of securing out of his property the amount of the debt which was afterwards to fall due, and if she afterwards, by her acts or omissions, sanctioned the proceedings of her agent, she is as much bound

by his acts, as if she had given him special and particular directions. Now, I think it clear enough, that *Mrs. Smith*  
172 \*did constitute her brother *Murray Forbes* her agent in this transaction, with plenary powers; that he procured and accepted *Million's* deed of trust, and it was with his consent, that the property of *Million* on which the attachment had been levied, was restored to him; and that *Mrs. Smith* must afterwards have been informed of his proceedings, and acquiesced in and sanctioned them. The attachment was hers, not *Mrs. Ashby's*: and she was bound to hold on upon the security which it gave her, and not, by letting it go, jeopard the interest of the surety.

Such being my understanding of the facts of the case, the question for adjudication is, whether the release of the attachment lien which the creditor had on specific property of the debtor, is a discharge, in equity, of the surety? In *M'Kenny v. Waller*, this court adjudged, that the withdrawal of an execution which had been delivered to a sheriff and which the sheriff was about to levy on property, but had not levied, did not absolve the surety, the creditor not binding himself to suspend the execution for any definite time, and having suspended it without any consideration. The same point was adjudged in *Alcock v. Hill*. I incline to the opinion, that those cases are rendered of doubtful authority by the opinions of our brethren *Brooke* and *Cabell*, in *Chichester v. Mason*; to which we may add the opinion of the president, who had decided that case in the court below. But, however this may be, there is a sensible distinction between them and the case at bar. In those cases, the lien was not complete; it was an inchoate lien on the chattels generally of the debtor: but here was a perfect lien on specific property. In the case of *Mayhew v. Crickett*, in which the creditor had taken the debtor's goods in execution, but afterwards withdrew the execution, lord *Eldon* said, "I think it clear, that though the creditor might have remained passive if he chose, yet if he takes the goods of the debtor in execution, and

afterwards withdraws the execution,  
173 he discharges \*the surety, both at law and in equity." The distinction between an execution delivered, and one levied, was strongly adverted to by our late brother *Carr*, and made the foundation of his opinion, in the case of *Chichester v. Mason*. So, in *Ward v. Vass*, 7 Leigh 138, the same judge said, "If the creditor discharges any specific lien on the principal's property, out of which he might have made the debt, he releases the surety from his obligation."

Such is the established doctrine as to executions levied; and I think the same reason applies to an attachment levied on the goods of an absconding debtor. The statute places the attachment on the same ground with the execution. It directs, that when judgment is rendered in behalf of the creditor on the attachment, "all goods and effects attached shall be sold and disposed of, for and towards satisfaction of the plaintiff's judgment, in the same manner as goods taken in execution

upon a writ of fieri facias." The attachment levied, then, being a security which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply it, or to hold it as a trustee for the surety, ready to be applied, should the surety desire it (*Theobald*, p. 143, 2 Swanst. 185), and if he voluntarily parts with that security, the surety is absolved.

In this case, the creditor, by her agent, did part with a security on which she had a legal hold, and which would have been adequate, if retained, to pay off her whole debt; she was guilty of gross neglect in not regaining the property after she had let go her hold; and she accepted, by her agent, an inferior security, so far as regarded the property attached; for although the same chattels which had been levied on were conveyed to the trustees, yet the possession of them, so far from being given to the trustees, was resumed and retained by the debtor. By this conduct of the creditor, I think that the surety was completely discharged.

I think the decree should be reversed, and the injunction perpetuated.

174 \*CABELL, J. I concur. It is not necessary to decide, as a general question, how far the creditor of a debt payable at a future time, is bound, at the request of the surety, to sue out an attachment against the principal. It would seem, however, that the creditor, in this case, admitted her obligation to do so; for she did in fact sue out an attachment, at the request of the surety; and having thus commenced it, she ought to have prosecuted it diligently. This she did not do; for the attachment was, in fact, abandoned.

But there is another and a higher ground on which I place the discharge of the surety. The attachment sued out by the creditor was levied on property abundantly sufficient for the payment of the debt. This levy created a specific lien on that property; and the discharge of this lien by the creditor, without the assent of the surety, was, on general principles of equity, a discharge of the surety. That this is so where the creditor waives the lien of an execution levied, was decided by lord Eldon in *Mayhew v. Crickett*. And I can perceive no difference in this respect, between the lien of an execution levied, and that of an attachment levied. This court, in the case of *Chichester v. Mason*, carried the principle still farther; for it was there decided, that the waiver of a general lien on the property of the principal, resting on the mere delivery of an execution to the sheriff, was a discharge of the surety.

TUCKER, P. I am also of opinion, that the decree should be reversed.

By our statute providing remedies for sureties, a surety apprehending loss may require his creditor to proceed against the principal, in case an action has accrued against him. This requisition must be in writing; and upon its being made, the creditor is bound, within a reasonable time, to institute suit and to prosecute it diligently to judgment and execution; and if he fails to comply, the surety is by law discharged. Now in the present case, it is true it may be

a question, whether, as the debt was not at the time due, the requisition could have been made by the surety. On the one hand, an attachment may truly be said to be an action; and if there is reason to believe the debtor intends to abscond, the creditor may have this action; and it is by no means clear, that in this, the case of the greatest exigency, the law did not intend the remedy to the surety. On the other hand, it may well be doubted, whether it ever could have been designed to compel the creditor to institute a proceeding, which he cannot institute unless he himself really believes in the intention to abscond, and by which he renders himself responsible for heavy damages, if his fears should turn out to be groundless. But, be this as it may, *mrs. Smith* did commence this proceeding upon the requisition of *mrs. Ashby*; and whether she was bound to do it or not, and whether the request was in writing or not, is now no longer of any importance. Having commenced the process at the surety's instance, and having attached effects sufficient to secure the debt, she was thenceforth bound, in the language of the statute, to "proceed with due diligence in the ordinary course of law to recover judgment" and obtain an order of sale. For, having already commenced the proceeding, it would have been a vain thing for the surety, after the debt became due, to make such demand in writing as the statute required; and the rather, as the pendency of this attachment would have been an obstacle to any other proceeding. All that the surety could expect was, a compliance with the statute in the use of due diligence. Has the attachment been prosecuted with due diligence? It cannot be pretended; and the legal consequence is a discharge of the surety.

Decree reversed, and injunction perpetuated.

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\*Pegram v. May.

January, 1838. Richmond.

(Absent CABELL, J.)

**Executions—Commencement of Lien—Delivery to Officer—Case at Bar.**—A creditor delivers a *fi. fa.* to a deputy sheriff acting in a different district of the county from that in which the debtor resides, in order by such delivery to bind the debtor's property, but with directions to the deputy to hold it till a future day, and then to transfer it to the deputy of the district in which the debtor resides, to be by him levied, unless the debt should be paid in the meantime, or unless the deputy should bring his property to the district of the first deputy to be sold, in which case the first deputy was to levy the execution upon it: *Held*, the execution binds the goods of the debtor from the date of its delivery to the first deputy—*dissentiente BROOKE, J.*

In an action of detinue for a slave, brought by Nathaniel Pegram against David May, in the circuit court of Dinwiddie, and thence transferred to the circuit superior court of Greenville, there was a case agreed, stating the following facts.

1. That though there are a corporation

\*See monographic note on "Executions" appended to *Palne v. Tutwiler*, 27 Gratt. 440.

court and a circuit superiour court established for the town of Petersburg, and though there is an officer of the corporation called the serjeant, who is the executive officer of those courts, yet that part of the town which lies in the county of Dinwiddie, hath anciently always been, and yet is, in many respects, within the jurisdiction of the courts of that county, and the sheriff of the county has many official duties to perform, especially in the execution of civil process against persons resident in the town; and, in October 1823, Roger Mallory was the serjeant of the town of Petersburg, and at the same time deputy of Edward Watkins, sheriff of Dinwiddie.

2. That John May having recovered a judgment against John Scott, in the circuit court of Petersburg, sued out a fieri facias thereon, and delivered the same  
177 \*to Mallory; and Mallory, at his instance, made the following endorsement on the execution—"Came to hand 28th October 1823, Roger Mallory deputy of Edward Watkins sheriff."

3. That the county of Dinwiddie was, at that time, divided into several precincts, to which the deputies of the sheriff were respectively arranged, and were, by agreement among themselves and with the sheriff, confined; by which arrangement the duties of Mallory as deputy sheriff were confined to the town of Petersburg, and did not extend, nor could he consistently with that arrangement and agreement serve any process, in the county beyond the limits of the town.

4. That Scott the debtor against whom May's fieri facias was sued out, had no property in Petersburg, and lived about thirty miles from the town, in a precinct of the county, in and for which Thomas Field was the deputy sheriff.

5. That all the facts above stated were well known to May, when he placed his execution against Scott in Mallory's hands; and he did not expect or require Mallory to go beyond the limits of the town of Petersburg to execute it; but he put it into Mallory's hands in order to bind the property of Scott, the debtor, and to be held by Mallory until the following November term of the county court of Dinwiddie, which was on the third monday of the month, when (unless the debtor Scott should pay or secure the debt in the meantime, as he had promised) the execution was to be transferred to the hands of Field, the proper deputy of the precinct in which Scott lived, to be by him levied; yet Mallory was instructed, that if Scott should bring any of his slaves to Petersburg for sale (as May apprehended he would) he should levy the execution on them.

6. That while the execution yet remained in Mallory's hands, namely, on the 29th  
178 November 1823, Scott executed a deed of trust, whereby he conveyed the \*slave which was the subject of this suit (among other property) to Abner Adams, in trust that he should sell the mortgage subject, and out of the proceeds of sale pay sundry debts therein mentioned and secured, and among others a debt due to Pegram the

plaintiff in this action; that Scott, on the same day, executed another deed of trust, conveying other slaves to a trustee for the security of other debts, in which last mentioned deed of trust the deputy sheriff Field was personally interested as a cestui que trust; and that both the deeds of trust were duly recorded on the day of their date.

7. That while May's execution against Scott was still in Mallory's hands, namely, on the 15th of December 1823, Adams the trustee in the first mentioned deed of trust, sold the trust subject, and (with the rest) the slave for which this action was brought, of whom the plaintiff Pegram became the purchaser, and Adams delivered him possession thereof and gave him a bill of sale: and that this sale by the trustee Adams was made at Dinwiddie courthouse, on a court day, in the presence of Field and other deputies of the sheriff, and was not forbidden or opposed by them, or any other person.

8. That, after this sale of the slave in question by the trustee Adams to the plaintiff Pegram, but before the return day of May's execution against Scott, that execution was, by May's directions, transferred by the deputy sheriff Mallory to deputy sheriff Field: that Field levied it upon the slave in question, then in possession of Pegram under the sale thereof to him by the trustee Adams; and afterwards made due sale of the slave, under the execution, to the defendant David May, who received possession from the sheriff, which he still held.

The question referred to the court was, whether, upon the case agreed, the plaintiff or the defendant had title to the slave?

179 \*The circuit superiour court held that the law upon the case agreed was for the defendant, and gave judgment for him. The plaintiff applied to a judge of this court for a supersedeas to the judgment; which was allowed.

The cause was argued here, by Stanard for the plaintiff in error, and May for the defendant, upon the following objections taken by the former:

1. That the fieri facias in the hands of the deputy Mallory, did not bind the property of the debtor Scott; and therefore no title was acquired by May, the purchaser under the execution, which overreached the title acquired by Pegram by his purchase under the deed of trust. That an execution does not bind the property in the goods of the debtor against whom it is sued out, but from the time the writ is delivered to the sheriff "to be executed;" 1 Rev. Code, ch. 134, § 13, p. 529, and the execution in question was not delivered to the deputy Mallory, to be executed, but the levy of it was to be made on a future contingency, and then by the deputy Field; and until it was handed to Field at a date subsequent to that at which Pegram's title accrued, it was not delivered to be executed, so as to bind the property. That the execution (having respect to the purpose of the delivery of it to Mallory, and the manner in which it was afterwards to be treated) was intended to bind the property of the debtor, and yet to be suspended as to the levy of it, until on a future event it should be trans-

ferred to the hands of Field, the other deputy; and this latter purpose defeated the intention as to the lien; for a delivery to an officer with instructions not to levy for a given time, or until a given event, could not immediately bind the debtor's property. The suspension of the levy, during its continuance, cancelled the lien. *Payne v. Drew*, 4 East 523; *Kellog v. Griffin*, 17 Johns. Rep. 274.

180 \**PER CURIAM*. The judgment of the circuit superior court is to be affirmed.

BROOKE, J., dissented. He said—I cannot concur in the opinion, that May's execution was delivered to the deputy Mallory "to be executed," according to the 13th section of the statute concerning executions. The words of the statute are, that "no writ of fieri facias, or other writ of execution, shall bind the property of the goods against which such writ is sued forth, but from the time such writ shall be delivered to the sheriff, under sheriff, coroner or other officer, to be executed:" to be executed, I presume, in pursuance of law, not according to the directions of the creditor. The section is copied from the english statute 29 Car. 2, ch. 3, and any delay amounting to laches in the creditor loses the priority of the execution; as in the case of *Payne v. Drew*, cited at the bar, where a sequestration out of chancery, having the force of a fieri facias, lost its priority by the delay to execute it, amounting to laches in the plaintiff. So, in the case of *Kellog v. Griffin*, where the plaintiff having a prior fieri facias, directed the sheriff to levy it, but to do nothing until ordered, unless crowded by younger executions, but by no means to let the execution lose its preference. There, the laches was not so great as in the case before us, in which the execution was put into the hands of the deputy sheriff, to be executed only in the contingency of the debtor bringing his property to the town of Petersburg, which was the precinct or bailiwick of that deputy, but if he should not bring his property thither, and should not pay or secure the debt, the execution was to be delivered at the next county court of Dinwiddie, to another deputy, Field, to be executed on property within his precinct. The proceeding upon the execution after its delivery, was designedly suspended. Meanwhile, Scott the debtor mortgaged his property to

secure a just debt,—under which deed 181 the plaintiff fairly \*acquired the title; the execution still remaining dormant in the hands of Mallory. I can see no difference between this case and the cases cited, unless a distinction is to be taken between a deed of trust, and a bona fide sale under it, which are recognized by law as one means of securing and satisfying a debt, and a fieri facias, which is another means of effecting the same object. Before the statute, the mischief was, that the creditor after taking his execution might permit it to lie in the office, and so be a secret lien on the debtor's property. Now, it had as well be in the office, as in the hands of the sheriff, if he, by the direction of the creditor, is not to execute it but on some contingency that may never happen. To bind the property of the debtor, an execu-

tion must be delivered to the sheriff to be executed in pursuance of law, so that he is bound to proceed, and responsible for not proceeding. If it is delivered to him, to hold, and abide the directions of the creditor, other liens may intervene, which ought not to be affected by the creditor's delay to execute his writ.

### Mason v. Bond & Co.

February, 1838, Richmond.

[38 Am. Dec. 248.]

**Sale of Personality—Retention of Possession by Vendor—Fraud Per Se.**—It is a general rule, that an absolute sale of chattels not accompanied and followed by transfer of possession to the vendee, is per se fraudulent and void as against creditors of the vendor, and though there are exceptions to the rule, yet it is no ground of exception, that the possession at the time of the sale was in a third person, if, notwithstanding such possession, the vendor had a right, and it was in his power, to take the possession and deliver it to the vendee.

This was an action of detinue for two slaves, Rolla and Peggy, brought by 182 Mason and Heath against Bond & Co. in the circuit superior court of Petersburg. Plea, the general issue. The suit abated as to the plaintiff Heath, by his death, and was prosecuted by Mason alone.

Mason filed exceptions to opinions of the court given at the trial; from which it appeared, that the plaintiff gave in evidence on his part, a bill of sale executed by Richard Epes of Nottoway to him and Heath, dated the 11th March 1827, whereby, in consideration of 1800 dollars, he conveyed to them nine slaves, among whom were the two slaves in question, Rolla and Peggy; under which bill of sale the plaintiff claimed. And then the plaintiff proved by a witness, Peter Epes, son of the vendor Richard, that the slave Peggy was the property of the vendor, and in his possession at the date of the bill of sale, and remained in his possession until she was taken under an execution sued out by the defendants as hereafter mentioned. That the slave Rolla was also the property of the vendor on the day the bill of sale was executed, but he was then, and had been for some months before, in the possession of the witness, under the following circumstances: the witness had leased a farm in the neighbourhood of his father's residence, for a term of seven years; and after his contract for the lease, it was agreed between him and his father, that the lease should be held on their joint account, that each should furnish six hands to cultivate the farm for their equal benefit, and that the witness should reside on the leased premises, and have the management thereof: that in January 1827, Richard Epes the father sent six hands to the farm, of whom

\***Sale of Personality—Retention of Possession by Vendor—Fraud Per Se.**—The principal case was cited with approval in *Tavener v. Robinson*, 2 Rob. 286. But in *Davis v. Turner*, 4 Gratt. 423, the doctrine of fraud per se is examined and repudiated. See footnote to this case (*Davis v. Turner*) for a somewhat extended discussion of the subject.

the slave Rolla was one; and this slave remained at the leased farm, until the day the bill of sale was executed to Mason and Heath; upon which day, the slave was sent by the witness at his father's request to his residence, and there sold to Mason and Heath: that Rolla was then again sent back by the witness's father to the leased farm,

183 and remained \*there till some time in September following; when he was again sent by the witness to his father, who had sent for him in order to deliver him to Mason and Heath, the purchasers; but, on the same day, while the slave was thus at the father's residence, he was taken under the execution of the defendants; that some three or four weeks after Mason and Heath's purchase, one of those vendees informed the witness of their purchase of this slave Rolla, and he was informed thereof, either previously or subsequently, by his father also; and though the witness was of opinion that he might refuse to deliver the slave unless another was substituted in his place, yet he waived his rights in that respect, and made no objection to the sale. And then the defendants gave in evidence on their part, two writs of *elegit* sued out by them against Richard Epes, the vendor under whom Mason and Heath claimed; and proved that these executions came to the hands of the sheriff of Nottoway in July 1827, and were by him levied on some day in September following, on the two slaves in question, Rolla and Peggy, then at Richard Epes's house and in his possession, and these slaves were delivered by the sheriff to the defendants, at their reasonable value ascertained by inquisition of a jury. And this being all the evidence in the case, I. the defendants asked the court to instruct the jury, that if they believed the evidence, they were bound to find for them: the court declined to give the instruction in that form, but told the jury, that if the slaves were in possession of Richard Epes at the time of his sale to Mason and Heath, and remained in his possession until the seizure thereof by the sheriff under the defendants' execution, the bill of sale was void as against the defendants. And then II. the plaintiff moved the court to instruct the jury, that if they believed from the evidence, that Richard Epes, the vendor, had parted with the slave Rolla for one year under his agreement with the

184 witness Peter Epes, that \*the slave was actually in possession of Peter from and after the date of the bill of sale, and that Peter was authorized to detain him till the end of the year; then the possession of Peter was not the possession of Richard, the vendor, and the bill of sale was not fraudulent in law: but the court refused to give this instruction, because whatever might be the law upon the state of facts supposed in the motion for the instruction, the court was of opinion that the evidence did not prove any such state of facts, and it would not give an instruction upon a hypothetical case. The plaintiff excepted.

The jury found a verdict for the defendants. And then the plaintiff moved for a new trial, on three grounds: 1. that the ver-

dict was contrary to the evidence; 2. that the court erred in the instruction it gave at the instance of the defendants, and in refusing the instruction asked by the plaintiff; and 3. that the court, in assigning its reasons for such refusal, had declared its opinion touching the weight and effect of the evidence. The court overruled the motion for the new trial, and the plaintiff excepted.

The court proceeded to give judgment upon the verdict for the defendants. The plaintiff applied by petition to this court for an appeal from the judgment; which was allowed.

Macfarland, for the plaintiff in error.

Spooner, for the defendants.

TUCKER, P. I am clearly of opinion, that the judgment should be affirmed. The errors assigned are, that the verdict was against evidence; that the instruction given was erroneous; that that refused ought to have been given; and that the court improperly declared its opinion on the weight of the evidence. All these objections are, I think, without foundation.

185 \*As to the first: Was the verdict against evidence? This depends upon the question, whether there was, in this case, a sufficient excuse for not delivering the possession of the slaves to the vendees; for if not, then the sale was void, according to the principles of that class of cases of which that of *Edwards v. Harben*, 2 T. R. 587, has always been considered a leading one. For, although the doctrine of those cases has been much and very properly modified, yet they apply in their full force, where possession does not follow the deed, and there is no apology for the nondelivery. In the cases of *Land v. Jeffries*, 5 Rand. 252, and *Sydnor v. Gee*, 4 Leigh 535, the modification and exceptions to the general rule are very carefully stated: they all admit, that if the property can be conveniently delivered, and is not delivered, but is retained in the service and for the use of the vendor, notwithstanding the sale purports to be immediate and absolute, the transaction is fraudulent *per se*. Now, this was precisely the case here. The slave Peggy was, notwithstanding the sale, retained by the vendor in his own immediate possession. It was theretofore as to her, confessedly, fraud *per se*. The slave Rolla, the subject of contest here, was kept on a farm held jointly by the vendor and his son, each being bound to furnish six hands. Rolla was one of those furnished by the vendor. He was, therefore, in the vendor's possession, held jointly by him with his son. But as his contract was indefinite to furnish six hands, and Rolla was not expressly among them, he had at any time a right to take him out of the concern, and put in another in his place. That slave was, therefore, not only in his possession, but under his control, and might have been delivered at the time of the sale. He was, in point of fact, sent to the vendor by his son at the time of the sale: the son did not object to the sale; nor did he even insist on the substitution of another; for he

says, that not intending to assert such right, he accordingly sent the \*slave to his father at the time of the sale, at his father's request. But the father, instead



of delivering him to the purchasers, sent him back to labour for his own profit in the joint concern. Subsequently, when the execution was in the sheriff's hands, the slave was again sent to be delivered to the purchasers, the vendor having sent for him for that purpose. These facts prove a complete control over the property, and power of delivery. The failure to deliver, therefore, is not satisfactorily accounted for, and the case falls within the influence of the principle, that an absolute bill of sale is void, unless possession follows and accompanies the deed, or the want of it is satisfactorily accounted for.

It cannot but be remarked, in this case, that the deed is absolute and immediate; whereas the pretence is, that the son of the vendor was entitled to the possession of the property for seven years. This fact, together with the want of proof of consideration, creates a strong suspicion of fraud in fact; which is fortified by the circumstances, that the vendor retained others of the slaves sold, that about the date of the sale there must have been judgments against the vendor, and that the slaves were sent over to be delivered to the purchasers, just at the time when the levy was about to take place. Upon the whole, I think the verdict is abundantly sustained by the evidence.

As to the instructions: that given on the defendants' motion was strictly correct, as the general rule. It was not necessary or proper to set forth the exceptions or modifications of that rule, unless the plaintiff had asked it. Were it otherwise, every instruction must contain a perfect institute of the law of the subject.

The instruction moved by the plaintiff was properly refused. He moved the court to instruct the jury, that if they believed that the vendor had parted with the slave Rolla for a year to his son, and that his son was actually in possession and

187 authorized to detain him till \*the end of the year, the bill of sale was not fraudulent in law. The court refused to give the instruction, because it was of opinion that the evidence did not prove such a state of facts, and it would not give an instruction on a hypothetical case. The court did right: there was no such state of facts. The vendor, if the witness was credible, did not part with Rolla for a year to the son, and the son was not authorized to detain him till the end of the year. He was in the possession both of father and son, with the right of the father at any time to withdraw him, and put another in his place, and with the power (as the son did not insist on the substitution) to deliver him to the vendees without putting another in his place. There was no testimony which even tended to prove a right of exclusive possession in the son, or a right to detain the slave against the father's will. The instruction therefore was rightly refused.

Lastly, it is said, the court improperly expressed its opinion upon the facts. I do not think so. No opinion would have been expressed, but for the motion of the plaintiff to give an opinion upon an entirely fictitious state of facts. It then became necessary that

the court should say, in justification of its refusal to instruct, that the facts upon which the instruction was based, had no existence in the cause. It is true, that the court, under our system of jurisprudence, cannot assume the right to instruct the jury upon the facts; yet it would be very mischievous, if every incidental remark of the court, in deciding the matters of law arising upon the trial, should be tortured into an invasion of the rights of the jury.

Upon the whole, I see no error in the record. The other judges concurred. Judgment affirmed.

## 188 \*Erskine v. Henry and Wife and Others.

February, 1838, Richmond.

(Absent BROOKE and PARKER, \* J.)

### Wills—Emancipation of Slaves in Futuro—Increase.†—

Testator devises and bequeaths all his estate, real and personal, to R. C. for her life, and at her death, all his negroes to be free; and again, bequeaths at her death to T. & G. F. all his personal estate, except his negroes who are then to be free: HELD, the increase of the negroes, born during the life of the legatee for life, are hereby emancipated.

### Negroes—Suit for Freedom—Judgment—Conclusiveness

as to Status of Negroes.—In a suit in forma pauperis brought by negroes against Erskine to recover their freedom, it is adjudged, that the paupers are slaves; then Henry and others bring suit against Erskine to recover the same negroes as their property: HELD the judgment in the pauper suit is not conclusive evidence for the plaintiffs in this suit, that the negroes are slaves, and if the court in this suit holds them to be free, the plaintiffs here cannot recover them.

Same—Same—Same—Same.—In a suit in forma pauperis brought by negroes to recover their freedom, judgment is given against them, that they are slaves: it seems, such judgment is not necessarily conclusive of the status of the negroes, in a new controversy between them and the same defendant; and, under peculiar circumstances, may be no bar to the recovery of their freedom.

Absolom M'Coy late of Berkeley county, died in the year 1803, and by his last will and testament devised and bequeathed as follows: "I give and bequeath to Rebecca Crouch all my real and personal estate, wheresoever it may be found, during and all the time of her natural life, and at the death of her the aforesaid Rebecca Crouch, all my negroes to be free and at full liberty—I give and bequeath, at the death of her the aforesaid Rebecca

\*He pronounced the decree in the circuit superiour court.

### †Wills—Emancipation of Slaves in Futuro—Increase.

—Several notes have been written on this subject in this series of reports. See *foot-note* to Blinford v. Robin, 1 Gratt. 327; *foot-note* to Lucy v. Cleminant, 2 Gratt. 36; *foot-note* to Osborne v. Taylor, 12 Gratt. 117. On this subject, the principal case was cited in Crawford v. Moses, 10 Leigh 283; Anderson v. Anderson, 11 Leigh 621, 622, (and see what is said in this case concerning the principal case, by BROOKE, J., in his dissenting opinion); Osborne v. Taylor, 12 Gratt. 129; Wood v. Humphreys, 12 Gratt. 336, 351; Taylor v. Cullins, 12 Gratt. 398; Hunter v. Humphreys, 14 Gratt. 296, 298. Digitized by Google



Crouch, to Thomas Fakes and George Fakes all my personal estate (except my negroes which are then to be free and at full liberty) to be equally divided between them." And the testator appointed the same

189 \*Rebecca Crouch his executrix, who proved the will in the county court of Berkeley in December 1803, and qualified as executrix. She took and held possession of all the testator's slaves and their increase subsequent to his death, during her life.

Rebecca Crouch died in 1828, and by her last will and testament, after subjecting the whole of her estate real and personal to the payment of her debts, she gave all the residue thereof to James Erskine, and then bequeathed and provided as follows: "Ab-solom M'Coy, by his last will and testament, left me sundry negro slaves during my natural life; such of them as are not of age at my death, I leave to the said James Erskine, to be hired out to good masters and mistresses, who will treat them with humanity and kindness, until they severally arrive at age according to law, and to apply the proceeds of such hire to his own proper use and behoof." And the testatrix subjoined a list of the "names of the negroes not of age," six in number, which list she desired should be recorded with her will. James Erskine, the executor named in her will, proved it in the county court of Berkeley in April 1828, and qualified as executor. He took possession of the six negroes mentioned in the list sub-joined to the will of his testatrix as not being of age, and of two others, who were likewise descendants of the parent stock left by the testator M'Coy, and who, though of age at the time of Mrs. Crouch's death, were born after M'Coy's death; so that there were eight negroes born during the continuance of the life estate held by Mrs. Crouch under M'Coy's will.

These eight negroes brought a suit against Erskine, in forma pauperis, to recover their freedom, in the circuit court of Berkeley, claiming that upon the just construction of the will of M'Coy, they were thereby emancipated as well as their parents; and in that suit, the circuit court adjudged that

190 they were slaves, (upon the \*supposition, without doubt, that the principle on which the case of *Maria v. Surbaugh*, 2 Rand. 228, was decided, was applicable to their case); which judgment remained in full force; for upon a petition for a supersedeas to it, presented on behalf of the paupers, this court refused to allow it. *Emory v. Erskine*, 7 Leigh 267.

Whereupon Henry and wife and others, distributees and next of kin of the testator M'Coy, as well as of Thomas and George Fakes, the residuary legatees of that testator, both of whom were now dead, exhibited their bill against Erskine, in the superiour court of chancery of Winchester, setting forth the wills of M'Coy and of Mrs. Crouch, and all the facts above stated: insisting, that the eight negroes born of the parent stock of M'Coy's slaves, after his death and during Mrs. Crouch's life estate, having been adjudged to be slaves, were slaves belonging to the estate of M'Coy; as to which either

that testator was intestate, or they passed by the residuary clause of his will to Thomas and George Fakes; and that, in either view, the plaintiffs were now entitled to them: and praying, therefore, that Erskine should be compelled to deliver them to the plaintiffs, and render an account of the profits, and that the court should decree a division of the slaves and of their profits among the plaintiffs.

Erskine, in his answer, insisted, that taking these negroes to be slaves according to the judgment of the court in their suit for freedom, they were slaves belonging to the estate of his testatrix Mrs. Crouch, having been born of parents who were her slaves at the time they were born, though the parents were entitled to their freedom at her death.

The cause was transferred to the circuit superiour court of Berkeley. And that court, considering that the eight negroes in question had been ascertained to be slaves by the judgment of the court in their suit for freedom, was of opinion, that they were

191 slaves belonging \*to the estate of the testator M'Coy, not to the estate of his legatee for life Mrs. Crouch; and that the plaintiffs were entitled to them as next of kin of Thomas and George Fakes, the residuary legatees of M'Coy. Therefore, the court decreed, that Erskine should deliver up the eight slaves in question, to the administrator of Thomas and George Fakes, and render an account of the profits thereof, in order that division of the slaves and of their profits might be made among the next of kin of those decedents, according to the statute of distributions.

From this interlocutory decree, Erskine by petition to this court prayed an appeal; which was allowed.

The cause was argued here, by Stanard and R. C. Stanard for the appellant, and by Johnson and G. N. Johnson for the appellees.

I. The first question was, whether, according to the just construction and effect of the testator M'Coy's will, the eight negroes in question, born of the parent stock of that testator's slaves after his death and during the lifetime of Mrs. Crouch, the legatee for life, were emancipated or not, by force of the bequest in M'Coy's will, that "at the death of Mrs. Crouch, all his negroes should be free"? The cases of *Maria v. Surbaugh*, 2 Rand. 228, and *Elder v. Elder's ex'or*, 4 Leigh 252, were cited in argument; and the doctrines of the civil law, with respect to the status of persons in the like situation with these eight negroes, were referred to and examined.

II. If, according to the just construction and effect of M'Coy's will, these eight negroes were really entitled to their freedom, whether the judgment that they were slaves, rendered in the pauper suit they brought against Erskine, was conclusive that such was their status? whether the judgment in the pauper suit was conclusive of the point, in this controversy (to which the negroes were not parties) between the plaintiffs

192 in this cause \*(who were not parties to the pauper suit) and Erskine? and whether the judgment in the pauper suit

could be conclusive against the negroes in a future suit between them and Erskine?

III. Supposing these people slaves, whose slaves were they? Were they the slaves of M'Coy's estate, which that testator's will bequeathed, with their parents, to Mrs. Crouch for life, but either made no disposition of them after her death, or bequeathed to his residuary legatees? Or were they the slaves of Mrs. Crouch, of whom their parents were slaves at the time of their birth, though she held but a life estate in the parents?\*

BROCKENBROUGH, J. The principal difficulty in this case, arises from the fact, that the negroes, who are the subject of this suit, were declared to be slaves by the circuit court in a suit brought by them to recover their freedom against Erskine. He held them, I apprehend, under the will of Mrs. Crouch, until they (the negroes) should arrive of age. I presume, he did not claim to hold them as his slaves for a longer period than the one I have mentioned. Mrs. Crouch held all the slaves given to her by M'Coy for her life only; and it would seem from the language of her will, that she supposed, that such as were born after the death of M'Coy, and had not arrived of age at the period of her death, were her own slaves till they should come of age. She devised them for that limited period to Erskine, with directions to appropriate their hires during that time to his own proper use; and, I suppose, it was for that limited period he claimed

193 \*freedom, claiming it not under the will of Mrs. Crouch, but that of M'Coy.

I shall consider, 1. Whether, under M'Coy's will, they were free or not? and 2. Whether, if they are free under that will, the decision of the circuit court in the suit between them and Erskine, is irrevocably binding, so as to make them slaves to the plaintiffs, who were not parties to that suit?

1. Are they free or not? Absolom M'Coy, by his will, gave to Rebecca Crouch all his real and personal estate for her life, and at her death all his negroes to be free. And then he bequeathed, at the death of Mrs. Crouch, to Thomas and George Fakes all his personal estate, except his negroes which were then to be set free and at full liberty. Thus, in the two clauses, giving first a life estate, and at the expiration thereof a remainder, he expressly bequeathed freedom to all his slaves, to take effect at the expiration of the life estate. Who were his slaves? Undoubtedly, not only those in being at the time of his own death, but the children of the females born during the life estate of Mrs. Crouch. Those children were born slaves, because their mothers being then in a state of slavery, their children were in the same state. But they were slaves to the life tenant, only

during her life, and no longer. Nor could they be slaves to the remaindermen at all, because the will expressly excludes all his negroes from being subjects of the gift in remainder. At the termination of the life estate, all his negroes were to be free; but if those born during that life estate are excluded from the operation of the bequest, then all of his negroes will not be free, but some of them will still be slaves. It seems to me, that the right of the child to freedom is identical and contemporaneous with that of the mother; and that when Mrs. Crouch died, eo instanti the will of M'Coy operated to confer freedom on both. These propositions seem to me so plain as not to stand in need of authority; but

194 if \*they do, we have it in the case of *Elder v. Elder's ex'or*. The decision of the court in the pauper suit between these negroes and Erskine, was founded on the authority of *Maria v. Surbaugh*; but I do not think that the cases are alike. In that case, the testator William Holliday had bequeathed to a legatee, a female slave, who was to be free at the age of thirty-one years. She was a slave till thirty-one; and the court decided, that her children born before that period were in the same state as the mother, that is, were slaves; and there was nothing in the will to shew, that the testator intended to extend the bequest of freedom to them at the time the mother was to be free. But, in this case, the testator extended the bequest of freedom to all his slaves, born and to be born.

2. The great difficulty, as I have said, arises from the decision of the circuit court in the suit of the paupers against Erskine, which has never been reversed. It seems to me, that the paupers are not barred by that judgment, as against the plaintiffs in this suit, they not being parties in that suit. The obligatory character of a judgment or decree must be reciprocal. Suppose that the negroes in question had been slaves by the will, and the circuit court had erroneously decided in the suit brought by them against Erskine, that they were free. Such a judgment would not have been binding on the next of kin of T. & G. Fakes, they not being parties to the suit. They might have sued for and recovered them, into whose hands soever they might have fallen; or they might have taken peaceable possession of them, and in a suit for false imprisonment by the paupers against them, the previous judgment in favor of freedom, rendered in the suit against Erskine, would not have availed the negroes. As the next of kin of T. & G. Fakes, in that state of the case, could not have been injured by a judgment between other parties, so neither can they be benefited by the judgment

195 against the \*paupers in their suit with Erskine. It may be, that if the plaintiffs in this case had been parties to that suit, as well as Erskine, the circuit court might have decided differently. Those parties would have been in a belligerent attitude towards each other: it would have been the interest of Erskine to shew, that the Fakeses had no right, and vice versa: and from their contests the court might have discovered, that neither had a right, but that the negroes were free.

\*The counsel for the appellant Erskine very strenuously maintained that these eight negroes were emancipated by M'Coy's will; and that the judgment against them in their pauper suit against Erskine, could nowise avail the plaintiffs in this cause, nor could it conclude the negroes in a future contest with Erskine himself.—Note in Original Edition.

But it was argued, that as this is a case in which the negroes are not parties, they must be here looked on as property, having been declared to be slaves; and that all we have to do is to decide, which of the present parties has the best right to the property. I do not think so. The plaintiffs are bound to shew, that they have a complete right; and if the defendant can shew, that the plaintiffs have no right, they cannot succeed, though the defendant defeats his own right. He has the possession, and must hold it against those who have no right.

It is proper that we should arrive at this result, to prevent circuitry of actions. If the plaintiffs in this suit could recover possession of the negroes against Erskine, the negroes might immediately institute proceedings in forma pauperis against the present plaintiffs, and as the former judgment would be no evidence against them, they would recover their freedom. We ought not to encourage this kind of litigation.

It has been said, that the rights of the negroes will be placed in jeopardy by this decision; for as Erskine holds them, and has a decree in his favour, they can never recover their freedom against him. I do not know that such will be the result. The record of the suit for freedom is not before us, but from what can be gathered of its contents from the proceedings in this suit, I apprehend, that the only claim Erskine had against the negroes, was, that they were his property until they should arrive at the age of twenty-one, till which time,

196 \*under Mrs. Crouch's will, he was to hire them out, and apply the proceeds to his own proper use. The declaration of the court that they were slaves, seems to be an assertion of a mere abstract proposition, not applicable to the dispute then carrying on between the negroes and Erskine. That declaration is not the decree of the court, but is the reason on which the decree is founded. If this be so, Erskine's right over the negroes ceases as soon as they become of age.

But however this dispute may be settled as between them and Erskine, I am satisfied, that the plaintiffs have shewn no right to recover them as slaves; and therefore I am for reversing the decree, and dismissing the bill.

TUCKER, P. This case has been most learnedly and elaborately argued on many interesting points. According to my view of it, however, it lies within a narrow compass. The testator Absalom M'Coy, by the residuary clause in his will, bequeathed to Thomas and George Fakes, after the death of Mrs. Crouch, all his personal estate (except his negroes who were then to be free) to be equally divided between them. Here, it is first to be observed, that there was nothing left undisposed of, and if there were any of his negroes not free, they must go to the residuary legatees, and not to the next of kin; for it is clear, that every thing except the emancipated negroes was to go to them. Secondly, the residuary clause having ex-

pressly excepted emancipated slaves from the residuum, the rights of the legatees are to be determined by the question, whether the slaves they claim title to were or were not free: if slaves, they belong to them: if free, they are excluded from the residuum, and therefore do not belong to them. The court, therefore, cannot decree without deciding whether the negroes claimed are free. Since on that identical question depends the question whether they are included in the residuary clause.

197 \*Now, as to this I have no doubt.

The testator bequeathed all his slaves to Mrs. Crouch for life, and at her death all of them to be free. Did the increase of the slaves belong to him? Of this there can be no question. Who can doubt, that the slaves born after a testator's death, in Virginia, constitute part of his estate, and are a part of the distributable subject after payment of debts? Such things are of daily occurrence. It is probable, there is not a slave estate in Virginia, which is not increased by births between the testator's death and distribution. Whose are they? Part of his estate; for they are subject to his debts, before distributees or residuary legatees can claim them. Being his property, we must next inquire, whether this testator emancipated the increase by his will or not? And here it must be observed, that the words are broad and general. He declares that at Mrs. Crouch's death all his slaves shall be free. This includes the increase, unless we suppose, that he confined himself to the slaves then in being. But for this there seems no reason or motive. It is obvious that he designed to exonerate from slavery every one bound to him by that tie. Why exclude the increase? I cannot perceive. Moreover, where the testator gives the mothers for life, with remainder over, the increase passes to the remainderman, though not named. *Ellison v. Woody*, 6 Munf. 368. And if a testator were to give all his slaves to A. that bequest would embrace those born after his death, not merely as accessory to their mothers, but substantively, and by virtue of the generality of the bequest. Accordingly, in *Elder v. Elder's ex'or*, it was expressly so decided. There, the testator, after devising freedom to Clara and her increase, declared it to be his will that "the remaining part of his negroes" should be sent to Liberia; and these words were held to embrace, and effectually to emancipate, the increase.

Judge Carr said, "If these children 198 were born slaves, they were the \*slaves of the testator, and come within the bequest, as well as their mothers." Judge Cabell said, "I think the children born since the death of the testator are entitled to their freedom, equally with their mothers. If they were born slaves, they were the slaves of the testator, and passed by the will, to be sent to Liberia." Judge Brooke concurred. I added, "The increase were born slaves, as their mothers are yet slaves; but they fall as fully as their mothers, within the general expression 'the rest of my negroes,'

and of course are equally the objects of the trust." That case is decisive of the question here. The increase of M'Coy's female slaves were emancipated by his will; and if so, they did not pass to the plaintiffs as their property.

But it was objected, that by a final and irrevocable decision between the negroes and Erskine, they have been declared slaves, and that this court refused to allow a supersedeas to that judgment. Let me here express my deep regret at that refusal. It was anterior to the case of *Elder v. Elder's ex'or*, and was presented as a case decided upon the authority of *Maria v. Surbaugh*. No distinction was drawn in the petition, or even suggested, between the two cases; and, for my own part, I confess my mind did not take that direction in considering the subject. Considering *Maria v. Surbaugh* as unassailable, and looking to the paupers' claim as being rested on their right to freedom because their mothers were free, I thought the case was not such as to justify the award of a supersedeas. I am now satisfied of the error, and if it were within our power, I should heartily concur in the reversal of that judgment.

To return, however, to the case. It can have no influence here, either on the ground that it is *res adjudicata*, or on the ground of authority. The circuit superior court very properly looked upon it as authority, and I think the judge was fully warranted in his decree in this case. But though 199 authority for him, it is not so \*for us, when we see our error. Nor does it bind in this case, as *res adjudicata*. As *Erskine* could not use it against the plaintiffs, because they were not parties, so neither can they use it against him; for mutuality is the governing principle in such questions. The pauper suit is out of the question.

But it was said, if on this ground the legatees fail and their bill is dismissed, the decree will operate to give the negroes to *Erskine*, who may continue to hold them as slaves, because the verdict and judgment are conclusive that they are slaves. I think not—and, certainly, hope not. The dismissal of the plaintiff's bill upon the ground that the negroes are free, cannot have the effect of adjudging them to *Erskine*. It will leave them, indeed, in his possession, if he still has them; which seems at least doubtful, from the testimony taken upon the rule made some time since in this cause; see *Erskine v. Henry*, 6 Leigh, 378. But if he has the possession, I do not think the former judgment would be a bar to a new action: 1. because a new case may be made at law, by proof of assent of M'Coy's executor, without proof of which they could not have succeeded in the former case; and 2. because *Erskine* having no pretence of ownership, the former action could not determine their rights; and if they could have had no benefit from its successful issue, they ought not to be affected by its unfavorable termination.

CABELL, J., concurred in the opinion of the president.

Decree reversed, and bill dismissed.

## 200 \*Lee & Others v. The Bank of the U. States.

February, 1838, Richmond.

(Absent BROOKE and PARKER, J.)

### Postnuptial Settlement\*—Separate Real Estate—Case at Bar.

By postnuptial deed of settlement (reciting that husband had sold his wife's estate, and she had joined him in conveyances thereof, under a promise from him to settle an equivalent on her, therefore) husband conveys real estate to a trustee, 1. to the separate use of wife for life, unless she should, in writing under her hand, direct trustee to sell and convey the whole or any part of trust subject, in which case he should hold the proceeds of sale subject to the separate use and order of wife; 2. after wife's death, to the use of husband for life; and 3. after husband's death, to and for the use of the devisees or heirs of wife, to be divided and conveyed to them in such portions as she shall by will direct, or the law of the land in that case made and provided shall determine. By mortgage afterwards executed by husband and wife (the wife duly joining, but the trustee in the settlement nowise joining, in the same) the same real estate is mortgaged to creditors of husband to secure a just debt due from him—HELD,

1. *Same—Same—Wife's Power of Disposition.*—That under the deed of settlement, the wife has full power to dispose of the whole estate in the trust

\**Postnuptial Settlement—Subsequent Relinquishment of Dower—Presumption.*—Where a deed of settlement, on its face, purports to be in consideration of the wife's releasing her dower interest in the other lands of the husband, the subsequent relinquishment, made by the wife, will be presumed to be made in reference to, and on the faith of, the previous settlement, and no distinct and independent proof of a previous agreement is necessary. *Strayer v. Long*, 86 Va. 561, 562, 10 S. E. Rep. 574, citing principal case. See further, on this subject, *foot-note* to *William and Mary College v. Powell*, 13 Gratt. 372.

†*Wife's Separate Estate—Power of Disposition.*—In regard to her separate personal estate and the rents and profits of her separate real estate, the wife may exercise the power of disposition, if it be unrestrained, in the same way by deed, will or otherwise, as if she were a *feme sole*; but, in regard to the corpus of separate real estate, it can be disposed of only in such mode, if any, as may be prescribed by the instrument creating the estate, or, unless prohibited by such instrument, in the mode prescribed by law for the alienation of real estate of married women. *Burgin v. McDowell*, 30 Gratt. 244, citing principal case, and *McChesney v. Brown*, 25 Gratt. 393. This is a well-settled principle of law. *Justis v. English*, 30 Gratt. 571.

But, in Virginia, the right to restrain or interdict the power of the wife to dispose of her separate estate has been expressly recognized and affirmed in several cases. *Nixon v. Rose*, 12 Gratt. 431, citing the principal case, *West v. West*, 3 Rand. 873, *Vizonneau v. Pegram*, 2 Leigh 183, and *Williamson v. Beckham*, 8 Leigh 20. To the same point, see the principal case cited in *Radford v. Carwile*, 13 W. Va. 662.

*Same—Alienation of.*—In *Norvell v. Hedrick*, 21 W. Va. 523, 528, real estate was conveyed to a trustee for the sole use of a married woman, with power to said trustee, upon the written request of said mar-

subject, by deed in her lifetime, duly executed by her husband and her according to the statute of conveyances, as well as by will; and, therefore,

2. **Same—Same—Same.**—That the mortgagees are entitled to have the whole estate in the trust subject sold for satisfaction of their debt.

By deed dated the 11th May 1811, and duly recorded, between Richard Bland Lee of the first part, Zaccheus Collins of the second part, and Elizabeth Lee wife of the said Richard Bland of the third part,—reciting, that Mrs. Lee had joined her husband in deeds of conveyance of two several parcels of land to several purchasers thereof, to whom he had sold the same for a sum exceeding 25000 dollars, that the "sole" interest of Mrs. Lee in the lands so sold and conveyed, was equal in value to at least 22000 dollars, that Mrs. Lee had joined her husband in the conveyance of those lands, under his promise and agreement that she should  
201 \*receive an equivalent in lieu of the property so sold and conveyed, in other property to be conveyed and settled to her separate use, and that the husband was now bound by his said promise and agreement to convey to and for the separate use of the wife, property to the value of 11900 dollars, having already settled property to the value of 10100 dollars,—therefore, the said Richard Bland Lee, in consideration of his said promise and agreement, and of five dollars paid him by the said Zaccheus Collins, conveyed to Collins, his

heirs and assigns, a tract of 880 acres of land in the county of Fairfax,—“in trust for the following uses, namely, 1. to and for the separate use of the said Elizabeth Lee during her natural life, unless the said Elizabeth Lee shall, in writing under her hand, direct the said Zaccheus Collins, his heirs or assigns, to sell and convey the whole or any part of the before described tract of land, in that case the said Zaccheus Collins, his heirs or assigns, to hold the proceeds of such sale or sales subject to the separate use and order of the said Elizabeth Lee; 2. after her death, to and for the use of the said Richard Bland Lee during his natural life; and lastly, after his death, to and for the use of the devisees or heirs of the said Elizabeth Lee, to be divided and conveyed to them, in such portions as the said Elizabeth Lee shall by last will direct, or the law of the land in that case made and provided shall determine.”

By deed, dated the 16th June 1825, between the same Richard Bland Lee and Elizabeth his wife of the one part, and Richard Smith of the other, Lee and wife conveyed the same tract of land mentioned and settled in and by the deed of the 11th May 1811, to Smith, upon trust that he should sell the land and apply the proceeds of sale to the payment of a debt due from Richard Bland Lee to the bank of the U. States at its office at Washington. This deed stated, that Mrs. Lee had a fee  
202 simple estate in the land, subject to her husband's \*life estate therein, and contained covenants of general war-

ried woman attested by a credible witness, to sell and convey the same in fee simple to any person she might designate by the writing aforesaid. In pursuance of such written request by the married woman, the trustee conveyed the said real estate by trust deed to secure the payment of a note executed by the married woman. On the authority of the principal case, it was held that the said conveyance by the trustee operated as a grant from the original grantors, and not as a grant from the married woman; and, therefore, that no privy examination, joinder of the husband, or other formality, not mentioned in the deed creating the power, was necessary.

**Same—Mode of Alienation When One Mode Prescribed.**—The question whether, where the instrument creating a wife's separate estate prescribes a mode of disposing of it, the prescribing of that mode, without negative words, is to be construed as intended to exclude any other, on the principle of the maxim, *expressio unius est exclusio alterius*, has been referred to by several cases, decided subsequent to the principal case, as an unsettled question. See *Justis v. English*, 30 Gratt. 565, 571, and *foot-note*; *Nixon v. Rose*, 12 Gratt. 432; *Frank v. Lillienfeld*, 33 Gratt. 395, all citing the principal case. The maxim seems to have been applied in *Williamson v. Beckham*, 8 Leigh 20, and rejected in the principal case and in *Woodson v. Perkins*, 5 Gratt. 345. *Frank v. Lillienfeld*, 33 Gratt. 395; *Nixon v. Rose*, 12 Gratt. 432; *Christian v. Keen*, 80 Va. 573; *foot-note* to *Justis v. English*, 30 Gratt. 565.

In *Christian v. Keen*, 80 Va. 360, 374, the court, after quoting at some length from the opinion of JUDGE CABELL in the principal case, says: "It is to be observed that that case (*Lee v. Bank of the United States*) arose before the passage of the statute

allowing a married woman to devise her separate estate, and was heard by three judges only, one of whom, JUDGE TUCKER, dissented. But in the later case of *Woodson v. Perkins*, 5 Gratt. 345, the same doctrine, it would seem, was held in the unanimous opinion of the court, delivered by JUDGE ALLEN. It is true that in some of the cases subsequent to the one last mentioned, the question is referred to as 'still unsettled.' But after all, it is a question of construction, to be determined on the particular facts and circumstances of each case, remembering that while in the creation of a separate estate, restrictions on the power of alienation, express or implied, may be imposed, the intention to do so must, in either case, be clear. *Bain & Bro. v. Buff*, 76 Va. 371; *Frank & Adler v. Lillienfeld*, 33 Gratt. 377; *Finch v. Marks*, 76 Va. 207." In this case it was held that the principle affirmed in *Lee v. Bank of the United States*, was decisive of the question before the court (p. 376). Again, in *Price v. Planters' Nat. Bank*, 92 Va. 473, 23 S. E. Rep. 887, it was held that where the instrument creating the separate estate prescribes one mode of alienation by the wife, the prescribing of that mode is not to be construed as an intention to exclude alienation by her in any other manner, unless an intention to do so can be clearly gathered from the face of the instrument. The court cites the principal case; *Woodson v. Perkins*, 5 Gratt. 345; *Frank v. Lillienfeld*, 33 Gratt. 377; and *Christian v. Keen*, 80 Va. 360, as authority for its decision, and cites Mr. Burks as holding this rule to be in accord with the decided weight of authority both English and American. To the same effect, see the principal case cited with approval in *Smith v. Fox*, 83 Va. 768, 1 S. E. Rep. 200 (in this case, the court said that the question under discussion in this note must be considered as settled in Virginia); *Radford v. Carwile*,

ranty, against incumbrances, and for further assurance. And the deed was executed by mrs. Lee with her husband, and duly acknowledged by her, on privy examination, before justices of the peace of the county of Washington in the district of Columbia, by whom her privy examination and acknowledgment were duly certified to the clerk of the county court of Fairfax, and the deed, with the privy examination and acknowledgment of the wife, was thereupon duly recorded.

In 1833, the trustee Smith having advertised the land for sale, under the deed of June 1825, for the payment of the debt due the bank of the U. States, a bill in chancery was exhibited in the circuit superior court of Fairfax, by Elizabeth Lee, widow of Richard Bland Lee who was now dead, and her four children by her late husband, against the president, directors and company of the bank of the U. States, and Smith their trustee, setting forth the deed of May 1811, under which the plaintiffs claimed, and that of June 1825, under which the bank claimed; alleging, that the deed of May 1811 conveyed only a life estate to mrs. Lee, with remainder to her husband Richard Bland Lee for his life, and remainder to their children in such proportions as the wife should by will direct and appoint; that the deed of June 1825, in effect, conveyed only the contingent life estate of Richard Bland Lee under the deed of May 1811, and was ineffectual to any other purpose, because the trustee Collins, appointed by the deed of May 1811 to protect the rights and interests of the feme covert, had not joined in the deed of June 1825, or any way assented thereto; and that the doubts respecting the title would cause a great sacrifice of the property if a sale thereof should be made before those doubts were removed. Therefore, the bill prayed an injunction to inhibit Smith, the trustee, from proceeding

to sell the land under the deed of June 1825, and general relief.

203 \*The injunction was awarded.

The defendants, in their answer, controverted the claims of the plaintiffs as to the effect of the deeds, and insisted, that Lee and his wife having joined in the deed under which the bank claimed, the whole equitable estate in the property was by that deed effectually mortgaged to the bank. They added, that the sale had been postponed for several months at the instance of one of the plaintiffs; and it was not until the sale was advertised, that the defendants had any actual knowledge of the deed of May 1811. And they demanded proof of the reality of the consideration recited in that deed.

The two deeds were exhibited. There was no other evidence in the cause.

The court, on the motion of the defendants, dissolved the injunction. And from that order, this court, upon the application of the plaintiffs, allowed them an appeal.

The cause was argued here, by Carter, Robertson and Cooke for the appellants, and by Stanard for the appellees, very elaborately, and with great learning and ability, as the reporter was informed, for he was not present. The opinion of the judges will sufficiently explain the principal points of argument at the bar, as well as the grounds of decision.

CABELL, J. The question in this case, depends on the construction and effect of the deed of May 1811, executed by Richard Bland Lee to Zaccheus Collins, conveying to Collins and his heirs the tract of land in Fairfax, in trust for the uses therein declared. What interests and powers did the declaration of uses create?

1. Mrs. Lee had an express estate for life for her separate use. 2. She had power, by writing under her hand, to direct the trustee to sell and convey the land or any part of it; the proceeds of sale to be subject to her

204 separate use or order; a power which she might have exercised the day after the execution of the deed, and in the lifetime of her husband. I understand that clause as giving to mrs. Lee absolute and uncontrolled dominion over the proceeds, to her separate use, unaffected by any of the subsequent limitations in the deed. 3. At the death of mrs. Lee, the land, if not previously sold by her direction, was to be held by the trustee, to and for the use of Richard Bland Lee during his life. Thus far there seems to be no room for doubt. The difficulty commences with the next clause, which prescribed the destination of the property after the death of Richard Bland Lee, in case he should survive his wife, and which declared, lastly, that "after his death, it was to be held to and for the use of the devisees or heirs of the said Elizabeth Lee, to be divided and conveyed to them in such portions as the said Elizabeth Lee should by last will direct, or the law of the land in that case made and provided should determine." This clause is most inartificially drawn; but it is manifest, that it was the intention of the grantor, not only to give mrs. Lee the power of appointing those who should succeed to the property after her death and that of her husband, but further, to prescribe

18 W. Va. 651; Weinberg v. Rempe, 15 W. Va. 861, 862; Hughes v. Hamilton, 19 W. Va. 302.

In Radford v. Carwile, 13 W. Va. 649 *et seq.*, the court, after discussing at some length the decisions of Williamson v. Beckham, 8 Leigh 20; West v. West, 3 Rand. 373; Vizonneau v. Pegram, 2 Leigh 183; Lee v. Bank of the United States, 9 Leigh 200; Woodson v. Perkins, 5 Gratt. 345; Nixon v. Rose, 12 Gratt. 431, says (p. 653) that the weight of authority is decidedly in favor of the position, that where property is settled to the separate use of a married woman, she is to be regarded as a *feme sole* as to that property, and she may dispose of it in any manner she pleases, unless specifically restrained by the instrument, under which she takes the property; and, although a particular mode of disposition is pointed out in the settlement, it will not preclude her from adopting another mode of disposition, unless there are negative words restricting her power of disposition except in the mode pointed out. In support of this proposition a long list of cases are cited. Continuing, the court said: "Since the decision of Woodson, trustee, v. Perkins, 5 Gratt. 345, I can hardly think, that the Virginia courts can sustain the views expressed by JUDGE TUCKER in Williamson v. Beckham, 8 Leigh 20." See further on this subject, monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

the persons to whom it should go, in case she should fail to make such appointment. Such a provision, in case of Mrs. Lee's failure to appoint, was absolutely necessary to the disposition of the inheritance; for without such provision, there having been nothing but life estates granted by the deed, the fee or inheritance would have resulted to the grantor. Both of these objects, the power of appointment by the wife, and the destination of the inheritance in case she should fail to make an appointment, might have been directed so as to leave no doubt on the subject, if the draughtsman of the deed had used two separate simple clauses for expressing the intention of the grantor. But he resorted to

205 thus "labouring to be concise, he became obscure." Obscurities of this

sort, however, may often be removed by reducing the sentence to its original elements; by dividing the compound sentence into the simple parts of which it is composed, and throwing into each part that which properly belongs to it. Let us try this process. The estate is to go to Mrs. Lee's devisees or heirs: the devisees of Mrs. Lee are the persons whom she prescribes to be such by her will; her heirs are the persons prescribed by the law to take her estate in case she makes no will. Her devisees, or her heirs, are to take the estate in such portions as Mrs. Lee shall direct, or as the law shall prescribe: that is, her devisees are to take in such portions as Mrs. Lee may direct by her will; or, in case there be no will, and consequently no devisees, then her heirs are to take in such portions as the law shall determine. It would be preposterous to say that the heirs of Mrs. Lee should take as heirs, in such portions as she should direct by her will; for if they take under her will, and in portions directed by her, they are devisees or appointees, and not heirs. If we reduce this sentence to its component parts, assigning to each what properly belongs to it, all difficulty will vanish; for then it will run thus: after the death of Richard Bland Lee, to and for the use of the devisees of Mrs. Lee, to be divided and conveyed to them in such portions as she shall by her last will direct: or in case she shall fail to give such direction by her will, then the property is to go to her heirs, in such portions as the laws of the land may determine. If the deed had been in that form (as I conceive it is in substance) then it would be clear, that there would have been an express estate to Mrs. Lee for her life, remainder to her husband for life, remainder to such persons as she should appoint by her will, remainder, in default of such appointment, to the right heirs of Mrs. Lee. And,

206 in that case, the remainder limited to the heirs of Mrs. Lee, \*would, under the operation of the rule in Shelley's case, have vested in her; so that she would have the whole estate, subject only to her husband's life estate, with an express power to convey the estate by her will.

Having thus ascertained the meaning of the limitations of this deed, let us now proceed to the main question in the cause, whether the express power to devise the estate, took

from Mrs. Lee the power to convey it by deed in her lifetime? I am of opinion that her power is not thus restricted.

We must bear in mind, that real and not personal property is the subject in controversy; for the law, as it relates to the power of the wife over her separate estate, is different, in many respects, when applied to real, from what it is when applied to personal estate; as I shall hereafter have occasion to shew.

By the common law, it is a fundamental principle, that the sole deeds of a feme covert are void. Perk. § 6; 2 Roper on Prop. 98. It follows, therefore, that she cannot, without the concurrence of her husband, part with or encumber her own freehold estate. And this principle is, from the policy on which it is founded, applicable to the wife's separate estate, settled or limited by deed or otherwise to her separate use. The *jus disponendi*, however, is incident to the idea of property; and, therefore, when real estate is limited to the separate use of the wife, although she cannot dispose of it by her own sole act, yet she may part with it by fine or recovery in England, or by deed in this country, her husband joining with her in the deed, and she being privily examined according to our statute, even although nothing be said in the deed creating the separate estate, as to the power of the wife to dispose of it. And it is to these modes of conveyance, where her husband joins with her, and to these only, that the remarks of the judges are applicable, when they say,

207 that the wife may dispose of her separate real estate, in cases \*where the deed creating it is silent as to the power of disposing of it. For it has been solemnly decided, that the wife cannot, in such cases, dispose of it by will. *West v. West's ex'ors*, 3 Rand. 373. But it is competent to the grantor of real estate in trust for the separate use of a feme covert, to give her power to dispose of it by either deed or will; and then she may dispose of it, accordingly, by her own sole act. It is competent to him, also, to restrain the power of alienation, by confining it to some particular mode, or by interdicting it entirely. And I am of opinion that this may be done either expressly, or by necessary implication. For, *cujus est dare, ejus est disponere*. But, as I before observed, the law is different, in some respects, as to the power of the wife over her separate personal estate. Thus, it is unquestionable, that the mere grant of separate personal property, without any thing being said as to the power of alienation, gives her such absolute dominion over it, that she may dispose of it by her own sole act, in any manner that she pleases, as if she were a feme sole. It is not necessary, in this case, to inquire into the reason of this difference; and I mention it, merely because I may hereafter have occasion to refer to it by way of illustration. With these general principles in view, let us proceed to the main question in this case, whether the power expressly given to Mrs. Lee to convey the estate by will, necessarily precludes her from conveying it in any other way?

It is true, that if the power given to the



wife was a mere power, unconnected with any interest in the estate which she was empowered to convey, the power could be exercised only in the mode prescribed. But here, the wife was entitled to the whole estate, subject only to the life estate of her husband in case he should survive her; and we have seen, that she might convey her interest in the estate, by fine and recovery in England,

or by deed properly executed under our statute, \*even if no power to convey had been expressly given by the deed creating her separate estate. She could not, however, in such case, dispose of the estate by her will; *West v. West's ex'ors*, before cited. But, in the case before us, she is expressly authorized by the deed creating the estate, to dispose of it by her will. Now, I cannot perceive the force of the argument, which infers diminution of power from its extension. I cannot perceive how the express grant of a power, which the wife without such grant had not, can be made to take from her a power which she had, without a grant, and independent of the grant.

But it was contended, that the grant of a power to convey in one mode, indicates an intention to prohibit all other modes of alienation; on the principle that *expressio unius est exclusio alterius*. This is the great argument relied upon, in cases of separate personal property; and there may be some plausibility in it, when applied to such property. We have seen, that where personal property is the subject, the mere grant of a separate estate, nothing being said as to the power of disposition, gives to the wife the power of alienation in any mode she may please, as if she were a feme sole. It might, therefore, be said with some appearance of reason, that the express grant of a power which the wife would have had without the express grant, indicates an intention to confine her to that power; since the express grant would otherwise be supererogatory. How far this argument may be conclusive in cases of personal property, it is not necessary to decide in this case; for this is a case of real estate. I will observe, however, that there has been some conflict of opinion, among the judges of the english courts, upon the force of this argument when applied to personal property; and I am decidedly of opinion, that the weight of authority is against the argument. But be that as it may—and admitting that *expressio unius est exclusio alterius*, \*when personal estate is

subject, I think that the argument founded on it, when applied to real estate, fails to prove that which it is adduced to prove. Let it be remembered, that a feme covert is under a legal disability to convey, by her own sole act, in any form, her separate real estate, in cases where the instrument giving her the estate is silent as to the power of alienation. The express grant of a power to convey the estate, in one particular form, is therefore nothing more than a dispensation from one species of disability; and if there is any force in the argument founded on the maxim *expressio unius est exclusio alterius*, its sole tendency is to exclude the dispensation, from all other disabilities; and,

therefore, to leave all other disabilities in full operation. But the implied or even express permission of existing legal disabilities to remain in force, is no proof of intention to take away existing legal rights; one of which, in the case of a married woman, is the right to convey her separate real estate, with the concurrence of her husband.

There is, moreover, internal evidence in the deed before us, that in giving mrs. Lee power to dispose of the estate by will, it was not the intention of the grantor to exclude the power to convey by deed: for, in the very first clause of the deed declaring the trusts, power is expressly given to mrs. Lee to direct the trustee to sell the estate; and in case of a sale, the trustee is to hold the proceeds subject to her separate use and order. This circumstance has another most important bearing. It deprives this case of the force of the argument most commonly used in similar cases; namely, that the express power to dispose by will, shews an intention in the grantor to continue the estate in the wife during her whole life, and thus to guard her against the improvident conveyances which she might be induced to make through the solicitations or improper influence of her husband. For here, the wife not only has the power to \*dispose of the estate by her will, but she has the express power to sell it at any time during the coverture. This view of the subject, in my humble judgment, is absolutely conclusive of the case.

So much on the ground of principle. How stand the authorities? I have carefully examined a vast number, I may say almost all, of the english decisions; and I have not found one, in which it has been held that the mere grant of power to appoint by will, takes from the wife the power to convey her separate real estate by fine and recovery. The only case which even looks that way, is the case of *Parke v. White*, 11 Ves. 209. That was the case of an antenuptial settlement, making (among other things) provision for the children of the marriage. The property was conveyed to a trustee, to permit the wife to receive the rents and profits, during her life, to her sole and separate use; and from and after her decease, in trust for such person or persons as the wife should by her last will in writing limit and appoint; and in default of such appointment, then to the use of the children of the marriage; and in default of issue, then to the use of the right heirs of the wife. The husband and wife sold the estate by fine. Lord Eldon confirmed the sale as to the life estate of the wife, and also as to her ultimate remainder in fee; but set it aside as to the remainder to such persons and uses as the wife should appoint by will, and also as to the children who were to take in default of appointment. He said, that the wife being authorized to appoint by will, shewed an intention in the grantor, that the trustee should so hold the estate as to enable the wife to appoint at any time during her life. But it is to be observed, that the power to appoint by will was not the only ground of the decision. The children of the wife were regarded as purchasers; and they were to



take as such, in default of appointment by will. Well, therefore, might it be said in that case, that the grantor, having  
 211 \*regard to the interests of the children, did not mean that those interests should be defeated by any other means than those prescribed in the deed. This case, therefore, is no authority for one, in which there is nothing from which to infer intention, except the power to the wife to dispose of her own estate by will.

But it was contended by the counsel for the appellants, that if all other grounds fail, this case must be ruled by that of *Williamson v. Beckham*, 8 Leigh 20. They say, that case is identical with this, and that it was decided against the power of the wife to convey by deed, on the sole ground that it was expressly provided by the deed of settlement, that the wife might appoint by will. I have most carefully examined that case, and I have come to a very different conclusion; that it is materially different from this, and that, consequently, it ought not to influence our present decision. That was an antenuptial settlement, conveying both real and personal estate; but the controversy related to real estate only. The deed of settlement conveyed the property to Gallaher, in trust to permit the wife to receive and enjoy all the interest and profits of the real estate, and the free and absolute disposal of the personalty, as fully and as freely as if the wife were a feme sole; and then came these clauses: "And should the said Ann A. R. Stevenson" (the intended wife) "survive the said Fountain Beckham" (the intended husband) "the said property hereby conveyed shall be at her full and absolute disposal. And the said Ann A. R. Stevenson shall, at all times after her intermarriage with the said Fountain, have the power, by a written instrument under her hand and seal, and attested by three or more witnesses, in the nature of an appointment of a will and testament, to dispose of the said property, real and personal, to whomsoever she may please, as fully as if she were a feme sole; and in default of such appointment, all the said property shall descend to her  
 212 lawful heirs or representatives." \*The husband and wife, shortly after the marriage, joined in a deed duly executed according to our statute, conveying the land to Williamson. And the question was, whether Beckham and wife had power to convey the land by deed? This court decided that they had no such power. Let us examine the terms of these limitations, for the purpose of ascertaining with precision, not only the powers given to the wife, but the times when it was intended they should be exercised. These powers, so far as they relate to the real estate, are to be found in the two clauses I have quoted. The first of those clauses gives to the wife a contingent interest in fee, depending on the contingency of her surviving her husband; and it declares, that should she survive him, the property shall be at her full and absolute disposal. This clause gives to the wife the absolute and unlimited power of alienation, to be exercised, however, after the death of the husband. The next clause, immediately following and

in juxtaposition with the first, gives the wife a special power; the power to appoint by will. This special power was intended to be exercised by the wife during the life of the husband; for, although the words are in themselves general, that she should have the power to appoint by will, "at all times after her intermarriage," yet it is manifest, that the grantor meant all times after the marriage and before the death of the husband; for he had, in the sentence immediately preceding, already given her absolute and unlimited dominion over the property after the death of the husband. Here, then, was a grantor giving powers to be exercised and enjoyed at different times and under different circumstances; the first, to be exercised after the death of the husband, and of course after the termination of the coverture; the second, to be exercised during the life of the husband and during the existence of the coverture. And these powers are given in clauses in juxtaposition, and, as I may say, in the  
 213 same breath. \*The first clause gives general and unlimited power; the second gives a special power to appoint by will. Could there be a doubt, under such circumstances, that the grantor intended to grant, by the second clause, nothing more than the power specially given? If he had intended that the grantee should have general powers, would he not have said so? As he had already done in the first clause, where it was clearly his intention to give general powers. This marked change of phraseology, shewed most manifestly a difference of intention. It shewed as clearly to my mind, that, in the second clause, he intended to exclude all other modes of alienation, as if he had used express terms of positive exclusion. Well, therefore, might the court say, in *Williamson v. Beckham*, that quoad that case, *expressio unius est exclusio alterius*. In this respect, that case differs essentially from this; for here, although there is a power given to dispose by will, yet there is also an express power given to dispose by deed. That case was well decided, on this ground; but has no application to this.

There is also another marked difference in the case of *Williamson v. Beckham*. There, the wife had a contingent interest depending on the event of her surviving her husband. And it has been decided in England by sir W. Grant, in two cases (*Richard v. Chambers*, 10 Ves. 587, and *Lee v. Muggeridge*, 1 Ves. & Beam. 118,) that the wife has no power, during coverture, to part in any way with such an interest, unless she has stipulated for power to do so. Both of these cases were referred to in *Williamson v. Beckham*: and if that was the ground of decision in that case, it is not for me, now, to inquire into its propriety or impropriety. It is sufficient to say, that no such circumstance exists in this case. That decision, therefore, whether right or wrong, has nothing to do with the case before us.

I am of opinion, that the decree should be affirmed.

BROCKENBROUGH, J., concurred.

214 \*TUCKER, P. According to my view of this case, it lies within a nar-

row compass, depending very much upon the construction of the residuary clause of the deed of May 1811, and steering clear of the doubtful question which has been so much argued, and which is supposed by the counsel for the appellants to have been settled by the case of *Williamson v. Beckham*, 8 Leigh 20. Let us see, then, what is the true construction of the deed.

The legal title having passed by the deed to Zaccheus Collins, the trustee, all the limitations of the instrument must of necessity be trust estates. And if, as has been contended, the limitation over to the use of the devisees or heirs of the wife, is not a designation of the persons to take as purchasers, there can be no doubt, that that limitation enured to vest in her the remainder in fee. For both the life estate and remainder being of the same character, the rule in *Shelley's case* applies, and vests the remainder in the ancestor, instead of the heirs as purchasers. Nor would it be an objection to this construction, that this is the case of a trust; for trust estates are as much within the influence of the rule as legal estates, although in the case of articles, and of executory trusts, the court always moulds them according to the intention, without reference to the rule. The case of *Bagshaw v. Spencer*, 2 Atk. 583. in which lord Hardwicke denied, or was supposed to have denied, the distinction between executed and executory trusts, was, as to that matter, soon contradicted, and has long since been overruled. *Wright v. Pearson*, Amb. 358; *Jones v. Morgan*, 1 Bro. C. C. 206; *Butl. Fearn* 114, 132, 3. I shall not therefore, in my construction of this instrument, rely upon the nature of the interest being equitable instead of legal. But I think it plain, that the words "to the use of the devisees or heirs of the wife," are to be taken as words of purchase, and not as words of limitation. They

do not, indeed, as was contended  
215 \*by Mr. Cooke, necessarily designate the children as purchasers, for if she should have no children, her collateral heirs would still take under the designation of heirs. But neither her children nor her collateral heirs could ever take by inheritance, since, by the express provisions of the deed, they are to take in such portions as she should direct. If, then, she were to make a will, directing that A. should take a double portion and B. should take a half portion, they must take accordingly; and, in that event, they obviously could not take as heirs, but could only take as beneficiaries under the deed, that is, as purchasers. It is true, that in default of the direction, the estate is to be divided and conveyed "as the law of the land in that case made and provided shall determine;" but that is nothing more than to adopt the principle of equity, that where no appointment or direction is made under a power, equality shall be the rule. To say the least, here is a contingent limitation to those who at her death may be her heirs; and she therefore has but a life estate in the property. The case, then, comes within the conceded principle, that where there is a contingent limitation over, the wife cannot by her conveyance effect or destroy it.

My brother Cabell thinks, that the limitation in default of appointment, is to heirs as such, and not as purchasers. I cannot think so. It is quite clear, that if there be an appointment of the portions which they are to take, they must take as purchasers. Was it designed that they should in one clause be considered as purchasers, and not so in the next? The word is used but once, and it is clearly there used as a word of purchase; can it have another and opposite signification in the dependent clause? Can it mean both? I think not, because, in either event, the estate is to be divided and conveyed to them by the trustee. Admit that the words were, that the estate was limited over to the heirs, to be divided and conveyed to them in such portions as the law shall determine,  
216 \*still they must take as purchasers; for the estate is to be conveyed to them, and divided among them before it is conveyed; all which is inconsistent with the notion of inheritance in parcenary. I adhere, therefore, to the opinion, that the words, "as the law of the land in that case made and provided shall determine," mean that, in default of apportionment by Mrs. Lee, the property shall be divided and conveyed to the heirs, in such portions, as, in default of apportionment among a class who are to take, the rules of law appoint and determine.

From this view of the case, it is obvious, that it is not within the principle of the decision in *Williamson v. Beckham*. There is, indeed, an implied power of appointment by will, contained in the limitation to the devisees of the wife. The clause, if carried out, would run thus—"to the use of such person or persons as she shall by will direct and appoint, and in default of such appointment, to the use of her heirs in such portion as she shall by will direct and appoint, and in default of such appointment, then in such portions as the law of the land in that case made and provided shall determine." In default, however, of the exercise of this power of appointment to devisees, there is, as I conceive, a limitation to her heirs as purchasers since it is obvious, they are not necessarily to take in the proportions which would devolve on them by inheritance. This limitation excludes the idea of that absolute property in the fee, which was the basis of the very powerful argument of Mr. Stanard. If the heirs are to take as purchasers, though their interest is contingent, yet it cannot be passed or defeated by her conveyance.

In this view of the case, it seems unnecessary to reconsider *Williamson v. Beckham*: yet to avoid misconception, I shall state, succinctly, the principles in regard to this matter, which I consider as governing it.  
1. Where a settlement of property, real or personal, is made upon a feme covert,  
217 whether before or after marriage, \*by which property is conveyed to her separate use, she has the absolute right to dispose of it, unless her power of disposition is controlled by the settlement; provided, in the case of realty, the husband joins in the deed. 2. Where her power of disposition is so controlled, the restriction is valid and bind-

ing, and does not fall within the principle which declares, that conditions or provisions repugnant to the nature of the estate granted are void. This seems to be a concessum; for all the cases admit that the power of the wife may be controlled by negative words. This being so, it is clear, 3, that the whole question is a question of construction. Where a trust estate in fee is given to the wife, with power to dispose of it by will, but in no other manner, it seems to be conceded that, with these express words of restriction, she has no power to alien, except in the manner prescribed. But it is denied, that a power to dispose by will, without negative words superadded, is to be construed as restricting her to that mode of disposition. Upon this point, opinions have been divided; and this court, in *Williamson v. Beckham*, regarding itself as tied down by no settled rule, decided, that the prescribing one mode of disposition, in a marriage settlement, was to be construed as a negative of all others: that the object of marriage settlements is not to increase the power of the wife, so much as to place her beyond the power or influence of her husband, and to protect her, not only against his marital rights and his imprudence, but against her own weakness and imprudence also: that the object is to put the property out of her reach, and secure it from the effect of the influence and solicitation to which she may during coverture be exposed: that, however large the interest given to the wife, she can have no power to control, contradict or overthrow the instrument under which she claims; that this is admitted, where there are express words negating all other power, so

218 that the validity and binding \*operation of the restriction is admitted; that as the wife cannot violate or annul the provisions of the instrument, she cannot, by deed, annihilate that continuing power over the disposition of the estate, which is implied in the power to appoint by will. That power, though executed, is liable to be revoked even in her last moments, when she may, by the act of her will, render invalid any previous instrument obtained from her through the undue influence of the husband. In the particular case, for instance, of *Williamson v. Beckham*, the father of the feme, knowing probably that the intended husband was embarrassed, and desirous to secure his daughter from want, insists on a settlement. It is made in terms which give her the power of appointment by will; which secures to her through life the locus pœnitentiæ, the power of revocation. If the deed made by herself and her husband, in one month after marriage, be valid, then she has defeated the settlement; she has taken away from herself that power to change her mind to the last moment, which it was designed she should have; she has conveyed away the estate, and given up to her husband all that had been secured to her, and has thus debarred herself of the power of appointing it to her children, and has cut herself off from the support provided for her in the event of her surviving him. Suppose she were now to execute the power in favour of her chil-

dren, and should then die? If such execution would not be valid, then it is plain that by the deed she has defeated the settlement; and on the other hand, if it would be valid, then it is clear the deed is inoperative.\*

It was argued, however, with great force, by Mr. Stanard, that the intention of the clause giving power to dispose by will, is to 219 extend the powers of the feme \*covert, not to limit them; that she had, without such clause, a power to convey by deed with privy examination, and that this is not taken away. But it must be observed, that the power of the wife over her trust estate, is not equivalent to her power over a legal title vested in her. For, admit our privy examination to have the sweeping and conclusive effect of a fine, and to pass or bar equitable as well as legal rights, yet even a fine is not always conclusive in equity, upon the equitable interests of the wife; 11 Ves. 232. If the transaction is not fair, it will be set aside; for, the legal title being outstanding in a trustee, the whole matter is completely within the jurisdiction and power of the court of equity. Even the donee of the fine, or the bargainee (with us) under a deed with privy examination, cannot resist the legal title of the trustee: they must enforce their rights in equity. Suppose, then, Mrs. Beckham should hereafter make an appointment by will to the children of the marriage: to whom shall the trustee convey? To the bargainee under the deed, which at most conveys but an equity, and which sets at naught the provision securing to her the exercise of free will, and a power of revocation at all times during life? or shall the conveyance be made to the appointees under the power regularly executed according to the provisions of the settlement? The latter assuredly: for the deed of settlement being made to secure certain rights to the feme covert, and among others the right of changing her will, the deed of bargain and sale, which curtails her of this right, cannot be countenanced in equity. The trustee stood bound to hold to the use of those whom she might appoint by will; it would be a breach of trust in him to convey to any other, and a violation of the settlement by the court to compel him to do so. It was on this principle that in *Parkes v. White*, 11 Ves. 209, Lord Eldon set aside the fine of the feme "as to the remainder to such persons and uses as the wife should appoint by will;" for he said, that the wife being 220 \*authorized to appoint by will, shewed an intention in the grantor, that the trustee should so hold the estate as to enable the wife to appoint at any time during life. Nothing can be more apposite to the question before us than this opinion. It is true, that diminution of power cannot be inferred from an extension of power. But its extension in one way, may well operate a diminution in another. The power to appoint by will, is a negative of the legal ability to appoint by deed, because the exercise of the legal power

\*The judge, in this sentence, refers to the deed made by the feme covert in favour of her husband in the case of *Williamson v. Beckham*.—Note in Original Edition.

annihilates the granted power; and the grantee thus, in effect, annuls the deed under which she claims. By the settlement, a continued control over the property during life is secured to her; by her conveyance, this power is frustrated and defeated forever: by the settlement, as lord Eldon says, "the trustee is so to hold the estate as to enable the wife to appoint at any time during her life;" and by her conveyance, he ceases to hold for that purpose, and is compelled to convey the estate to the grantee in a conveyance directly in conflict with the provisions of the instrument under which he acts.

With these general views of a much debated question, I am still of the opinion expressed by the court in *Williamson v. Beckham*. In the present case, however, so far as respects the life estate of *mrs. Lee*, I am of opinion, that the mortgage to the bank of the U. States in which she joined, passed her title. Her interest is but a life estate; and as the disposition of it is uncontrolled by any express or implied restriction, I think it was at her absolute disposal. In this respect, the case very much resembles that of *Parkes v. White*. I should, therefore, be of opinion, that the decree should be reversed, and the cause remanded for further proceedings upon the principle of the validity of the mortgage, so far as respects the life estate of *mrs. Lee*. But my brethren are of opinion that the decree should be affirmed.

Decree affirmed.

221 \*Bank of the U. States v. Jackson's  
Adm'x.

Bank of the Metropolis v. The Same.\*

November, 1835, Richmond.

(Absent BROOKE, J.)

Promissory Note—Indebitatus Assumpsit against Indorser—When It Lies and When Not.—Though, in general, Indebitatus assumpsit for money lent, or

\*These cases would have been reported in their order (in 6th Leigh) among the causes decided at the fall term 1835, but that the principle on which they were decided, was involved in another case, that of *Jackson's administratrix v. The Bank of Marietta*, though it was there presented under different circumstances; which was argued at the same term with these, and the court gave judgment in it likewise, but afterwards set aside the judgment, and directed another argument. It was thought best to defer the report of all the cases, till that case should be finally determined. It was not decided till February 1838, and was then decided on a point peculiar to itself: see the report of it, post.—Note in Original Edition.

†Bills and Notes—Common Counts in Assumpsit against Indorser.—To the point that the common counts in assumpsit will lie for the holder of a bill of exchange against an indorser, the principal case was cited in *Billgerry v. Branch*, 19 Gratt. 398.

In *M. & M. Bank v. Evans*, 9 W. Va. 381, 384, the principal case and *Page v. Bank of Alexandria*, 7 Wheat. 35, were cited as holding that no recovery can be had under the common money counts against the indorser of an accommodation note. See principal case distinguished in *Davis v. Miller*, 14 Gratt. 21. See further on this subject, monographic note on "Assumpsit" appended to *Kennalrd v. Jones*, 9

money paid and expended, or money had and received, lies for the holders of a promissory note against an indorser, and the indorsement is *prima facie* evidence to support those money counts; yet if it be found by special verdict, that the defendant indorsed the note, and the holders discounted it, for accommodation of the maker, and that the defendant received no part of the proceeds of the note so discounted, in such case the holders cannot recover against the defendant on the money counts.

These two causes were argued and decided together.

1. The first was an action of assumpsit, brought in June 1823, by the president, directors and company of the bank of the U. States against *Jackson*, in the circuit court of *Harrison*.

The declaration, after stating the incorporation of the bank of the U. States by congress, contained four special and two general counts. 1. The first count set forth a promissory note, dated the 18th April 1820, at the city of Washington, by *Richard Cutts* to *Jackson*, for 3600 dollars, payable at the office of discount and deposit of the bank there, sixty days after date, for value

received, "and the indorsements of the note, at the same place and on the day of its date, by *Jackson* to *Charles Cutts*, and by *Charles Cutts* to the plaintiffs; and then averred, that when the note became due and payable according to its tenor, namely, on the 21st June 1820, it was duly presented for payment to *Richard Cutts*, the maker, and payment of the contents then and there duly demanded of him; but *Richard Cutts* did not, and would not, pay the same to the plaintiffs; of all which *Jackson* then and there had notice; by reason whereof he became liable to pay the said sum of 3600 dollars to the plaintiffs; and so being liable, in consideration thereof, assumed to pay them the same. 2. The second count, after setting out and describing the note, the making and delivery thereof by *Richard Cutts* to *Jackson*, and *Jackson's* indorsement to *Charles Cutts*, as in the first count,—alleged, that *Charles Cutts*, being on the 18th April 1820 (the date of the note) in possession of the note at Washington, and being then and there indebted to the plaintiffs in the sum of 3600 dollars, in consideration thereof, indorsed, and by indorsing assigned and transferred, the note to the plaintiffs; and then averred, that when the note came to maturity according to its tenor, namely, on the 20th June 1820, *Richard Cutts*, the maker, failed to make payment of its contents, though thereto requested; and after the note became due and payable, he became and still was wholly insolvent; by reason whereof *Jackson* became liable to pay the plaintiffs the said sum of 3600 dollars in the note mentioned, and so being liable, assumed &c. 3. The third count, after set-

Gratt. 188; monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

Evidence—Checks.—A check is only *prima facie* evidence of money lent, paid and advanced, or had and received. *Blair v. Wilson*, 28 Gratt. 174, citing the principal case.

ting out and describing the note, and the making and delivery thereof by Richard Cutts to Jackson, as in the preceding counts,—alleged, that Jackson, being on the 18th April 1820 (the date of the note) in possession of the note at Washington, and being indebted to the plaintiffs in the sum of 3600 dollars, in consideration thereof, then and there assigned and transferred the 223 note \*to the plaintiffs, and thereby agreed to make himself responsible for the payment of the contents thereof according to its tenor; and then averred, that Richard Cutts, the maker, failed to pay the contents of the note when it came to maturity, and was, at the time the note came to maturity, and had ever since remained, wholly insolvent. so that, though the plaintiffs had used due diligence to recover the money from him, they had been unable to do so; of all which Jackson had notice; by reason whereof he became liable to pay the plaintiffs the sum of 3600 dollars, and being so liable, in consideration thereof, assumed &c. 4. The fourth count, after setting out and describing the note, and the making and delivery thereof by Richard Cutts to Jackson, as in the other counts,—alleged the indorsement of the note, at Washington on the day of its date, by Jackson directly to the plaintiffs; and then alleged due presentation of the note at its maturity, and due demand of payment from the maker, and his failure to make payment; of all which Jackson had notice; by reason whereof, and of the statute in such case made and provided, Jackson became liable to pay the plaintiffs the sum of 3600 dollars, and so being liable, in consideration thereof, assumed &c. 5. The fifth count was for 3600 dollars had and received by Jackson to the plaintiffs' use; and 6. the sixth was for so much money lent and advanced by them to him.

Jackson died pending the action; and it was revived against his administratrix. She demurred generally to each and every count in the declaration; and pleaded, 1. the general issue; and 2. the statute of limitations of Maryland, the laws of which state were in force in the city of Washington, where the transaction occurred. And to this second plea, the plaintiffs demurred generally.

By consent of parties, the issues of fact were tried by a jury, without decisions being first had on the issues of law, reserving the questions arising on the demurrers 224 \*for consideration and decision after the verdict should be found, together with such questions as should arise on the verdict.

The jury returned a special verdict, wherein they found 1. the note of Richard Cutts, mentioned and described in the declaration, in hæc verba, with the indorsements thereof, in blank, by Jackson the payee, and by Charles Cutts. 2. That Jackson indorsed the note, in Virginia, for the accommodation of Richard Cutts, the maker. 3. That the note was, on the day of its date, presented at the office of the bank of the U. States at Washington for discount, and was then and there dis-

counted by the maker. 4. That Jackson received no part of the avails or proceeds of the note. 5. That the plaintiffs retained for discount on the note, for the time the same had to run, the sum of 38 dollars 40 cents, and lent to Richard Cutts the sum of 3561 dollars 60 cents upon the note. 6. That by the custom of the bank of the U. States at Washington and of the other banks of the district of Columbia, at the time this note was discounted, payment of a note or bill discounted at any of those banks, could not be demanded until the fourth day after the time limited by the bill or note for the payment thereof; and that the discount retained by the plaintiffs on this note, was computed at the rate of six per centum per annum for sixty four days, according to the custom aforesaid. And 7. that after the said note became due and payable, the plaintiffs used due diligence to recover the amount of the said note from Richard Cutts, the maker, and did not recover from him, or from Charles Cutts, the same or any part thereof. And if the law on this state of facts was for the plaintiffs, then the jury found for them 3600 dollars with interest from the 22nd June 1820; and if the law was for the defendant, then they found for her.

The court held, that each and every count of the plaintiffs' declarations was good 225 and sufficient, and that \*the defendant's second plea (of the statute of limitations of Maryland) was not a good plea in bar; and therefore, upon the defendant's demurrers to the declaration, and on the plaintiffs' demurrer to the defendant's second plea, the court gave judgment for the plaintiffs. And then the court held that the law upon the facts found in the special verdict, was for the defendant, and gave judgment for the defendant accordingly. From which judgment the plaintiffs appealed to this court.

II. The second suit was an action of assumpsit, brought, in the same court and at the same time as the first, by the bank of the Metropolis against Jackson, on a promissory note, dated the 2nd August 1820, for 3600 dollars, payable at the bank of the Metropolis at the city of Washington, sixty days after date, for value received, made by Richard Cutts to Jackson, and indorsed by Jackson, the payee, and then by Charles Cutts, to the bank; which note was indorsed by the indorsers, and discounted by the bank, for the accommodation of Richard Cutts, the maker. The only difference between this case and that of The Bank of the U. States against Jackson, which this court thought worthy of notice, consisted in the single fact, found by the jury in their special verdict, that at the foot of the note on which this action was brought, there was a direction to "credit the drawer," signed by Jackson with the initials of his name, J. G. J. The circuit court gave judgment for the defendant; and the plaintiffs appealed to this court.

The causes were argued here by Standard for The Bank of the U. States, and Johnson for The Bank of the Metropolis, and by Wyndham Robertson for the appellee.

BROCKENBROUGH, J. First as to the case of The Bank of the U. States against

Jackson's administratrix: the only question

I deem it necessary to discuss at any  
226 \*length, is that arising from the two  
general counts of the declaration, and  
the finding of the jury. Do the probata agree  
with the allegata of those two counts? Does  
the special verdict support them?

It is obvious, that the allegation in both  
those counts, sets forth a debt due from the  
defendant himself, and a promise founded on  
that debt. The charge in the first, is a very  
different one from that of some other person's  
having had and received the money to the  
use of the plaintiffs, though obtained on the  
credit of the defendant; and in the second,  
it is very different from the charge of the  
money being lent and advanced, not to the  
defendant himself, but to a third person at  
the defendant's request and on his credit.

The researches of the counsel have not  
pointed out a single case or authority sanc-  
tioning the doctrine, that the general counts  
in assumpsit may be supported against a de-  
fendant who has not received the money in  
some shape or other, which he is charged with  
having received, or against one for money  
lent to him, or paid and expended for his use,  
where it was lent, or paid, to a third person  
on his credit.

"Money lent" (says Chitty) "to the defend-  
ant himself, may be recovered under the  
common count for money lent, though deliv-  
ered to another person at his request; but if  
money be lent to a third person at the defend-  
ant's request, and both be liable to repay  
the money, the one on the loan, and the other  
in respect of his collateral engagement, which  
must be in writing, the count against the  
latter must be special." 1 Chitt. Plead. 340.  
This proposition is supported by Butcher v.  
Andrews, 1 Salk. 23, in which it is said, "the  
money being lent to J. S. the defendant can-  
not be obliged as for a debt, and liable to an  
indebitatus, but to a special assumpsit, as  
being but collaterally bound by the promise;  
for the same money cannot be lent to two.

Otherwise, had the money been only  
227 delivered to the son at the father's \*re-  
quest, or only had and received by the  
son at the father's request; for then the loan  
had been to the father. See also Marriot v.  
Lester, 2 Wils. 141, 1 Wms. Saund. 211 a,  
note 2.

There has been much discussion in the  
books, on the question whether indebitatus  
assumpsit would lie for money had and  
received, for money lent, or for money paid,  
against the drawer or acceptor of a bill of  
exchange, or against the maker or indorser  
of a promissory note. So far back as the  
case of Wood v. Luttrell, 1 Call 232, a ques-  
tion arose in this court, whether the indorsee  
of a bill of exchange could recover against  
the indorser on the general counts in  
assumpsit; but the decision of the question  
was waived, because the evidence submitted  
would not authorize a recovery on any count.  
Judge Pendleton, however, said, "that he  
could not forbear to mention that he did not  
much like this new practice of general  
counts, as they tend to surprise the other  
party, without giving him an opportunity of  
preparing for a full defence."

We have been referred by the appellants'  
counsel to many authorities, but I am much  
mistaken if they are not all reconcilable  
with the proposition with which I first set  
out. In the excellent treatise of Bayley on  
Bills p. 244, (Boston ed. 1826) it is said, "A  
bill is prima facie evidence of money lent  
by the payee to the drawer, and a note, of  
money lent by the payee to the maker, and  
each, consequently, of money had and re-  
ceived by the drawer or maker to the use of  
the holder, and of money paid by the holder  
to the use of the drawer or maker." He fur-  
ther remarks, "that an acceptance is also  
prima facie evidence of money had and re-  
ceived by the acceptor to the use of the holder,  
and of money paid by the holder to the use of  
the acceptor; and an indorsement, of money  
lent by the indorsee to the indorser." The  
two former propositions are proved to be  
true by the cases of Clarke v. Martin,  
228 2 Ld. Raym. \*758, and Grant v.

Vaughn, 3 Burr. 1516, 1525. In the  
first case lord Holt, whilst he denied that an  
action could be brought on a promissory  
note on the custom of merchants, yet de-  
clared, that there was an easy method,  
namely, a general indebitatus for money  
lent; and lord Mansfield, in the other, said  
—"I do not find it any where disputed, that  
an action on an indebitatus assumpsit gen-  
erally, for money lent, might be brought on  
a note payable to one or order." That the  
acceptance of a bill is also prima facie evi-  
dence of money had and received by the  
acceptor to the use of the holder, is, I think,  
proved by the strong cases cited by the  
appellants' counsel, Le Sage v. Johnson,  
Forrest's Rep. 23; Tatlock v. Harris, 3 T. R.  
174; Vere v. Lewis, 3 T. R. 182, to which  
may be added Weston v. Penniman, 1 Mason  
306, in which too the bill was not a negotiable  
instrument. It may also be readily agreed,  
that an indorsement is prima facie evidence  
of money lent by the indorsee to the indorser,  
and that the action may be maintained by  
the indorsee at least against the person who  
indorsed to him. Bayley on Bills, 246, re-  
ferring to Keesebower v. Tims, before the  
king's bench, 22 Geo. 3; State Bank v. Hurd,  
2 Mass. Rep. 172.

In the case of Waynam v. Bend, 1 Camp.  
175, lord Ellenborough is reported to have  
said, that in an action of assumpsit on a prom-  
issory note payable to L. Toader or bearer,  
the plaintiff (who was the holder) could not  
recover under the money counts, as he was  
not an original party to the note, and there  
was no evidence of any value being received  
by the defendant from him. If this be a  
correct decision, it restricts very much the  
rule that an indorsee may recover under the  
money counts against the indorser. There  
is much reason, however, to doubt its cor-  
rectness. It is repudiated by the supreme  
court of New York in the case of Pierce v.  
Crafts, 12 Johns. Rep. 90, where the court,  
after noticing that it was a nisi prius  
229 decision, remarked that it "contradicts  
several of the preceding decisions; that it  
contradicts Tatlock v. Harris, in which it  
was decided that an indorsee of a bill of  
exchange might recover against the

acceptor, under the count for money had and received, upon the principle, that the giving such a bill is an agreement between all the parties to appropriate so much property, to be carried to the account of the holder of the bill; and that it contradicts *Grant v. Vaughn*, in which it was held, that the action for money had and received might lie in behalf of a bearer on a bill made payable to bearer, though it is very clear, that in that case the bearer was no party to the original bill. I am, therefore, of opinion, that the objections made by the supreme court of New York to the case of *Waynam v. Bend* are well founded. The maker of a note, whether payable to bearer or to order, if appearing to be made for value received, must be presumed, till the contrary appears, to have received that value, which constitutes it a debt due from him to any person to whom it may come, in the fair course of trade. By our statute, bills or notes payable to bearer, cannot be made and passed by any individuals; but notes, bonds and bills may be assigned, and by an act passed since the decision in *Dunlop v. Harris*, 5 Call 16, an assignee may maintain an action against a remote as well as an immediate assignor. If the obligee of a bond, or payee of a note, assigns or indorses it to another person, it is presumed, that the assignor or indorser has received value for it from his immediate assignee or indorsee; and when he becomes the assignor or indorser in his turn, the presumption is, that he has received value from his assignee or indorsee. Although the last assignee, or the holder, has not paid anything to the obligee or payee, yet he has received the value from the intermediate party, and therefore may fairly be said to have received it to the use of that person who is entitled to the instrument.

230 \*However, though I am of opinion, that the case of *Waynam v. Bend* was not well decided, and that the indorsee of a note may maintain *indebitatus assumpsit* for money had and received against the payee or remote indorser, yet I cannot perceive, that the doctrine has any application to the present case. We must, on the present occasion, not only inquire into the presumptions arising from the making and indorsement of the note, but we must also attend to the facts found. The special verdict states, that the note was presented for discount to the plaintiffs, and was discounted by them for the accommodation of Richard Cutts, the maker thereof; that Jackson the defendant indorsed the note for the accommodation of the said Richard Cutts; and that no part of the avails or proceeds of the note came to the hands of or was received by Jackson. It farther states, that the indorsement of the note by Jackson was in blank, and was the first indorsement, and that afterwards said note was indorsed by Charles Cutts, and then delivered to the plaintiffs for discount. Although then the note imports on its face, that money was lent by Jackson to Richard Cutts, and the first indorsement imports that money was lent by Charles Cutts to Jackson, and the last indorsement, that money was lent by the plaintiffs to Charles Cutts; yet all these pre-

sumptions are done away by the facts found. No money was lent by Jackson to Richard Cutts, nor by Charles Cutts to Jackson, nor by the bank to Charles Cutts: but, by the consent and contract of all these parties, the note was discounted, and the money lent by the plaintiffs to the maker of the note on his direct responsibility, and the collateral responsibility of the indorsers. The parties contracted through the medium of a note made negotiable and payable at bank. Viewing it as a strictly commercial paper, the liability of Jackson became complete, when, on a failure of the maker to pay it at maturity, it was regularly protested, and notice thereof

231 regularly given to the indorsers. \*If we do not consider it in our courts as a strictly commercial paper, on the ground that it was not made negotiable by our statutes, the liability of Jackson depended on a suit being brought against the maker, and due diligence used in the prosecution thereof, and a failure to recover the money by execution; or, on the notorious insolvency of the maker, which would dispense with the suit. In whatever way we view it, still the responsibility of the indorser was not direct, but collateral. The loan was not made to him, nor the money received by him; but it was lent to and received by a third person, in part on his credit. He was therefore liable, in the language of the case cited from *Salkeld*, "not to an *indebitatus*, but to a special *assumpsit*." The counsel for the appellants admitted, that if the case decided by the supreme court of the U. States, of *Page v. The Bank of Alexandria*, 7 Wheat. 35, be law, the general counts would not lie in this case. The full examination which this case has undergone, both at the bar and in our conferences, convinces me, that that case was correctly decided.

It was admitted, and indeed it seems clear, that the special counts in this declaration are not supported by the proofs. I am for affirming the judgment.

Then, as to the case of *The Bank of the Metropolis against Jackson's administratrix*; the only difference between it and the other, is, that the special verdict, after finding the execution of the note by Richard Cutts, also finds that Jackson, the payee, wrote at the foot of the note the words "credit the drawer," signed his name thereto, and then indorsed the note in blank. I do not think that this varies the case. It rather tends to confirm the other finding of the jury. It seems to be equivalent to a declaration by Jackson, that he is not to have credit for the proceeds of the note, and, consequently, not to have the right to receive them; but that the maker is to have credit for the

232 money, and to check \*for it. I think that this judgment should likewise be affirmed.

*CARR, J.* In *Israel v. Douglass*, 1 H. Blacks. 241, lord Loughborough says. "Where a party has not the substantial justice of the case on his side, the court will not favour any action he may bring: but where justice is clearly with him, they will, if possible, allow him to maintain the action he has



brought, because the only effect of a refusal would be to make him adopt another form of action." Feeling strongly the correctness of this sentiment, and believing that the justice of the case is clearly with the plaintiffs in these actions, I have struggled hard to convince myself, that we ought to suffer them to maintain their actions, rather than put them to begin this ten years seige anew. But the opinions of my brethren, with the host of authorities and arguments arrayed in their support, have been too powerful for resistance; and I am obliged to say, that it seems better that these parties should suffer by the mistakes of their counsel, than that we should, to save them, break down the settled and established rules of pleading.

The four special counts were given up on all hands to be either bad on demurrer, or not sustained by the facts found in the special verdict; and the only point of serious discussion at the bar, was, whether those facts would support the general counts, for money lent, and money had and received. I must say, that, judging by the light of authority, they do not. The note was made by Richard Cutts payable to Jackson, indorsed first by Jackson, and then by Charles Cutts, and discounted by the bank. Jackson, then, occupies the position of a remote, not an immediate indorser. It seems admitted, that the prima facie evidence of a loan or advance of money, resulting from the indorsement,

would, unless destroyed by opposing testimony, support indebitatus "assumpsit by the indorsee against his immediate indorser; and the cases seem to extend it to remote indorsers. As to this, I do not undertake to give a positive opinion; for, whether it be so or not, it cannot influence the decision of this case. The special verdict has found, that the note was indorsed, and discounted, for the accommodation of Richard Cutts alone, no part of the money coming to the hands of Jackson. This destroys the presumption of loan or advance arising from the indorsement, and leaves the money counts wholly unsupported. I refer, for the positions here taken, to cases cited by my brethren, which I have carefully examined.

This opinion applies equally to the case of *The Bank of the Metropolis against Jackson's administratrix*, as I cannot think, that the words "credit the drawer" make any difference.

CABELL, J. I entertain no doubt, that on the facts found by the special verdict, Jackson became liable to the bank, and that that liability would have been enforced in this suit, if it had been asserted by a good declaration suited to the case.

The declaration contains four special counts on the note, and two general counts, for money lent and money had and received. All the special counts on the note are either clearly bad on demurrer, or are unsupported by the facts of the case as found by the jury. They were properly abandoned by the counsel for the appellants. The general counts are in themselves free from objection, but the question is whether they will avail the bank on the case stated by the special verdict?

I am entirely satisfied, after an examination of the authorities, that general indebitatus assumpsit for money lent, paid and advanced, or had and received, will lie for an indorsee against the indorser of a promissory

note, and that the mere indorsement is 234 prima facie evidence, "that the money was lent, or paid and advanced, by the plaintiff to or for the defendant, or that the money was had and received by the defendant to the use of the plaintiff, and that this prima facie evidence carries with it such presumption of the fact, as will entitle the plaintiff to recover, unless it shall be rebutted by other proper testimony. These propositions will not be controverted, as between an indorsee and his immediate indorser. I conceive they are equally true, as between an indorsee and a remote indorser. In *Grant v. Vaughn*, 3 Burr. 1516, the bearer of a note payable "to ship Fortune or bearer," brought an action on it, and inserted a count for money had and received. Lord Mansfield said—"Upon the count for money had and received, the case is clear beyond dispute; for undoubtedly an action for money had and received to the plaintiff's use, may be brought by the bona fide bearer of a note payable to bearer. There is no case to the contrary. It was certainly money received for the original advancer of it, and if so, it is for the use of the person who has the note as bearer." I do not think it possible to distinguish that case, in principle, from the case of an action by an indorsee against a remote indorser. For the money was received by the remote indorser for the use of his immediate indorsee, who paid it to him; and if so, it is for the use of any person into whose hands the note may subsequently come, by indorsement from that indorsee.

But although an indorsement is prima facie evidence as aforesaid, yet it results from the very nature of prima facie evidence, that all the presumptions arising from it may be rebutted and destroyed by other testimony. Thus it may be, that the defendant indorsed the note without any consideration, solely for the benefit and accommodation of his indorsee; or it may be, that the defendant indorsed the note as a mere security for a pre-

cedent debt due from the maker to the 235 indorsee, or for money to be lent by the indorsee to the maker of the note: and if these facts be proved, the presumptions which would otherwise have arisen from the indorsement, are entirely done away; and the counts for money lent, money paid, or money had and received, are left without support; for it cannot be said with truth, in such a case, that any money was lent or paid to, or received by, the defendant.

These principles are decisive of the case before us. For it is expressly found by the jury, that the note was indorsed by Jackson and discounted by the bank for the accommodation of the maker, and that Jackson received no part of the proceeds. The case of *Page v. The Bank of Alexandria*, 7 Wheat. 35, is precisely in point.

The case of *The Bank of the Metropolis against Jackson's administratrix* cannot be distinguished from that of *The Bank of the U.*



States. It is true, Jackson made a memorandum at the foot of the note, directing that the drawer should have credit for the avails of it: but that can make no difference. It is only evidence of what is expressly found by the jury, that the note was indorsed by Jackson, and discounted by the bank, for the accommodation of the maker.

I am of opinion, that the judgments in both cases should be affirmed.

TUCKER, P. I assent to the proposition advanced in argument by the counsel of the bank of the U. States, that the note in this case, being mere accommodation paper, was never an available negotiable note until it was discounted by the bank. This is so well established by the case of *Whitworth v. Adams*, 5 Rand. 332, that it is unnecessary to do more than refer to that case for the support of the proposition. Considering the transaction, then, in this light, let us inquire what is to be regarded as the character of the contract between the parties.

236 \*But the act incorporating the bank of the U. States not having placed notes discounted by it upon the footing of bills of exchange, it has been attempted to bring this case within the influence of the doctrines of the Virginia law, as to the assignment of bonds. But it is obvious to me, it cannot be so considered. An assignment implies a subsisting debt, transferred from the obligee to the assignee, for a valuable consideration. It implies an engagement on the part of the assignee, to sue the obligor, and to use due diligence for the recovery of the debt: and it also implies an engagement on the part of the assignor, to refund what he has received, if the money cannot be recovered. In this case, there was no subsisting debt to assign: there was no assignment by Jackson to Charles Cutts, nor value received by Jackson from Charles Cutts, or by Richard Cutts from Jackson; nor did any money or value pass in the transaction at all, until it was advanced to Richard Cutts by the bank on discounting the note. Still less was there an engagement to refund money received on the supposed assignment, for no such liability was contemplated. In short, the case has not a single feature of the ordinary case of the assignment of a subsisting bond or note; and the law, therefore, which applies to such assignments cannot be brought to bear upon it. "In Virginia," says chief justice Marshall, "the indorser is liable under the implied contract, by the general understanding of the country, which is that he will pay the note, if by due diligence it cannot be obtained from the maker. This condition was not expressed but it was just, because it was consistent with general usage, and therefore was the real understanding with which such an indorsement was made and received. But in banks, this is probably not the usage, and therefore the same reason does not exist for annexing such a condition to the contract created by indorsement." In this case, the transaction

237 was with a bank, and there is nothing in it from which \*even the most acute could infer, that the parties designed to place this paper on the footing of an assigned

bond, or that it was the real understanding with which the indorsement was made by the one party, or received by the other.

How, then, is the contract to be considered? This, after all, is the real question in the case. The court sits for the purpose of enforcing the agreements of parties according to their true intent and meaning, whatever may be the form given to such contracts. "If," continues the chief justice, "banks are understood to receive notes made negotiable with them, as subject to the law which governs inland bills of exchange, then it would seem reasonable, in the case of notes actually negotiated with them, to imply from the act of indorsement an undertaking conformable to that usage. If the case then shewed, that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say, that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties." These opinions seem to me to be founded in good sense and the principles of justice. Let us, then, endeavour to get at the real understanding of the parties in this case, and then "fashion the undertaking so as to give effect to the real intention."

On this subject, I think there can be little room to doubt. The verdict of the jury has ascertained, that the note was indorsed by Jackson for the accommodation of Richard Cutts, who received the whole avails of the note, no part of which came to the hands of Jackson. This finding discloses to us the whole character of the transaction, unless we wilfully shut our eyes to what every body else can see, and close our understanding to facts which every intelligent man in the community must know. I should doubt whether it be even necessary to find, specially, that banks discounting paper of

238 \*this description, receive it as subject to the law which governs inland bills of exchange, and not subject to the law which governs the assignment of bonds and notes under the statutes of this commonwealth. That is a matter, which I had apprehended was as well understood as any other part of the commercial transactions of the country, even as the principles which govern the negotiation of bills of exchange themselves: and I should have found little difficulty in my own mind, in saying at once, that the parties intended to bind themselves as in the case of inland bills; and though they cannot change the law by contracting for the remedy, there is nothing to control their contracting for the responsibilities of drawers and indorsers of bills. The features of this transaction correspond most strictly with those of inland bills negotiated in our banks. Jackson indorsed the paper for R. Cutt's accommodation,—to enable him, on the credit of his name, to get a discount at the bank of the U. States. By this indorsement, he intended to make himself responsible for the debt. He did make himself thereby responsible. *Russell v. Langstaffe*, Doug. 514; *Violet v. Patton*, 5 Cranch 142; 4 Mass. Rep. 45; 2 Wash.

164. The only question remains,—in what manner and on what terms was he to be responsible? We have already seen, that the responsibility could not be that which arises in the case of assignment of subsisting debts, as there is no one feature of such assignment here. We must, therefore, consider him either in the light of a principal bound at all events, whether R. Cutts, the drawer, was solvent or insolvent, and whether the due demand had been made of him or not; or we must look upon him merely as a guarantor of the note, in like manner as the indorser of an inland bill of exchange. I do not think the former could have been "the real understanding and intention of the parties." We cannot wink so hard as not to see that such indorsement is neither made  
239 nor \*received, in any other light than as a collateral undertaking on the part of the indorsers, to be responsible in succession (4 Rand. 553, 562,) for the amount of the note, in case it could not be obtained upon due demand from the maker. In this light, at least, it clearly appears to my mind.

In this case, however, it will be unnecessary, if I am right upon another point, to take upon us to decide upon the character of this contract, and its analogy to bills of exchange. I am satisfied the judgment must be affirmed, and the plaintiffs turned around to a new action: and if the action be renewed, a special finding may be introduced as to the usages of the bank, which will leave no doubt about the light in which the transaction is to be viewed.

The four special counts I understood to be abandoned, and very properly, for they are either defective in themselves, or do not fit the facts found by the verdict. Had the pleader been content to set forth those facts simply as they occurred, he could not have failed to draw a good declaration. But in attempting to mould the transaction into a technical form, he has unfortunately altogether failed. It remains, then, only to inquire, whether the action can be sustained on the general counts. I am sorry to say, I think it cannot. No principle is better established, or upon a sounder foundation, than this—"that he who is chargeable upon a collateral undertaking, and not for his own debt, must be sued upon his special contract." 1 Chitt. Plead. 339. *Indebitatus assumpsit* does not lie against him, for he is not indebted, though he has made himself liable. He is responsible only upon his express engagement, and not upon an implied contract. That express engagement must be shewn to be complied with on the part of his adversary; and if he cannot be rendered liable upon the special counts because of a defect in the plaintiff's case, the plaintiff

will not be allowed to go into evidence  
240 \*on the money counts. *Long v. Moore*, 3 Esp. Rep. 155, in note; *Chitt.* on Bills 206, in note. This is in perfect consistency with the established principles in analogous cases, which refuse to the party leave to proceed on the general counts, where a special agreement is proved, but different from that declared on.

It is unnecessary to bestow any separate

attention on the case of *The Bank of the Metropolis* against Jackson's administratrix. Both judgments are to be affirmed.

Judgments affirmed.

### Jackson's Adm'x v. The Bank of Marietta.

February, 1838, Richmond.

(Absent BROOKE, J.)

**Suit by Corporation—Failure to Prove Incorporation—Effect\*—Case at Bar.**—A bank brings a suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio; plea, the general issue; at the trial, defendant demurs to plaintiff's evidence; the demurrer contains no direct proof of the legal incorporation of the bank, nor can the fact be fairly inferred from the evidence stated in the demurrer: **Held**, this defect of evidence is fatal to the plaintiff's case.

**Same—Same—Same—Same.**—Nor can the want, in the demurrer to evidence, of this necessary proof to entitle the bank to recover, be supplied by resort to a demurrer to the declaration, which was overruled, whereby the averment therein contained, of the legal incorporation of the bank, was admitted.

**Pleading—Admissions—Effect.**—No admission made, directly or by inference, in one part of a party's pleading, can be referred to in aid of another plea, or to supply evidence necessary to be given under it.

**\*Suits by Corporations—Proof of Incorporation.**—In a suit by or against a corporation, it was necessary at common law to prove the existence of the corporation whenever that fact was put in issue by proper plea; and it was held that the plea of nonassumpsit put such fact in issue. *Gillett v. American Stove, etc., Co.*, 29 Gratt. 567, citing the principal case. To the same effect, see the principal case cited in *Hart v. B. & O. R. R. Co.*, 6 W. Va. 350; *Anderson v. Kanawha Coal Co.*, 12 W. Va. 537; *Central Land Co. v. Calhoun*, 16 W. Va. 375. In accord, see *Grays v. Turnpike Co.*, 4 Rand. 578; *Rees v. Conococheague Bank*, 5 Rand. 326; *Taylor v. Bank of Alexandria*, 5 Leigh 471. But see Va. Code 1887, sec. 3280.

In *Hays v. Northwestern Bank*, 9 Gratt. 180, it is said: "But it is insisted that the evidence in support of the plaintiff's action was insufficient in this, that there was no proof that the plaintiff was an incorporated institution authorized to sue; and the case of *Jackson v. The Bank of Marietta*, 9 Leigh 240, is relied upon in support of the objection. That was an action of assumpsit by a bank alleged to have been incorporated by an act of the legislature of Ohio; the plea was nonassumpsit, and there was a demurrer to the plaintiff's evidence filed by the defendant. The court held that proof of the plaintiff's incorporation was necessary to maintain the action; and none having been given, there was judgment for the defendant. But this is an action by a bank incorporated by the legislature of Virginia, and the act for its incorporation is a public act of which the courts will judicially take notice. *Stribbling v. The Bank of the Valley*, 5 Rand. 132. In that case the court *ex officio* took notice of the act incorporating the Bank of the Valley; and the Northwestern Bank was incorporated by the same act. It was not necessary, therefore, that it should have been specially given in evidence to the jury."

For further information on this subject, see monographic note on "Corporations (Private)" appended to *Slaughter v. Com.*, 15 Gratt. 767.

This was an action of assumpsit on a promissory note, brought in the circuit court of Harrison, by the president, 241 \*directors and company of the bank of Marietta, the holders of the note, against the administratrix of Jackson, the indorser thereof to the bank. The declaration alleged, that "the plaintiffs were a body corporate and politic created by an act of the legislature of the state of Ohio, passed" prior to the making of the note, "whereby the bank was incorporated for a term of years not yet expired;" and then contained several special counts on the note, and counts for money lent, and for money had and received. The defendant demurred generally to the whole declaration, and to each and every count; and she pleaded, 1. the general issue, and 2. that the note was indorsed by her intestate at Harrison in Virginia, and that the plaintiffs were not, and never had been, incorporated by any law of Virginia; and the plaintiffs demurred generally to the second plea. The court overruled the defendant's demurrers to the declaration, and sustained the plaintiffs' demurrer to the second plea. The cause was then tried on the general issue. The defendant at the trial filed a demurrer to the evidence, and there was a verdict for the plaintiffs, subject to the opinion of the court on the demurrer. The court gave judgment on the demurrer for the plaintiffs, and the defendant appealed to this court.

The demurrer set out the evidence adduced at the trial, which consisted of the note on which the action was brought (a note, namely, made by M'Calley to Jackson, negotiable and payable at the bank of Marietta, and the same note on which the action of The Bank of Marietta v. M'Calley was brought, which was, before this court in 1824, reported 2 Rand. 465,) the indorsement of the note by Jackson to the bank, and his direction at the foot thereof to credit the drawer; the discounting of the note by the bank for the accommodation of M'Calley, the maker, and his receipt of the proceeds; the institution of suit on the note against M'Calley, in the name of the plaintiffs, in which the 242 \*defendant's intestate Jackson was their counsel; a judgment in that suit for the defendant, which was afterwards reversed by the court of appeals, and judgment entered for the plaintiffs; the proceedings upon that judgment, and the failure of the plaintiffs to make their money out of M'Calley; and a letter from Jackson to the president of the bank, which was adduced to shew, that he had dispensed with proof of demand and notice of dishonour. There was no direct evidence, that The Bank of Marietta was, as the declaration alleged, a corporation chartered by the legislature of Ohio.

Several questions were presented by the record, and among them the same point on which the two preceding cases of The Bank of U. States v. Jackson's adm'r, and The Bank of the Metropolis v. The Same, were decided; and the cause was argued at the same term with those cases, and the court gave judgment in it, but afterwards set aside the judgment, and directed another argu-

ment. The cause was again argued by Grat-tan for the appellant, and Stanard for the appellees. The decision of this court turned on a single point—namely, that the demurrer to evidence contained no proof, that the plaintiffs were an incorporated company by act of the legislature of Ohio, as the declaration alleged them to be.

PARKER, J. There is a preliminary point in this case, which at the suggestion of the court has been reargued, and upon which the judgment in my opinion must be reversed, and judgment entered for the appellant.

There is no direct evidence in the record, that The Bank of Marietta was ever incorporated, and no proof at all of the fact, unless it can be inferred by the court from the evidence stated in the demurrer. I am of opinion, that there is nothing in that evi-

dence, from which the court can reasonably infer that the plaintiffs \*were 243 an incorporated company. The evidence only tends to prove, that they were trading and doing business, as if they were incorporated. Every fact reasonably to be inferred from the evidence, is as consistent with the idea that the Bank of Marietta was one of those unincorporated associations, so common in our country, which have usurped the privilege of banking, as that this privilege had been conferred by law. The execution of the note by M'Calley; its indorsement; its negotiability at the bank, and its actual negotiation, are facts which appear to me to have no bearing upon the question of incorporation or no incorporation. They do not admit the existence of a corporation, although they may admit the trading or contracting with persons claiming to hold that artificial character. The same circumstances concurred in almost all the cases (hereafter mentioned) in which it has been held, that a corporation suing, must at the trial, where the general issue is pleaded, prove that it is a corporation. Nor can the recovery of the amount of the note from M'Calley by a judgment of this court (see 2 Rand. 465,) influence the decision of this question. The points arising in that case, did not make it necessary for the court to enter into the inquiry whether the plaintiffs were an incorporated company or not. The court, from the nature of the pleadings, were bound to presume (as Mr. Stanard in that case properly argued) that the plaintiffs had proved they were a corporation, or they could not have maintained their action. And, moreover, if the court had decided that there was such proof in that case, this adjudication of a fact would not bind the defendant in this action. To say that the jury could infer the fact here, from the finding that the Bank of Marietta had, on some occasion, successfully maintained an action in one of our courts, against another defendant, where the question might not even have been raised or thought of, would be to bind the defend- 244 ant in the case now under \*consideration, by proceedings to which she was neither party nor privy.

Some reliance has been placed upon the defendant's special plea, that the plaintiffs

had never been incorporated by a law of this state, as an indirect admission that they were incorporated by a law of Ohio, as the declaration averred. But this appears to me to be a strained and unauthorized inference. It might have been said with equal or greater plausibility, that the overruled demurrer to the declaration, admitting the fact of the incorporation, would have authorized the jury, without further proof, to find it. But it is a rule well settled, that one branch of a pleading cannot be referred to in support of another. No admission made, directly, or by inference, in a party's pleading, can be referred to, to help or aid another plea, or to supply evidence necessary to be given under it.

It has been said, that no proof of the plaintiffs being an incorporated company was called for, and that the case proceeded upon the concession that there was such incorporation. But we have no right to say this, if the plea of non assumpsit imposed upon the plaintiffs the burden of producing such proof. This was a call upon them to supply it, in the only mode that we can recognize as proper or necessary. It was, in effect, a legal requisition upon them to prove every material allegation in their declaration, and every fact essential to the maintenance of their action. We may regret, that the practice of allowing demurrers to evidence, sometimes tends to surprise a plaintiff, by his inadvertently omitting evidence which could easily be supplied; but this has never been urged as a reason for not holding him to the proof made necessary by the nature of the defence.

Then the only remaining question is, whether the plea of non assumpsit put in issue the fact of the plaintiffs being a legal corporation. I understood the counsel for the appellees as hardly contesting this principle. It is, \*as I think, clearly established by the following cases, which either directly adjudge, or proceed upon the assumption, that although it is not necessary in the declaration to aver the incorporation, it is necessary, under the general issue, to prove it. *Grays v. Turnpike Company*, 4 Rand. 578; *Rees v. Conococheague Bank*, 5 Rand. 326; *Taylor's adm'r v. Bank of Alexandria*, 5 Leigh 471; *Henriques v. Dutch E. I. Co.*, 2 Ld. Raym. 1532, 5; *Norris v. Staps*, Hob. 211; *Jackson v. Plumbe*, 8 Johns. Rep. 295; *Bill v. Fourth Western Turnpike Co.*, 14 Id. 416; *Bank of Auburn v. Weed*, 19 Id. 300; *Portsmouth Livery Co. v. Watson*, 10 Mass. Rep. 91; *Bank of Utica v. Smalley*, 2 Cowen 770.

The other judges concurred. Judgment reversed.

### Cross v. Cross's Adm'r and Others.

February, 1888. Richmond.

**Parol Gift of Slaves\*—Validity—Statute.**—By the act of 1788 for preventing fraudulent gifts of slaves, though a parol gift of slaves may be given in evidence to shew the character of the possession held by the donee, yet the gift itself is void.

\*Gifts.—On all matters pertaining to gifts, see monographic notes on "Gifts" appended to *Barker v. Barker*. 3 Gratt. 244.

**Loan of Slaves—When Length of Possession Will Give Lendee Title.**—A father in law put slaves into the possession of his son in law on loan; no length of possession will give the lendee title against the lender, till such possession has become adverse by demand and refusal of the possession.

**Slaves—Possession by Child—Effect as Evidence of Gift from Parent—Quere.**—It seems, that, as between parent and child, possession of a slave is very equivocal evidence of a gift from the parent to the child, since the delivery of the possession would equally accompany a loan; and the law would rather infer a loan than gift from mere transfer of possession—Sed quere.

John Tinsley deceased, by his last will and testament bequeathed as follows: "I 246 lend to my daughter Lucy \*Cross ten negroes, namely, Sukey, James, Jane, Bartlett, Phebe, China, Ned, Joseph, Beck and Sarah, and I give her two young cattle; the negroes and the increase I give to the surviving children of my said daughter Lucy Cross to be equally divided between them at her death, but in case any of her children should die in her lifetime leaving lawful issue, then it is my will and desire that such issue shall have what its father or mother would have been entitled to, provided he, she or they had survived his, her or their mother." The will was dated the 13th October 1795, and recorded in the county court of Hanover in December following, so that the testator died in the latter part of that year. The legatee Lucy Cross was the wife of Samuel Cross, who had been in possession of the slaves bequeathed to her, for many years before the testator's death, though whether on a loan or on a gift from the testator, was the disputed question in this cause; and he continued in possession of the ten slaves and their increase during his life. He died intestate in 1805. Immediately after his death, his widow took possession of the whole of the slaves, and continued to exercise entire and undisturbed ownership over them and their previous and subsequent increase (which was very numerous) during

†**Slaves—Possession by Child—Effect as Evidence of Gift from Parent.**—In *Scott v. Jones*, 76 Va. 235, the court, after quoting from JUDGE TUCKER's opinion in *Mahon v. Johnston*, 7 Leigh 319, said: "And in *Cross v. Cross's Adm'r*, 9 Leigh 245, the same judge said: 'And I am, moreover, inclined to think that as between father and child possession of a slave is very equivocal evidence of a gift, as temporary loans of young females are very usual from a father to a young married daughter, and from mere possession, unaccompanied by evidence of a gift, there is nothing from which a gift can more fairly be inferred than a loan. In such a case, it is the duty of the court to infer the lesser rather than the greater—the loan rather than the gift. For if the testimony is satisfied by the inference of a loan, upon what principle can we further infer the fact of a gift which is not required by the evidence in the case.' Although these observations of JUDGE TUCKER were not necessary to the decision of the case, they were concurred in by JUDGES BROOKE and BROCKENBROUGH, and they have been ever since recognized as furnishing a most safe and satisfactory rule for the guidance of the courts in this class of cases."

her life; and she lived till after the commencement of this suit. Oliver Cross, the eldest son of Samuel Cross, took administration of his estate; and in the inventory and appraisal thereof returned by him to the county court, these slaves were not mentioned; and so far from ever exercising or claiming any ownership over them as part of his father's estate, he acted for some time as the agent of his mother in the management of them, and thereby admitted the right she claimed in them.

The legatee Lucy Cross had four children; Oliver Cross, who died before his mother, leaving five children; Catharine, who married Daniel Lyle, and died before her mother, leaving her husband her surviving,  
 247 \*but not leaving any issue; Thomas Cross, and Elizabeth, the wife of Benjamin Hazelgrove, both of whom are yet living. The mother, acting as tenant for life of the whole of the slaves, and of the increase thereof, bequeathed to her by the testator John Tinsley's will, gave the possession of some of them to her son Oliver in his life time, of others to her son Thomas, of others to her son in law Hazelgrove, and of two to her other son in law Lyle; and Hazelgrove had sold two of those put in his possession, and Lyle was about to sell one of the two he had received.

In January 1835, Thomas Cross and the five children of Oliver Cross exhibited a bill, in the circuit superior court of Hanover, against their grandmother Lucy Cross, Hazelgrove and Lyle; wherein, after setting forth the will of the testator John Tinsley, and all the facts above stated, they represented, that by the bequest of the slaves to the testator's daughter Lucy Cross and to her children after her death, Lucy Cross was, after the death of her husband Samuel Cross, entitled to a life estate in the whole of the slaves and their increase, with remainder to such of her children as should survive her, and the issue of such as should die before her leaving issue, excluding entirely such as should die before her without leaving issue. And then they stated, that Hazelgrove and his wife Elizabeth had as yet no issue, and it was now wholly improbable that she would leave or have any, yet Hazelgrove had already sold two of the slaves which he had received; that though Catharine, the wife of Lyle, had died before her mother without leaving issue, so that no share of the remainder of the slaves expectant on her mother's life estate ever vested in her, yet her surviving husband Lyle was about to sell one of the two slaves which he had received; and that Hazelgrove and Lyle supposed they had, and acted as if they had, the absolute property in the slaves that had been put into their possession, and  
 248 would probably so dispose of them, \*as

that they would not be forthcoming at the death of the tenant for life, to be divided among the persons who would then be entitled to the remainder, according to the effect of the bequest and executory limitation in the will of the testator John Tinsley contained. Therefore, the bill prayed, that the

defendants Hazelgrove and Lyle should be enjoined from selling or otherwise disposing of any of the slaves then held by them respectively, and should be compelled to give security to have the slaves now in their possession, forthcoming at the death of the defendant Lucy Cross, for division among the parties who should be then entitled thereto in remainder, and to account for the value of those they had sold; and general relief.

The injunction was awarded.

The defendants Lucy Cross, Hazelgrove and Lyle, put in a joint answer, in which they denied the title set up by the plaintiffs under the will of the testator John Tinsley: for they alleged, that, shortly after the marriage of that testator's daughter, the defendant Lucy, with her late husband Samuel Cross, which marriage took place in 1784, the testator gave and delivered, in absolute property, to Samuel Cross, eight of the ten slaves which he afterwards by his will bequeathed to his daughter Lucy, and the other two of the ten were the increase of the eight so given; that under that gift Samuel Cross took and held all the slaves and their increase, claiming them as his own absolute property by title paramount to the bequest in the will of the donor; and having so held the undisputed possession of the slaves for more than ten years before the death of the testator John Tinsley, the statute of limitations perfected his title to the property: that thus, all the slaves belonged to the estate of Samuel Cross, and were subject to distribution among his widow and children, though they were kept together for the general benefit of the family: that the widow did  
 249 not choose to claim \*her thirds, and have the residue divided, but permitted

each child to take and use a portion of the slaves, expecting that at her death they would be equally divided among all her children, including her daughter Catharine Lyle; ten or more of them were put into possession of her son Oliver Cross, of which all but three had been returned after his death; seven were put into possession of her son Thomas Cross; thirteen were put into the possession of Hazelgrove, who married her daughter Elizabeth, and other slaves were put in Hazelgrove's possession, as agent of his mother in law; and two slaves had been put into the possession of the defendant Lyle, the husband of the deceased daughter Catharine. The defendant Hazelgrove admitted, that he had sold two of the slaves he had received. The defendant Lyle denied, that he had sold, or intended to sell, either of the slaves he had received upon his marriage with his deceased wife. And the defendants all insisted, that the slaves in question belonged to the estate of Samuel Cross, and were subject to distribution among all his children, without regard to the executory limitation contained in the will of the testator John Tinsley.

The defendant Lucy Cross died pending the suit, and it was revived against her administrator.

The main question in the cause was a question of fact. There was no doubt, that

the parent stock of the slaves in question had been in possession of Samuel Cross, for some nine or ten years before the death of his father in law, the testator John Tinsley, having been put into his possession by Tinsley: but the question was, whether they had been delivered by Tinsley to Cross, as a gift to him and his wife? or only upon a loan, so that the lender might have resumed the possession at pleasure?

There were several depositions for the plaintiffs, going to prove, that the 250 slaves delivered by Tinsley to \*Cross, were delivered to him only on loan, and that Mrs. Cross and her eldest son Oliver Cross had often so declared. And in corroboration of that evidence, the plaintiffs relied on the circumstance, that the slaves had not been inventoried as a part of Samuel Cross's estate, as they would have been if it had not been known, that the title to them was derived from Tinsley's will, not from a gift made by him in his lifetime. On the other hand, there were the depositions of two witnesses, to prove an absolute gift by Tinsley to Cross, shortly after the marriage of the latter; but it appeared, that one of these witnesses must have been about ten and the other about three years old at the time of the marriage of Cross in 1784, shortly after which the gift was alleged to have been made. To account for the omission to inventory the slaves as a part of the estate of Samuel Cross, the defendants shewed the advice of counsel, who (apparently) judging of the title to the slaves from Tinsley's will alone, advised that these slaves were not to be considered as part of Cross's estate, and therefore were not to be inserted in the inventory; though this advice was plainly erroneous, since even if the title was derived from Tinsley's will, the life estate thereby given to Cross's wife belonged to her husband, and should have been inventoried as part of his estate.

The circuit superiour court was of opinion upon the evidence, that the parent stock of the slaves in question had been originally delivered by Tinsley to Samuel Cross, as a gift, more than five years before Tinsley's death, whereby Cross acquired a perfect title to them; and therefore, by its decree, the slaves were divided into four parts, and one part allotted to the children of Oliver Cross, one to Thomas Cross, one to Hazelgrove in right of his wife Elizabeth, and one to Lyle in right of his deceased wife Catharine.

The plaintiffs, children of Oliver Cross, applied by petition to this court for an appeal from the decree; which was allowed.

251 \*Lyons, for the appellants.  
Scott, for the appellees.

CABELL, J. I am of opinion, that the evidence in the cause establishes a loan from Tinsley to Cross, and not a gift; and that, therefore, the slaves in controversy are to be disposed of according to the will of Tinsley. The decree must be reversed, and the cause remanded for further proceedings.

TUCKER, P. I am of opinion, that the decree in this case should be reversed. The answer states the marriage of Lucy Cross in

1784; and that shortly after the marriage, her father Tinsley gave the slaves in question to her husband, who held them for more than ten years before Tinsley's death in 1795. Hence the gift, if made at all, was made in 1784 or 1785, and was therefore void, the statute of 1758 being at that time in force, not modified by the proviso now in the statute book, which was first introduced on the 31st December 1787. See 1 Rev. Code, ch. 111, § 51; Turner v. Turner's ex'x, 1 Wash. 139; Jordan v. Murray, 3 Call 85; Taylor ex'or v. Wallace, 4 Call 92; Spiers v. Willison, 4 Cranch 398. This is decisive of the question of title; and it is gratifying to place the case upon this ground, instead of resting the proof of a gift alleged to have been made fifty-four years ago, upon the testimony of two witnesses, one of whom was only three years old at the time the gift is alleged to have been made, and the other only ten, and whose memory seems to have been singularly unretentive, except as to the particular fact of this gift.

With respect to the length of possession, it could not give title against Tinsley in his lifetime. The possession was not adverse, for it was with Tinsley's assent; and under the circumstances, the transaction not being a gift, must be taken to be a loan, 252 which, after five \*years, would bar the lender as against creditors or purchasers, but could never ripen into a good title against himself in favour of the loanee. To consider Samuel Cross to have been in adverse possession, we must convert him into a wrongdoer, of which there is no evidence, as he confessedly came into possession by right, and without demand and refusal could not have become a tortfeasor; Williams v. Snidow, 4 Leigh 14.

With these views, it is unnecessary to examine the case farther. I shall only observe, that I think, under all the circumstances, the just inference is, that Mrs. Cross held under her father's will, and did not claim under her husband. I am moreover inclined to think, that as between father and child, possession of a slave is very equivocal evidence of a gift; as temporary loans, particularly of young females, are very usual from a father to a young married daughter; and from mere possession unaccompanied by evidence of gift, there is nothing from which a gift can be more fairly inferred than a loan. In such case, it is the duty of the court to infer the less rather than the greater,—the loan rather than the gift: for if the testimony is satisfied by the inference of a loan, upon what principle can we further infer the fact of a gift which is not required by the evidence in the case?

I am of opinion, that the decree be reversed, and the cause remanded for further proceedings.

BROOKE and BROCKENBROUGH, J., concurred in the opinion of the president.

PARKER, J., merely expressed his opinion, that the decree should be reversed, and the cause remanded for further proceedings.

Decree reversed.

## 253 \*Deane and Others v. Hansford and Wife and Others.

February, 1838. Richmond.

**Wills—Construction—"Dying without Heirs."**—Testator, by his will, lends slaves and their increase to his grandson T. D. and his heirs of his body, and if he shall die without a lawful heir, then he bequeaths them to the children of his daughter E. L.—**HOLD**, this is an executory limitation after an indefinite failure of issue of the grandson, and therefore void; and the slaves vest in the grandson, in absolute property.

Thomas Cooke, late of King & Queen, died in the year 1806, and by his last will and testament, bequeathed as follows: "After my wife's decease, I lend to my daughter Mary Deane one negro Hannah, Vennah, Amey (in possession) and one boy Nelson, one bed and furniture, one cow and calf with their increase, with all the increase of the said negroes, during her life; and after her death, lend the said negroes and bed to my grandson Thomas Deane and his heirs of his body; if he should die without a lawful heir, I give and bequeath the said negroes with all their increase and the said bed to the children of my daughter Elizabeth Lee." The testator's widow and his daughter Mary Deane being both dead, the slaves and the increase thereof, in the above bequest mentioned, came to the hands of his grandson Thomas Deane, who sold some of them to G. Carlton, and others to J. Walton, and still held the residue.

Hansford & wife and Shelbourn & wife

**\*Wills—Construction—"Dying without Heirs."**—In *Nowlin v. Winfree*, 8 Gratt. 846, a testator, who died in 1808, devised his estate, both real and personal, to his three daughters and "their heirs lawfully begotten of their bodies." "And in case either of my daughters should die without heir or heirs as above mentioned, the surviving one to enjoy their equal part." **ALLEN, J.**, delivering the opinion of the court, said: "The question presented by the special verdict as to the proper construction of the will of Benjamin Hall deceased, has been frequently under consideration in this court. The case of *Bells v. Gillespie*, 5 Rand. 273, presented precisely the same question, and the principle there settled rules this case. That case conformed to the earlier decisions of this court, giving a construction to the laws docking entails; and it has been recognized and followed in the subsequent cases of *Broadus & Wife v. Turner*, 5 Rand. 308; *Griffith v. Thomson*, 1 Leigh 821; *Callava v. Pope*, 3 Leigh 108; and *Deane v. Hansford*, 9 Leigh 253. The principle thus firmly established by a series of adjudications has become a rule of property in the construction of wills made prior to 1819, and ought not now to be questioned, the more especially as but few cases are likely to occur hereafter in which the question can arise. According to these authorities the will in this case created an estate tail in the first taker by express words; and the bequest over after the death of the daughter without heirs, was an executory limitation after an indefinite failure of issue, and therefore void, and the daughters took the slaves in absolute property." But see 1 Rev. Code, ch. 90, sec. 26; Va. Code 1887, sec. 2422.

The principal case is also cited in *Moore v. Brooks*, 12 Gratt. 151.

(the female plaintiffs being children of the testator's daughter Mrs. Lee) exhibited a bill in chancery, in the circuit superior court of King & Queen, against Deane, Carlton and Walton, and three other children of Mrs. Lee, insisting, that under the executory limitation in the above recited bequest in the testator's will contained, the children of

254 Mrs. Lee would be entitled to the slaves and their increase, \*the subject of that bequest, in the event of Deane's dying without leaving issue: representing, that Deane was now childless, and his age and infirm health rendered it wholly improbable that he should have issue; that he nevertheless claimed the absolute property of the slaves in question, and had actually sold some of them to Carlton, and others to Walton, who also claimed the absolute property in those they had bought; and that there was danger that all the slaves might, during Deane's lifetime, be placed beyond reach, so as to defeat the rights of the executory legatees, in case Deane should die without issue: and therefore praying, that the defendants Deane, Carlton and Walton should be enjoined from selling or otherwise disposing of the slaves, by them respectively held, so as to put them out of reach of the executory legatees; and should be compelled to give security to have the slaves forthcoming for the executory legatees, at Deane's death, in the event of his dying without issue.

The injunction was awarded.

The defendants Deane, Carlton and Walton, put in their answers; wherein (besides a variety of matters which it is unnecessary to mention) they insisted, that the effect of the testator Cooke's will, was to give the defendant Deane the absolute property of the slaves and their increase; in other words, that the executory limitation under which Mrs. Lee's children claimed, was void in its creation. The circuit superior court declared, that the executory bequest to the children of Mrs. Lee, in the testator Cooke's will contained, was well and effectually limited, and would take effect in the event of the defendant Deane dying without leaving issue: and therefore, the court perpetuated the injunction &c. From which decree, this court, upon the application of the defendants Deane, Carlton and Walton, allowed them an appeal.

255 \*The cause was argued here, by R. T. Daniel and G. N. Johnson for the appellants; there was no counsel for the appellees. The appellant's counsel maintained, that the executory bequest in the will of the testator Cooke, to the children of Mrs. Lee, in the event of the grandson Deane dying without lawful heir, was limited on too remote a contingency, namely, an indefinite failure of issue of the grandson, and was therefore void in its creation. They said, this case was distinguishable from that of *Timberlake v. Graves*, 6 Munf. 174, and from all the cases which followed the principle of that decision; *Gresham v. Gresham*, Id. 187; *James v. M<sup>r</sup> Williams*, Id. 301; *Cordle's adm<sup>r</sup> v. Cordle's ex<sup>r</sup>*, Id. 455, and *Didlake v. Hooper*, *Gilm.* 194. And if *Timberlake v.*



Graves could be supposed to be in point to the present case, they controverted the principle on which that case was decided; insisting, that it was sustained by no authority, and was contrary to a series of adjudications; to prove which, they cited and examined the leading english cases touching executory bequests of this kind; and that it had been overruled by this court, in the subsequent case of Griffith v. Thomson, 1 Leigh 321.

PARKER, J. I am clearly of opinion, that the limitation over to the children of Elizabeth Lee, contained in the will of Cooke, is too remote, being after a quasi estate tail to Thomas Deane; and as this point puts an end to the case, it is unnecessary to notice any other.

After the death of Mary Deane, the testator lends certain slaves and their increase to his grandson Thomas Deane "and his heirs of his body; and if he should die without a lawful heir," he bequeaths the slaves and their increase to the children of his daughter Mrs. Lee. There is nothing here, to confine the failure of the heirs of the grandson to his death. In legal contemplation, the words of the bequest import a dying without heirs of his body whenever they fail, although  
256 that event may \*not take place for centuries. The children of Mrs. Lee and their representatives, if entitled at all, would, under the settled technical construction of these words, be entitled whenever the heirs of the grandson should become extinct, whether at his death or at some remoter period. This would be a bequest tending to a perpetuity, and for that reason, the law will not permit it to take effect. An effectual limitation of personal property must be confined to the period of a life or lives in being and twenty-one years and some months after; and where the words import an estate tail, there must be other words in the will, confining the general words to the dying without heirs or issue at the death of the first taker, to enable the court to support the limitation. Here, there are no such words. The expression indeed is, "I lend to Thomas Deane" &c. but it is a loan to him and the heirs of his body; and there is no sound distinction between such a loan and words importing a gift. *Williamson v. Ledbetter*, 2 Munf. 521.

The words of this bequest, applied to lands, would create an express estate tail; and herein it is distinguishable from some cases in this court, where there was an implied estate tail in the first taker; as in those of *Gresham v. Gresham* and *James v. M'Williams*. It is also distinguishable from them in the circumstance, that the limitation is to a class of persons by description, not by name; which excludes the idea there relied on, of a personal benefit being intended to themselves. It differs also from the case of *Timberlake v. Graves*, not only in these particulars, but in the absence of the words "then and in that case," and "equally to be divided," upon which the court seemed to lay some stress, in aid of the construction supporting the limitation. The authority of this class of cases in support of a limitation, on the ground that a personal benefit was intended to the persons named, and that no words of inheritance

were annexed, is certainly questioned,  
257 if not disregarded, in the \*subsequent cases of *Griffith v. Thomson*, 1 Leigh 321, and *Callava v. Pope*, 3 Leigh 103. And it is difficult to conceive how those cases came to be so ruled by this court, after the case of *Wilkins v. Taylor*, 5 Call 150, (which they expressly contradict) and in opposition also to all the english cases; *Beauclerk v. Dormer*, 2 Atk. 308, and *Green v. Rodd* there cited; *Bigge v. Beasley*, 1 Bro. C. C. 187; *Glover v. Strothoff*, 2 Bro. C. C. 33; *Robinson v. Fitzherbert*, Id. 127; *Earl of Stafford v. Buckley*, 2 Ves. sen. 171; *Everest v. Gell*, 1 Ves. jun. 286; *Chandless v. Price*, 3 Ves. 99; *Rawlins v. Goldtrap*, 5 Ves. 440. Wherever the english judges have supported the limitation after a failure of heirs or issue, they have done so upon the force of some particular words, indicating an intention, that the interest of the remainderman should vest at or very soon after the death of the first taker, or not at all; and to effect this, they have pressed into the service the words leave or leaving issue; as in *Forth v. Chapman*, 1 P. Wms. 663; *Atkynson v. Hutchinson* 3 P. Wms. 258; *Crooke v. De Vandes*, 9 Ves. 157; *Goodtitle v. Pegden*, 2 T. R. 720; *Green v. Ward*, 1 Russ. 262; so in *Dunn v. Bray*, 1 Call 338,—or the words then after his or her decease; as in *Pinbury v. Elkin*, 1 P. Wms. 563; *Doe v. Lyde*, 1 T. R. 593, and *Wilkinson v. South*, 7 T. R. 555,—or survivor, or survivors, or surviving children; as in *Nichols v. Skinner*, Chan. Prec. 528; *Massey v. Hudson*, 2 Meriv. 129, and *Ranelagh v. Ranelagh*, 2 Myln. & Keen. 441, 8 Condens. Eng. Ch. Rep. 74; so in *Cordle's adm'r v. Cordle's ex'or*, 6 Munf. 455,—or some other equivalent expressions. But as far as my researches have extended, they have never relied on the distinction first taken by this court in *Timberlake v. Graves*, but have often disregarded it. Yet that case having been followed by several others, and the statute of 1819, 1 Rev. Code, ch. 99, § 26, p. 369, having from that period given effect to such contingent limitations, I am not disposed, in a case  
258 not absolutely \*requiring it, to say that those cases ought to be overruled, especially as some of my brethren seem to think that the distinctions I have pointed out between them and the case at bar, are sufficiently broad to leave it without their influence.

It is enough to say, that I see in this case no words to control the technical interpretation of the bequest to Thomas Deane and the heirs of the body, made before the year 1819. The decree must, therefore, be reversed, and the bill dismissed.

BROCKENBROUGH, J. The only difference that I can perceive between the bequest here and that in *Timberlake v. Graves*, is, that in that case the persons to whom the slaves were limited over were certain and named, that is, the "two nieces Margaret Allen and Patsy Allen;" in this, the persons are not named, and they are not certain; for who might be the children of Mrs. Lee, either at the death of Thomas Deane, or at the remote period of the failure of his issue, no one can tell. The grounds of the decision in



that case were, first, that the devise over was to them merely, and not to them and their heirs; secondly, that it purported a limitation to themselves, and was intended as a personal benefit to them. The first reason would apply to this case, because the limitation over is to the children of Mrs. Lee, and not to them and their heirs: but the second is not applicable, because, as the testator did not know who the children of Mrs. Lee would be, he could not be supposed to intend them as peculiar objects of his affection and bounty; not more so than any other of his unnamed and unknown grandchildren. The decision in *Timberlake v. Graves* has been, I believe, generally disapproved by the profession, as being a departure from the long established rule, that a limitation over of personal estate, after a dying without issue, or without heirs, is a limitation after an indefinite failure of issue, and there-  
 259 fore void, \*and that the whole interest vests in the first taker. It was disapproved of by this court (or rather by two judges of the court) in *Griffith v. Thompson*, but it was not expressly overruled. If the point adjudicated in *Timberlake v. Graves* had been confined to that case alone, I should have concurred in the opinion to overrule it: but it was followed in quick succession by *Gresham v. Gresham*, *James v. M'Williams*, and *Didlake v. Hooper*. These adjudications ought to be considered as settling the law in cases exactly resembling them, more especially as in devises made since the statute of 1819 took effect, the statutory rule will prevail. But I think it ought not to be extended further (in wills antecedent to the new statute) than those cases will strictly and literally warrant. I have already pointed out the difference which I think distinguishes this case from *Timberlake v. Graves*. I am of opinion that the limitation here is after an indefinite failure of issue, and is too remote, and void, and that Thomas Deane had the whole interest in the slaves and their increase; and that, therefore, the decree should be reversed and the bill dismissed.

CABELL, J. I am of opinion, that the limitation over, in the present case, is not sustained by the authority of the decisions of Westminster hall; nor do I think it supported by any of the decisions of this court. It is not like the executory devises in *Timberlake v. Graves*, *Gresham v. Gresham*, *James v. M'Williams*, or *Didlake v. Hooper*: there was a circumstance in each of those cases which is not to be found in this. There, the limitation over was to persons in esse and named; to them merely, and not to their heirs &c. and the court said, that this purported a limitation to themselves, and was intended as a personal benefit to them, which excluded the idea of an indefinite failure of issue. But in the case before us, the limitation over is to a class of persons,  
 260 \*the children of Mrs. Lee; none of whom are named, and some of whom might not then be in esse. And as I am not disposed to carry the principle of those cases farther than it has already been carried, I cannot support the limitation in this case,

there being nothing to restrain it within the prescribed limits.

But as this case stands clear of *Timberlake v. Graves*, and all that class of cases, I shall not go out of my way to express my opinion concerning them, favourable or unfavourable. It will be time enough to do so, when a case shall occur, presenting similar circumstances. It is contended, that one such case has occurred; *Griffith v. Thompson*, 1 Leigh 321. I am not prepared to say, whether it does or does not involve the same principle. In that case, the court, consisting of three judges, disregarded the principle decided in *Timberlake v. Graves*, and the other cases which followed it; and two of the judges expressly assailed its correctness. The case of *Callava v. Pope*, 3 Leigh 103, cannot, I think, be regarded as in conflict with *Timberlake v. Graves*: in *Callava v. Pope*, the limitation over was to a class of persons. Whether a single decision of a court consisting of three judges shall overrule a series of decisions of the whole court, will be a matter for consideration when the point shall be properly presented. I cannot, however, refrain from advert-  
 261 ing to one fact, which is sometimes relied upon as calculated to detract from the authority of *Timberlake v. Graves*, &c. namely, that the arguments of the counsel are not reported, and that the court adverted to no authorities in pronouncing its decisions. But although the fact is as stated, yet it does not follow, that the cases were not ably argued at the bar, and gravely considered by the court. It frequently happened, in those days, that important cases which had been elaborately argued at the bar, and long considered by the court, were decided by simply affirm-  
 ing or reversing; the court thinking it more important to \*administer the justice of the country, than to spend its time in assigning the reasons and authorities which had led to its decisions; and the arguments of the bar were not given by the reporter (Mr. Munford) simply because his official duties, as clerk of the house of delegates, prevented him from attending the court, for months together. Hence it is that his 6th volume contains the decisions of nearly three years.

I am of opinion that the decree should be reversed, and the bill dismissed.

BROOKE, J. I concur in the opinion that the decree should be reversed, and the bill dismissed; and in the remarks of my brother Cabell touching *Timberlake v. Graves*, &c.

TUCKER, P. I have no doubt, that this decree ought to be reversed, and the bill dismissed. For my own part, however, I do not see any essential difference between the executory limitation in the present case, and the limitations in *Timberlake v. Graves*, and some of the other cases which followed the principle on which that case was decided: but in deference to the opinion of my brethren, I forbear to enter into an examination of that class of cases.

Decree reversed, and bill dismissed.

## 262 \*Towner v. Lane's Adm'r.

February, 1838, Richmond.

(Absent TUCKER, P.)

**Partnership—Losses—Profits—Apportionment.**—*Quere*, whether, in the case of a mercantile partnership formed without any agreement as to the proportion in which the losses are to be borne and the profits divided between the partners, the same are to be borne or divided equally between them, or are to be apportioned in the ratio of their respective contributions?

**Practice in Court of Appeals—Rehearing at Subsequent Term—Mistake of Fact.**—Upon a petition for a rehearing of a cause in this court, at a term subsequent to that at which the court has entered a decree, but before that decree has been certified to the court below, on the ground that the decree was founded on a mistake in point of fact; the question was whether it was in the power of the court to allow the rehearing? And upon this question, four judges present were equally divided in opinion.

James Lane had been, for many years prior to 1817, engaged in quite an extensive mercantile business, consisting principally in the retailing of merchandise, at Shepherdstown in Jefferson county, and Benjamin Towner was a young man who had been long in his employment there, having been from early youth brought up to business by him. In September 1817, Lane admitted Towner into partnership with him; and announced by advertisement at Shepherdstown, that he had given Towner an interest in his business at that place, which would in future be carried on under the firm of Lane & Towner; this, Lane said in his advertisement, he had done to reward merit.

The capital of the house of Lane & Towner

consisted entirely of the stock of Lane's previous business in which he alone was concerned. Towner brought neither money nor merchandise, but only labour, industry and skill, into the partnership. Lane had several similar establishments at other places, and gave a general \*superintendence to all. The particular business at Shepherdstown (namely, the retailing of the merchandise, the keeping of the accounts, the collection of the proceeds of sales, as well as the collection of moneys due to Lane on account of his former transactions) was confided almost exclusively to Towner: but Lane made the purchases of the goods which were brought to Shepherdstown to be retailed. Lane appeared to have been a prudent and judicious merchant; and the part of the business confided to Towner was faithfully and judiciously conducted by him. The business was profitable. The partnership continued until September 1823, when it was dissolved by the death of Lane.

At the time the partnership of Lane & Towner was formed, there was no agreement between the partners, verbal or written, ascertaining the proportion of the profits which each was to receive; nor was there any agreement on that subject made between them during the continuance of the partnership. And in July 1819, Towner (being about to be married) addressed a letter to Lane, in which he said, he would not have been engaged in business for two years with any other person without knowing the terms, but placing the most implicit confidence in Lane, he had not hitherto thought it necessary to ask what part of the profits he was to receive; he now inquired on what terms Lane expected or intended he should continue

**\*Practice in Court of Appeals—Rehearing at a Subsequent Term—Error of Law or Fact.**—In *Campbell v. Campbell*, 22 Gratt. 666-669, 671, the court, after setting forth the decisions in *White v. Atkinson*, 2 Call 376; *Price v. Campbell*, 5 Call 115; *Campbell v. Price*, 3 Munf. 237; *Bank of Virginia v. Craig*, 6 Leigh 399, and *Towner v. Lane*, 9 Leigh 262, and quoting at some length from the opinions of PARKER and BROCKENBROUGH, JJ., in this last-named case, said: "These seem to be all the material decisions of this court on the subject we are considering, to which we have been referred by counsel, or which we have met with, and they seem conclusively to show that after the end of the term of this court at which a judgment or decree may be rendered by it—or at all events, after such judgment or decree has been certified to the court below, it is too late to have the case reheard in this court, upon any ground of error of law or of fact apparent upon the face of such judgment or decree, or of the record on which it was rendered. Whether the rule be founded on principle, or be merely a rule of practice, it is alike absolute and inflexible. Public policy, if not necessity, requires that it should be strictly enforced, even in cases of the greatest individual hardship. The law has been settled by these cases, and has ever since been acquiesced in, and hence no more recent cases on the subject are to be found in our reports. Applications for rehearings after the end of the term have often since been made to this court, but have always been refused, and there the cases have ended. There is a recent

statute authorizing the court, under certain circumstances, to rehear and review a case decided at the preceding term. Acts of Assembly 1869-70, p. 223, ch. 171, § 10 (Va. Code, 1887, § 3492). But that statute has no bearing on this case." See also, the principal case cited to the same point in *N. Y. Life Ins. Co. v. Clemmitt*, 77 Va. 374; *Hall v. Bank of Virginia*, 15 W. Va. 327, 328, 332.

As approving the decision of *Bank of Virginia v. Craig*, 6 Leigh 438, see principal case cited in *Newman v. Mollohan*, 10 W. Va. 502.

**Court of Appeals—Decree Final—Second Appeal—Bill of Review.**—The decree of the court of appeals upon a question, decided by the court below, is final and irreversible; and, upon a second appeal in the cause, the question, decided upon the first appeal, cannot be reviewed. In such case, the conclusiveness of the decree of the court of appeals is the same, whether the first appeal was from a final, or interlocutory decree of the court below. When the court of appeals makes a decree, and sends the cause back for further proceedings, there cannot be a bill of review, to correct the decree of the court of appeals for error apparent. *Henry v. Davis*, 13 W. Va. 252, 253, citing principal case; *White v. Atkinson*, 2 Call 376; *Price v. Campbell*, 5 Call 115; *McCall v. Graham*, 1 H. & M. 13; *Campbell v. Price*, 3 Munf. 237; *Bank of Virginia v. Craig*, 6 Leigh 399; *Newman v. Mollohan*, 10 W. Va. 438; *Western M. & M. Co. v. Va. C. & C. Co.*, 10 W. Va. 250; and *Pinkney v. Jay*, 12 Gill & J. 60. For other cases in point, see *foot-note* to *Campbell v. Campbell*, 22 Gratt. 649.

to do business in the partnership. It did not appear what answer, or that any answer, was returned by Lane to this letter.

The stock of merchandise which Lane had on hand when the partnership of Lane & Towner was formed, being intended as the stock with which this partnership was to commence business, an inventory thereof was taken, in which the articles were set down at their first cost; and according to the inventory, the value of the goods amounted to 48,456 dollars

264 \*In August 1827, Henry Boteler, the administrator de bonis non of Lane, exhibited a bill, in the superior court of chancery of Winchester, against Towner, the surviving partner, for a settlement of the accounts of the partnership transactions, and for a division of the profits according to the just rights of the partners.

Towner, in his answer to this bill, insisted, that as the stock of merchandise on which the partnership of Lane & Towner commenced business, and which was inventoried at first cost, amounting to 48,456 dollars, was but the remnants of goods that Lane had purchased and had been trading on, during his previous transactions, for a course of many years, there ought to be an abatement of some fifteen or twenty per cent. from the amount at which they were rated in the inventory. But the point on which he principally insisted, was, that he was entitled to one half of the profits of the business; 1. because, as there had been no agreement between him and Lane touching the apportionment of profits between them, each was entitled, by the general principles of law and equity, to an equal share; 2. because, as Lane had himself allowed one half of the profits of other partnerships, which he had formed with other junior partners at other places, to such junior partners, Towner inferred, that Lane really intended to allow him, likewise, one half of the profits of their partnership business; and 3. because the capital of skill, labour and industry, which Towner had brought into the business, and devoted to it during its continuance, fairly entitled him to an equal share of the profits.

Touching the facts upon the ground of which Towner claimed an equal share of the profits, the depositions of several witnesses were taken and filed in the cause; but, for reasons which will appear in the sequel, it is unnecessary to state the evidence.

An order was made by consent, referring all accounts between Lane and Towner to a commissioner, and especially

265 \*their partnership accounts, and directing the commissioner to ascertain and report the amount of profits of the partnership business—reserving all questions and principles involved in the case, for further examination and decision. And while the accounts were before the commissioners, the cause coming on for hearing before chancellor Browne, according to the reservation in the former order, the chancellor made an interlocutory decree, instructing the commissioner, that in stating the partnership accounts, he should first state the accounts of each partner with the firm, and credit Lane's

administrator with the amount of advances made by Lane to the firm and interest on those advances, and debit him with all sums drawn out by him, upon the ordinary principles of debtor and creditor; that the whole amount which would be thus ascertained to be due to Lane, together with all expenses and losses, should be deducted from the partnership funds; and that the net profits which should remain, should be equally divided between the partners: but as these instructions to the commissioner were founded on evidence then before the court, and as further evidence might yet be introduced into the cause, which might so vary the state of the case as to render it proper to apply other principles to it, the court reserved liberty to either party to insist on another rule for the division of the profits, if any evidence afterwards adduced should, in his opinion, make out a different case from that which then appeared.

The commissioner, in stating the partnership accounts, made various statements on which the general account of the partnership business was based. The first of these statements was the account directed by chancellor Browne's decree, of Lane with the house of Lane & Towner; which was headed, and the first item of credit therein was, as follows:

266 \*\*\* Dr. James Lane,  
in account with Lane & Towner, Cr.  
1817, Sept. 15. By sundry goods,  
wares and merchandise per inventory  
taken this day, \$48,456.\*\*\*

The result of the partnership accounts stated by the commissioners, shewed, that the net profits of the business amounted to 41,023 dollars; which, in pursuance of the instructions of the court, he divided equally between the partners.

The cause having been transferred to the circuit superior court of Frederick, and there coming on for hearing upon the report of the commissioner, that court declared, that though, where two or more persons agree to carry on business as joint partners, and the agreement is silent as to the proportion in which they shall share the profits, the profits are, by construction of law, to be equally divided, having regard to the persons composing the firm, and without regard to the amount of capital or labour furnished by them respectively, such being presumed to be the intention of the parties; yet, where the agreement is not completed by the parties, and they have designedly left for future adjustment the proportion in which the profits shall be divided, the rule of construction above mentioned is inapplicable, since such reservation for future adjustment by contract, manifests an intention that the rule of construction which the law would otherwise have enforced, shall not be, but some other shall be, the rule by which the losses and profits of the business shall be apportioned: that the law, indeed, would not enforce such a contract if it were

\*The partnership books were not before this court, so as to see whether the commissioner copied this item from them or not.—Note in Original Edition.

executory, because of its incompleteness and uncertainty; but where the parties have acted under it, and have carried on the intended business without settling the suspended terms between them, \*and finally disagree in regard to the same, it devolves upon the court to supply the omission: and that, as the elements which enter into such a contract (capital, labour, skill, credit, connexions, risk &c.) do not furnish any rule of universal application, the court, in doing that which the parties ought to have done but have not done, must be governed by the circumstances of each particular case, and make such division as, under all the circumstances, appears to be just. And upon the evidence in the cause, and especially Towner's letter to Lane of July 1819, the court was of opinion, that the proportion in which Towner was to share the profits of the business he had engaged in with his late master, was not settled, (much less was it understood that he was to receive half) but was to be the subject of future adjustment between them. The court inclined to refer it to a jury to say, what share of the profits Towner, under all the circumstances, reasonably deserved to have, but it finally concluded, that it was better for both parties, that the court should put an end to the litigation between them. The court then declared its opinion, that under the circumstances of the case, Towner reasonably deserved to have one fourth of the profits of the partnership business, and that the other three fourths thereof ought to be decreed to Lane's administrator. Therefore, the court recommended the accounts to the commissioner to be reformed accordingly, with some other instructions as to details of the accounts.

Towner applied by petition to this court for an appeal from the decree; which was allowed.

I. Stanard, for the appellant, contended, that the principle upon which the decree apportioned the profits between the partners, was wholly erroneous: that to place the compensation to the junior partner upon the footing of a quantum meruit, as this decree did,

268 was to give him wages for his labour as a servant, not a share \*of profits as a partner; that it was the settled and invariable principle of the civil law (the fountain of the law merchant) recognized by the common law, that where a partnership is entered into between two or more, without any express agreement concerning their shares of profit and loss, the loss and the profit must be equally divided; and that the nice distinction on which the decree denied one half of the profits to the junior partner, was unfounded, the circumstances of the present case being such, in truth, as to bring it exactly within the words and the reason of the general rule. He cited Just. Inst. Lib. III, Tit. XXVI, § 1; Domat, Lib. I, Tit. VIII, § 1, 4; Ayliff. Civ. Law, Book IV, Tit. VIII, p. 468; Gow on Partn. 9; Watson on Partn. 57; 3 Kent's Comm. 6; Peacock v. Peacock, 16 Ves. 49, 56; 2 Campb. Rep. 45; Crawshaw v. Collins, 2 Russ. 325; 3 Condens. Eng. Ch. Rep. 131.

Cooke, for the appellee, denied that there was any such principle as that stated by Stanard, to be found in the civil law rightly understood: on the contrary, he said, the true principle of the civil law was, that in the case supposed (of the silence of a contract of a partnership on the subject of the apportionment of profit and loss), the profits and losses were to be apportioned between the partners, with reference to the value of their respective inputs, whether of money, merchandise or personal services, when they are ascertained or ascertainable. And to shew this, he cited from the Corpus Juris Civilis, vol. I, the passage in the Digest corresponding with that in the Institutes referred to by Stanard—Dig. Lib. XVII, Tit. II, § 29, also Id. § 6, 80, and from vol. II, the constitution of Leo, 103—and the notes of Gothofred upon the several passages. He said, the key to the construction of the general language of the Digest and of the Institutes, was to be found in the circumstances, that the civil law idea of a partnership, in general, was an association of persons contributing equally \*to a common stock with a view to make profit; therefore, the civil law, in saying of partnerships generally, that if there should be no agreement concerning the apportionment of profits, they should be equally divided, did, in effect, no more than affirm the principle, that the profits should be divided between or among partners in proportion to their input. Pothier, in his treatise on the Contract of Partnership, was explicit, that the profits ought to be divided among the partners, in proportion to the value of what each of them has brought into the partnership. Pothier, Contr. de Soc. n. 15, 16, 73. He thought chancellor Kent had misapprehended the passage of Pothier, n. 73, cited by him in his commentaries, vol. 3, p. 6.

II. Stanard, adverting to the first item of credit in the account stated in the report of the commissioner, of "James Lane in account with Lane & Towner," where Lane was credited, under date "September 15, 1817, By sundry goods, wares and merchandise, per inventory taken this day, 48,456 dollars," insisted, that this must be regarded as taken from an entry in the partnership books. And then he maintained, that this entry was evidence of a sale by Lane to the new house of Lane & Towner, of merchandise to the amount or value therein specified, of 48,456 dollars: that the circumstance of the vendor's being a partner of the purchasing house, did nowise affect the legal character of the transaction proved by the entry; which was a sale and purchase to all intents and purposes, just as if the transaction had taken place between a third person and Lane & Towner: that thus, Lane & Towner commenced business on a stock of purchased goods, of which they were joint and equal owners: that Towner did, therefore, in fact, put in as much stock as Lane; and was therefore entitled to an equal share of the profits.

Cooke answered, 1. that it did not appear by the commissioner's report, that there was any such entry in the partnership books,

as this item of credit in the account \*stated by him; and, he said, there was, in truth, no such entry in the books. But, 2. if there was such an entry there, he contended it could not bear the construction the appellant's counsel had put upon it, or warrant the inference he had drawn from it.

BROCKENBROUGH, J. In the view which I have taken of this case, I do not know that it is important to decide which is the best construction of the civil law, that contended for by the appellant's or by the appellee's counsel. I shall, however, briefly notice them. On the one hand, we have the plain words of the Institutes, Lib. III, Tit. XXVI, § 1. "If no express agreement be made by the partners concerning their shares of profit and loss, the loss and the profit must be equally divided;" Cooper's Justinian, p. 280. Gow says, if there be not an express agreement, the partnership, as regards its regulation, is governed by the contract implied by the law from the relation of the parties: that in the latter case, the concurrent opinion of all the writers on the civil law, is, that the loss must be equally borne, and the profits equally divided; and for this position he refers to the above quoted passage from the Institutes. The same construction is adopted by chancellor Kent in the third volume of his commentaries; and such was the clear opinion of lord Eldon, as expressed in *Peacock v. Peacock*, 16 Ves. 55. In that case, the jury that tried the issue which the chancellor had directed, found that the plaintiff, who had been taken into partnership by his father without any convention as to the shares of profit and loss, was entitled to one fourth of the profits: lord Eldon was dissatisfied with the verdict, and said, it appeared to him that the son, insisting that he had a beneficial interest, must be entitled to an equal moiety, or to nothing; that as no distinct share was ascertained by force of any express contract between them, they must of necessity be equal part-

ners, \*if partners in any thing. This opinion goes to the full extent of the construction contended for by the appellant's counsel. On the other hand, the researches of Mr. Cooke have enabled him to shew, that several learned commentators have construed the passage from the Institutes and the correspondent passage from the Digest, differently. They maintain, that when a partnership contract does not express the ratio by which the profits shall be divided, and the original amount or value of the input of each partner is apparent or ascertainable, the profits shall be divided in the same proportion that the stock was contributed. This construction of the rule is adopted by Gothofred and Pothier, in the passages referred to by the counsel; and seems also to be supported by Domat, vol. I, Tit. VIII, § 1, 5. He says—"Although the partners have not expressly marked both the portions of the gain and those of the loss, yet if the portions of the gain have been expressed, those of the loss will likewise be regulated on the same foot. And if, without saying any thing of the

gain or loss, it be sufficiently expressed what every one has put into the common stock, the portions of the gain or loss will be the same with those of the stock." I am very strongly inclined to the opinion, that this is the true construction; and that where it is clearly expressed, that A. puts into the common stock one hundred dollars, and B. fifty, and nothing is said about the profit or loss, the profits will be divided in the same ratio, if the business be successful, and the losses in the same ratio, if unsuccessful.

But if this be the true construction, yet the appellee's counsel gains nothing, unless he can shew, that these partners have in fact contributed unequally to the common stock. The construction is not at all incompatible with the proposition, that if one of the partners lends or sells to the firm the whole stock, he lends or sells to the other partner one moiety of that stock, and that each partner thereby contributes equally to the common \*stock. The partner borrowing or buying is a debtor to the other, and is liable to refund or pay, either from his own share of the profits, or from his own peculiar property. This idea is well expressed by lord Eldon, in *Crawshay v. Collins*—"Where a sum is advanced as a loan to an individual partner, his profits are first answerable for that sum; and if his profits shall not be sufficient to answer it, the deficiency shall be made good out of his capital; and if both his profits and his capital are not sufficient to make it good, he is considered as a debtor for the excess."

According to the evidence in this case, I am of opinion, that the input of goods, wares and merchandise of each of the partners, Lane and Towner, was equal. I form this opinion from the entries in the books of the partnership, which are most persuasive evidence for and against each, because they are the books of both. It is true that these books are not copied into the record, but they were resorted to by the commissioner (and the report in this respect is not excepted to); and from his report it is evident, that the first account raised in them was thus: "Dr. James Lane in account with Lane & Towner, Cr." And the first credit given to Lane with the partnership, on the very day it was formed, (15th September 1817) was for sundry goods, wares and merchandises, per inventory of this day, 48,456 dollars. Here was an advance by Lane to the partnership of the whole of the specified sum, and consequently to Towner his partner, of a moiety of that sum. The goods which had been previously the property of Lane were on that day inventoried and valued, and placed in the storehouse of Lane & Towner, and the former owner was credited with them on the books of the partnership. This was a sale and transfer of those goods by Lane to the firm, and by this simple operation the property in them was transferred to Lane & Towner. If the goods had been sold by a Baltimore wholesale merchant to

\*the house of Lane & Towner, no one would doubt that Towner's share of them was the same with that of Lane; and I can see no difference between a sale by a

third person and the sale by Lane himself.

The personal services of the partners, I consider as equal; at least, I see nothing in the evidence to justify the opinion, that the administrator of Lane can set up any pretension to greater services than Towner. The latter was engaged principally in the business of selling the goods, for which his long acquaintance with the customers peculiarly fitted him. Lane, on the other hand, was principally engaged in buying and laying in goods. Even if this service was more important than that of selling (which does not appear), yet this was counterbalanced by the fact that Lane's whole attention was not bestowed on the business of this particular partnership. He was the elder partner in many other firms, and he was employed in making purchases not only for Lane & Towner but for all his other mercantile concerns.

One argument urged to shew that Towner was not entitled to an equal share of the profits, is, that after the partnership had been in existence for two years, he wrote a letter to Lane, inquiring on what terms he expected or intended him to do business; and declaring, that he would not have done business for two years for any other person without knowing the terms; but that, placing the most implicit confidence in him, he had not before thought it necessary even to ask what part of the profits he was to receive. The inference is hastily drawn from this letter, that Towner knew he was not to share equally. It is not a correct inference. The change that was about to take place in Towner's situation, plainly shews his motive in asking for a decision. It is not wonderful, that he should wish to be on a sure footing; and this long protracted controversy proves,

that he was right in his desire to have  
274 the questions which might arise between them settled by a convention. With respect to this letter, I will observe, 1. that it tends to prove, that, at its date, there had been no agreement between them as to the shares of profit and loss; and, consequently, that it leaves the operation of the rule of law (whatever it may be) in full force: 2. that as there is no answer to it, specifying the terms on which Lane understood they should keep up the partnership, we must conclude, that Lane himself was willing, that the decision of the question as to the share of the profits should rest on the footing on which the law placed it. If it be supposed, that Lane did answer the letter, and that Towner withheld the answer, it may be remarked, that the suspicion is entirely gratuitous. The bill does not charge, that Lane ever answered the letter, nor does it call on the defendant to say, whether he ever answered it: the plaintiff, by an amended bill, might have required the evidence of the defendant on oath as to this matter; and we cannot infer, in the absence of the answer to the letter, that Lane ever did express in writing, or otherwise, any determination as to the manner of sharing the profits.

The judge of the circuit superiour court was of opinion, that under the circumstances of this case, the defendant Towner reasona-

bly deserved to have one fourth of the net profits, and the other partner three fourths. This decision was probably founded on that of lord Ellenborough in *Peacock v. Peacock*, 2 Camp. 45, on the trial of the issue which lord Eldon had directed. He left it to the jury to decide, what the plaintiff should have, and they decided on one fourth. If the judge, in this case, had been right in supposing that it should be decided on the principle of quantum meruit, yet I think he was wrong in not leaving that matter to be decided by a jury.

I am of opinion, that the rule adopted by chancellor Browne in the directions which he gave to the commissioner  
275 \*was entirely correct. The only objection made to it by the appellant's counsel, is, that he authorized interest to be allowed to Lane on all advances made by him to the firm. I have no doubt that a jury would have allowed interest; and it is a well settled rule, in all our courts, that it shall be allowed on all advances, whether the account has been liquidated or not.

The commissioner in his report conformed to the directions of the chancellor, and reported the net profits (after paying Lane the amount of all his advances to the firm, and interest on them) to be 41,023 dollars. In that settlement the goods were charged to the firm, at the price set down in the inventory first taken. This is objected to by Towner, and a great deal of evidence is taken to prove, that they were very greatly overvalued. I pay no attention to that evidence. The inventory and valuation were made under the superintendence of both the partners, and that makes it a binding agreement on them.

I think the decree should be reversed, and the cause remanded to the circuit superiour court, to be further proceeded in according to the opinion declared by this court.

CABELL, J. It is unnecessary to discuss the question, what ought to be the ratio for apportioning the profits and losses of the firm of Lane & Towner, if the parties had contributed unequal portions of input stock, and had been silent as to the rule of apportionment. No such inequality exists in this case. Nothing was put in as stock by either partner. Neither contributed any thing, but his personal credit, his skill, his attention, his time and labour. The goods, wares and merchandise, which, on the 15th September 1817, were entered on the books of the firm to the credit of Lane, were not put in as his portion of input stock, but as a sale to the partnership. By that transaction, the  
276 goods became \*the joint property of the house; Towner's interest in them was, in every respect, equal to that of Lane; and if they had been consumed by fire the next day, the loss would have fallen on Towner equally with Lane; for he would have remained liable to Lane for a full moiety of the price at which they had been entered to the credit of Lane. Every body would admit this to be the case, if the goods had been purchased from some merchant in Baltimore, or elsewhere; and the principle is precisely the same where the purchase is

made of an individual partner. Towner's contributions to the firm, so far as relates to these goods, and indeed as to every thing else, were equal to Lane's; and as the partners made no special agreement as to the division of profits, the case, in this view of it, becomes one to which, by universal consent, the rule of equality is applicable. Towner is, therefore, entitled to an equal portion of the profits.

But I am of opinion, that Lane is entitled to interest on his advances to or for the company, and that his account should be settled on the principles applicable to ordinary debtors and creditors. He is to be credited for the goods furnished by him to the partnership, at the price at which they are creditors to him in the books; for that must be regarded as a matter adjusted and agreed to by the parties. But in settling the affairs of the partnership, for the purpose of ascertaining the profits, the goods remaining on hand at the dissolution of it, should be set down at the price at which they were sold, and not at the inventory prices, as stated in the report of the commissioner.

The decree should be reversed, and the cause remanded to be farther proceeded in according to these principles. And both parties should be at liberty to take any exceptions to the reports of the commissioner, heretofore made, that they might have taken at any former stage of the cause.

277 \*PARKER and BROOKE, J., concurred. Decree reversed, and cause remanded &c.

Before the above decree of reversal had been certified and transmitted by the clerk of this court to the circuit superior court, but after the expiration of the term at which it was pronounced, namely, at the next ensuing term, Lane's administrator presented a petition to this court, praying a rehearing, on the ground that the decree of this court touching the main point in controversy, was founded on a mistake in point of fact. That this court, regarding the first item of credit in the account stated in the commissioner's report, of "James Lane in account with Lane & Towner," where Lane was credited "September 15, 1817, By sundry goods, wares and merchandise, per inventory taken this day—48,456 dollars," as having been taken from an entry to the same effect on the books of the partnership, had thence inferred a sale of the goods by Lane to Lane & Towner; by which sale, the goods became the joint property of the partnership, and Towner's interest in them equal to that of Lane; so that Towner's contribution of stock was equal to Lane's, and consequently Towner was entitled to an equal share of the profits: whereas, in fact, there was no such entry on the books of the partnership as that found in the commissioner's account; the commissioner having stated that particular account, in that form, not because he found such an account stated on the books, but because chancellor Browne's decree instructed and required him to state the account. That the true state of the facts had been ascertained by an actual reference to the books of the partnership; and the proof was exhibited to

the court, that there was no such entry on the books; but if the court could not admit this proof, because it was no part of the record now here, yet a critical examination of the record itself would suffice to evince the truth of the case, and to satisfy the court, that its decree was founded on a mistake in point of fact.\*

PARKER, J. A motion has been made to set aside the decree in this cause, entered during the last term, and for a rehearing, on the ground of judicial error in matter of fact: and the motion has been urged with great earnestness and ability.

Taking it for granted, that there may have been such error in the decree, the first inquiry is, can it be amended after the term has ended in which it was pronounced? Decrees and judgments stand, in this respect, upon the same footing. With respect to decrees in the inferior courts, the doctrine has long been well settled, that after the term has passed, the cause cannot be reheard in the same court, except upon bill of review. In this court, we have no proceeding analogous to that. We must determine the question upon principle and authority.

It is just and expedient, that there should be some termination to litigation. Particular cases of hardship must yield to general rules of convenience. We must fix some period at which cases shall be considered as finally ended, or this court will be overwhelmed with applications for rehearing, and parties will be kept in continual uncertainty of their rights. Fix on any we may, individual injustice may be done, but upon the whole, the public good will be promoted, by avoiding the mischiefs of uncertainty and long protracted law-suits. This is one of the chief reasons why we adhere to erroneous precedents. Whatever the period may be, it ought to be certain, well defined and inflexible; or the evil is not remedied. If it depends on accidental circumstances, on the action of officers of the court, or on matters in pais, depending on evidence, the rule itself is of little importance.

The rule, that a cause shall not be reheard after the term is ended, is a certain and invariable one, of easy and uniform application. Any other that has been suggested, and especially that which makes the action of this court to depend upon the certifying of its decree to the court below, or upon that court's receiving and entering the decree, wants all the qualities of certainty, invariableness, equality and uniformity.

For these reasons, I should incline on principle to say, that the end of the term should be the end of the litigation, so far as this court is concerned; and I think this rule is established by authority.

In England, it has been repeatedly held, that when judgment is once given and enrolled, no amendment is permitted at any subsequent term. See 3 Christian's Blacks.

\*It seemed to the reporter, from the examination he was obliged to make of the record, that the alleged mistake of this court as to the matter of fact, though it was by no means obvious, and was easily to be accounted for, was yet quite certain.



Comm. 407. All the cases proceed upon that distinction. In *Blackmore's Case*, 8 Co. 156b, 157a, it is said, that, at common law, the judges might amend as well their judgment as any part of the record &c. in the same term, for during the term, the record is in the breast of the judges, and not in the roll. In 1 Bac. Abr. Amendments and Joefails, A. p. 145, it is laid down, that the record of a judgment is in the breast of the court all the same term, because it is a roll of that term, and so in the breast of the court during the whole term. So, in the case of *The Parish of St. Clements v. The Parish of St. Andrews Holborn*, 6 Mod. 287, Salk. 606, it was held, that the judgment of justice is in their breast, and alterable by them, all the same sessions. These decisions seem to me to have settled the doctrine in that country whence we derive the principles of our jurisprudence. Nor do I think, that the forbidding of alterations in the judgment of the court after the term, originated in the statute 11 Hen. 4, ch. 3. That statute did not prohibit them, but was, as I take it, 280 only in \*affirmance of the common law. Coke, Blackstone, and other writers, speak of amendments after the term not being allowed at common law; and in *Chambers v. Moor*, 2 Lev. 431, it is expressly affirmed, that such amendments could not be made at common law; citing the year book 4 Edw. 3, pl. 9, b. which was before the statute 11 Hen. 4, ch. 3.

Looking, next, to our own precedents, we have, first, the case of *The Commonwealth v. Beaumarchais*, 3 Call 107, 151. In that case, all the judges thought the decree of the court below erroneous as it stood, but being divided in opinion whether the contract should be settled by a scale of four for one or of five for one, a decree was entered, stating that the chancellor's decree was reversed, but that on account of the division among the judges as to the scale of depreciation, no further decree could be made, since the case was not provided for by the act of assembly. But, at a subsequent term, the court being of opinion, that upon an equal division of the judges in the partial affirmance of the decree, it ought to have been partially affirmed, and that the cause still remained in the court undecided and yet depending, the decree was corrected. Now, whether the court was right or wrong in saying that the former decree was interlocutory and not final, it is obvious it placed its control over the decree on the ground, and not on the ground of power to change the decree after the term: in truth, this ground is excluded by the reasons assigned.

In the case of *Campbell v. Patterson*, decided in March 1835, the court proceeded either on the ground of consent, or (what is more probable from the entry) on the ground that the court had no authority to hear the cause in the absence of retained counsel, necessarily otherwise engaged in the house of delegates, and that the cause had been heard by mistake, and against the rule established by the court in other cases; and consent having been in fact given for 281 the reinstatement, it was \*probably

little considered. It seems, too, in that case the certificate had actually gone out; so that that distinction will not avail.

In the case of *Glass v. Baker*, 6 Munf. 218, a motion for a rehearing being made at the next term, it was overruled; the court "doubting, at least, its right to rehear a cause at a subsequent term, and thinking it best not to do it."

Then we have the case of *The Bank of Virginia v. Craig*, 6 Leigh 399, 438, which strongly appealed to the justice of the court; for the sureties had not been heard, and the question decided against them was *coram non judice*; yet this court unanimously overruled the motion for rehearing, on the ground that it "could not now set aside the decree entered at the former term, whether it was prematurely entered, or whether it was objectionable on its merits, or not."

Other instances have been mentioned at the bar, of the court's adherence to this rule; but as they exist only in the recollection of counsel, and no entry was made on the record, I forbear to notice them. Enough appears to satisfy me, that the court has never intentionally departed from the rule of the english law, which I think is founded in wisdom and justice. If it is thought otherwise, let the legislature confer the power, and define its limits.

No distinction has ever been adverted to, of a decree being in the power of the court, as contradistinguished from its being in the breast of the judges; and we have seen what is meant by that expression: nor has any allusion ever been made to the certifying of the judgment or decree to the inferior court, or to that court's subsequent action on it.

I am of opinion, that this cause cannot be reheard; and so thinking, I purposely abstain from any consideration of its merits, as they may possibly (in consequence of the leave reserved to the parties, by the decree, 282 to \*except to the commissioner's report) come again, in some form, before this court.

BROCKENBROUGH, J. I concur in the opinion just expressed. I have always understood, that when the term of the court ends, the case is no longer within the breast of the court, but constitutes part of the unchangeable records of the court. If it is afterwards deemed to be within the discretion of the court to reopen the record, what limit is to be placed to that discretion? Is the certificate of the clerk, which the statute directs to be transmitted to the clerk of the court whence the appeal was brought, to be taken as the termination of the cause here? If so, very little relief will be given to suitors whose causes have been erroneously decided here. Each party who has gained his cause, will immediately apply for his certificate, and one or two days, instead of twenty, will be sufficient to furnish all the certificates. But if such a general demand be not made, then one rule will prevail in those cases where a long recess follows the termination of the term, and a different rule in cases where the ensuing recess is short. The rule at *Lewisburg* will not be the same as at *Richmond*. The suitors here whose causes are decided



against them at the November or January term, may have them reopened: but the doors of the court will be closed against those unfortunate persons, against whom judgments or decrees have been rendered in the March or July term.

I cannot understand how the certificate of the clerk, or the transmission of it, can make the judgment or decree any more a part of the rolls of the court, than it was before. Even an execution is no part of the record of a judgment; and as the clerk of this court issues no executions, his certificate of the judgment (which, when received by the clerk of the court below, and entered on the records of that court, will authorize an execution

283 \*cannot be a part of the rolls of this court. Nor can I perceive how the failure of the clerk to make out and transmit the certificate, can have the effect to retain within the power of the court, a cause which has been finally acted on, and which, but for that failure, would have been out of its power. But if the discretion of this court is so large as to embrace cases in which the certificate of the clerk has not been issued, why should it not embrace cases in which the certificate has been transmitted, but is not yet entered on the record of the circuit court? Until it is so entered, no execution can issue, nor any further action be had on the judgment or decree. Are we to hear motions of this kind from parties who will bring proof that the certificate of our clerk, though issued, has not yet been recorded in the court below?

Further, if the object of reopening the cause be to do justice in the particular case, why should we stop short of the actual termination of the cause by the prevailing party's putting the fruit of the judgment into his pocket? The certificate is transmitted and recorded, the execution has issued, and a forthcoming bond has been taken; but an execution has not yet been awarded on that bond. At that moment, a discovery is made, that the judgment or decree of this court is palpably erroneous: ought not this court, in the exercise of the discretion which is claimed for it, to reopen and review the cause, and correct its own mistakes? Certainly it ought to do so, on the principles contended for. But we have a recent and express authority that this cannot be done. In the case of *The Bank of Virginia v. Craig*, a decree was entered against the sureties in a guardian's bond, who, although they were parties in the court of chancery, were neither appellants nor appellees in this court. An execution was issued; and Mr. Hooe, one of the sureties, had given a forthcoming bond. He applied to this court

for a rehearing at a subsequent term; 284 and surely, \*if the court had had the discretion which is now contended for, it would have been granted to him, for a case of greater hardship can hardly be imagined. Yet the court refused to rehear it, on the ground, that "it could not now set aside the decree entered at the former term, whether it was prematurely entered, or whether it was objectionable on its merits, or not."

I am for overruling the motion. In this particular case, I am satisfied, that little if

any injury will be done to the appellee. The court, in its decision, established certain principles, growing out of the facts believed by it to be set forth in the commissioner's report (which was not excepted to), and remanded the cause to the circuit superior court, for further proceedings to be had therein according to the principles of the decree; but it reserved to both parties the right to take any exceptions to the reports of the commissioner, heretofore made, that they might have taken at any former period, consistent with the principles decided by the court. It seems to me, that under the decree it is still competent for the appellee to except, and to exhibit to the court below, a state of facts (if they exist) different from that which at present appears by the record. If those facts should be varied by the new evidence, the principles established by this court may not apply.

CABELL, J. This is an application, by the counsel for the appellee, to set aside an order of the last term, pronouncing a final decree, which has not yet been certified to the court below. The object proposed in setting aside the order is a reargument of the cause; and the reargument is asked for on a suggestion, most respectfully made, that the court was mistaken in the supposed existence of an important fact, on which its decree was based, when, in truth, as is now alleged, no such fact is to be found on the record. And the application is resisted on

the ground, that as the decree is 285 \*final, and the term expired, the court has no legal competency to reconsider the case, even although the decree may be palpably and grievously erroneous. I cannot accede to this broad proposition.

The time within which the courts will reconsider their judgments and correct their own errors, has, in my opinion, been regarded as involving a question of judicial discretion, rather than of strict legal power; a discretion to be regulated according to the requirements of justice. For we find that the practice of the courts in respect to this subject, although professed to be regulated by the common law, has been very different at different stages of our judicial history. Thus, Fitzherbert informs us, in his *Natura Brevium*, p. 49, 50, that, in his day, "error in the king's bench in the process, where it is the default of the clerks, shall be reversed in the same court by a writ of error sued by the party before the same justices; but not without suing of a writ of error, although it be the same term. But in the common pleas, after judgment given the same term, the justices may reverse their own judgments, upon error in the process, or for default of the clerks, without any writ of error sued forth; but, in another term, the party ought to sue forth a writ of error thereupon, returnable into the king's bench. But of an error in law, which is the default of the justices, the same court cannot reverse the judgment by a writ of error nor without a writ of error; but this error" (even although a mere interlocutory judgment, as I understand it) "ought to be redressed in another court, before other jus-

tices, by a writ of error." Again, Blackstone says (vol. 3, p. 407) "Formerly the suitors were much perplexed by writs of error brought upon very slight and trivial grounds, as misspellings and other mistakes of the clerks, all which might be amended at common law, while all the proceedings were in paper; for they were then considered as only

in fieri, and therefore subject to the

286 control \*of the court. But when once the record was made up, it was formerly held, that by the common law no amendment could be permitted, unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court; but afterwards it admitted of no amendment." Thus we see, that in the earliest stages of the common law, the court of king's bench could not correct an error of that court, even during the same term, and though the error was the mere default of the clerk, without a writ of error; and that, as to an error in law in the judgment of the court itself, the same court could not correct it, even during the same term, by a writ of error, nor without a writ of error. In process of time, however, the common law was held to justify an amendment, even of an error in law in the judgment of the court, by mere motion, at any time during the same term, but not after the term. This was a great extension of the common law, by the mere action of the courts, without the authority of any statute. But even this did not satisfy the demands of the public convenience. And we find that the courts proceeded still farther; for Blackstone adds—"But now the courts are become more liberal; and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up and the term be past. For they at present consider the proceedings as in fieri till judgment is given; and therefore that, till then, they have power to permit amendments by the common law." It is true that he further adds—"But when judgment is once given and enrolled, no amendment is permitted in any subsequent term." He here alludes unquestionably, to final judgments. But this inhibition of the power of amending final judgments, after the term, would seem to be founded on the statute of 11 Hen. 4, ch. 3, since Blackstone refers to that statute as the authority for the position. That

287 statute declares, "that the records and process of pleas real and personal, and of assizes of novel disseizin or mortdancestor, and certifications, and of others, whereof judgment is given and enrolled, or any thing touching such pleas, shall in nowise be amended nor impaired by new entering of the clerks, or by record, or any thing to be certified or testified, or commandment of any justice whatever, in no term after that such judgment in such pleas is given and enrolled." But this statute is not in force here; nor have we any similar statute. We are, therefore, at liberty to go as far as the principles of the common law, amended by the spirit of liberality in modern times, will carry us. It is admitted, that even a final judgment, pronounced on the grav-

est consideration, may be set aside, on mere motion, at any time during the term. This, possibly, may be as far as an inferior court ought to go; for if an error has been committed by such court, it may be rectified by resorting to a superior court. But this is the court of the last resort; and when it errs (as err it sometimes must, being human) its errors will be irreversible, unless it be allowed to correct them itself. It will correct its errors, if discovered during the term. Why shall it not do so afterwards? What magical influence has the lapse of a day, or the expiration of a term, to sanctify error and perpetuate injustice? There is no law for it, and reason revolts against it.

We have seen, that the inferior courts thought, for a long time, that they had no power over interlocutory judgments and decrees, after the term. We have seen, that, without the sanction of any statute, they were afterwards induced by a regard to "the requirements of justice," to extend their power beyond the term. Upon the same principles, this court ought to extend its power of amending even final judgments, beyond the term; for otherwise there will be a denial of justice. This ought to be done in those cases at least, where, as in 288 \*this case, the judgment or decree has not been certified, and where, consequently, there can be no clashing of conflicting jurisdictions.

Again, this is a suit in chancery; and this court, in deciding it, sits as a court of chancery. Now, it will be recollected, that all inferior courts of chancery, although they cannot, after the term, correct their own final decrees on mere motion, yet may do so by bill of review, long after the term. Shall an inferior court be thus allowed to correct its own errors, rather than force the parties to the expense and inconvenience of seeking redress in a superior court, and shall nothing be left to this, the court in the last resort, but to mourn that the injustice it has inadvertently committed is irremediable? If this be so, it calls loudly for legislative interposition.

It is objected, that if this court were, at a subsequent term, to allow a cause to be reargued that had been finally decided at a preceding term, the frequency of such applications would obstruct the course of business, and would perpetuate litigation. I cannot think that such would be the result. Time cools the zeal of the unsuccessful counsel; and reflection more frequently weakens, than strengthens, his conviction that this court erred in deciding the cause against his client. I should therefore think, that motions for reargument would be less frequent after the term than during the term. The right to move for a reargument during the term, has always been exercised at the discretion of the counsel: yet, although I have been a member of this court for more than twenty years, I can confidently affirm, that there have not been as many as twenty applications for the reargument of causes.

It is objected, that the practice of the court has been against the exercise of this power. I am free to admit that the leaning of the

court has, generally, been that way. But I do not think it has been invariable.

289 I do \*not remember that any case has occurred, where, as in this case, the application was made before the judgment or decree had been certified. The case of *Patterson v. Campbell* is among the last where an application was made, after the term, to set aside the decree and grant a rehearing; and in that case, it is believed, the decree has been certified. The application was made on the ground that Mr. Johnson had forgotten to mark his name on the docket, as counsel in the case; in consequence of which, it was taken up and decided in his absence. At the next term, on the application of Mr. Johnson, stating these facts, the decree was set aside, and a reargument directed. Now, if the forgetfulness of counsel to mark himself as such on the docket, be sufficient to break the spell of the expiration of the term, I cannot perceive why the conviction of the court that it has itself erred, should not produce the same effect.

Moreover, whatever may have been the practice of the court, it is competent to the court to change it, where it has not been prescribed by positive law.

Upon the whole, I am satisfied that we have the power to set aside the former decree, and grant a rehearing; and that this is a case in which the power ought to be exercised. It might save much time and expense. But the party will not be without redress, even if the rehearing shall be refused. The decree provides, that when the case gets back to the court of chancery, any exceptions may be taken to the report of the commissioner, which might have been made at any former period. It will, therefore, be competent to either party to shew, that the commissioner was mistaken in the facts stated in his report; and if this be done, it will be the duty of the court of chancery to pronounce the law applicable to that new state of facts, without regard to the opinion which this court has pronounced upon a different state of facts.

290 \*BROOKE, J. The orders of this court respecting any matter before it, are always in the power of the court, to be corrected or recalled, if necessary, until they are executed. They do not stand on the ground of a judgment or decree, which is out of the power of the court, after the term at which it was entered, and after the order to certify it to the inferior court has been executed. Until that is done, the order to certify it may be recalled at any time: when that order is executed, the court has no power to recall, and no process by which it can recall, the record, even though the decree of this court may not have been acted on in the inferior court. Such was the rule adopted by this court in the case of *The Commonwealth v. Beaumarchais*. That case was argued, and the opinions of the judges delivered, in November 1801. The court directed the reargument in May 1803. The president, Pendleton, in delivering the opinion of the court, said—"The court is not precluded from correcting the mistake in the former entry, since the record remains in court, and the cause undecided." If the fact of the

cause being undecided was the reason why the court was not precluded from correcting the mistake, that might have been done by looking at its own order book. The other was evidently the ground: the record remained in court; the order to certify it to the court of chancery had not been executed; there could be no conflicting decrees; the order to certify it could be recalled without the least inconvenience: and, therefore, the mistake in the decree could be corrected.

There are few cases reported on this point; and where a rehearing has been allowed, this ground, that the record remained in court, has not been stated. The cases of refusal to rehear have been the most numerous; and hardly any of them have been reported. The rehearing has been denied on one of two grounds; either that there was no error 291 in the judgment or decree, or \*that the record had been sent out: but however that may be, nothing in language can be plainer, than that the court in *The Commonwealth v. Beaumarchais*, proceeded on the ground, that the order to certify the decree to the court of chancery not having been executed, the record remained in court, and so the decree, being erroneous, might be corrected; and when Judge Pendleton added, that the cause was undecided, all he could have meant was, that the decree was erroneous. Omissions in a decree may make it as erroneous as errors of commission. If the record had been certified to the court of chancery, the ground that the cause was undecided could not have been taken; for then there would have been two conflicting decrees of this court certified to the court of chancery.

It is said, that this rule for rehearing the cause so long as the record is not certified to the inferior court, would operate unequally to suitors, because the clerk may send out the record in some cases, and neglect to do so in others; that his neglect would leave it in the power of the court to correct its errors in the one set of cases, while in the other, his diligence would take away from the court the power of correction. Still, it must be admitted, that the effect of such a rule would be to do more justice, than a rigid adherence to the opposite rule, that after the end of the term, no error, however great and palpable, can be corrected. But there is nothing in the objection. The law prescribes the duties of the clerk, and he takes an oath to perform them. He cannot send out all the records *uno flatu*; some must be postponed to others; and the manner in which he performs his duty cannot affect the power of the court over its orders and records so long as they in fact remain in court.

The case of *Campbell v. Patterson* has been mentioned. I did not sit in that case: if I had been present, I might have been against the rehearing. If the record 292 had \*been sent out in that case, the case goes further in support of motions to rehear after the term, than any other case decided by the court. The case of *The Bank of Virginia v. Craig* is not in point; for there the record had been sent out, and the court had no process by which it could recall it; so that if the cause had been reheard, a

different decree from the one which had been entered, might have been sent out, and when certified might have been in conflict with the first decree.

Examples drawn from inferior courts have no application. Their errors can always be corrected by the superior court; and they themselves have no power of correction after the term has passed, except in suits in chancery, where a bill of review may be filed. Nor are the examples of the courts of king's bench and common pleas in England, of any force: neither of them is a supreme court, and their errors may be corrected elsewhere.

In every view, I have no doubt of the power of the court to rehear the cause; and I think it might promote justice to rehear it, and to change the decree. But my brother judges incline to the opinion (as I myself do) that under the reservation in the decree of this court, of a right to both parties to except to the commissioner's report now in the record, and to any other report that may be made in the cause, justice may be done to the appellee. I have the less reluctance, therefore, the court being equally divided, to pronounce that the motion for a rehearing is overruled.

293 \*Smith v. Browne's Adm'r and  
Morton's Adm'r.

March, 1838, Richmond.

(Absent BROOKE, J.)

**Lis Pendens**—**Waiver of Claim against Purchaser Pendente Lite**—Case at Bar.—If, pending a suit in chancery for recovery of slaves and their profits, one of the slaves is sold by the defendant, and the plaintiffs ask and obtain a decree against the defendant for the value of the slave sold, they thereby waive their claim against the purchaser pendente lite for the specific property.

In September 1817, an interlocutory decree was made by the superior court of chancery of Fredericksburg, in a suit wherein the appellees and others were plaintiffs, and John Fox administrator of one Threlkeld and husband of Threlkeld's daughter was defendant; by which decree the court declared, that the plaintiffs were entitled to a female slave named Kate and her increase, and that the defendant should deliver to them all the descendants of Kate that were in his possession or power, and should render an account of the profits of the slaves &c. The defendant appealed from that decree to this court; by which, on the 1st April 1828, the decree was affirmed, with some modifications.

Immediately after the cause got back to the court of chancery, namely, on the 26th April 1828, upon a suggestion of the plaintiffs, that, since the decree of September 1817, and while the cause was pending in the court of appeals, a slave named James, one of the descendants of the woman Kate, had been given by the defendant John Fox to his son Elijah Fox, subject to the claim of the plaintiffs, and that slave had come to and

was now in the possession of Yeatmans Smith (the now appellant),—the court made a rule upon Smith to deliver the slave James to the marshal of the court to be by him delivered to the plaintiffs, unless he should shew \*cause to the contrary at the next term. This rule was served on Smith: but it appeared that no further proceedings were had on it.

The order for the account directed by the decree of 1817, was then put into the hands of a commissioner of the court to be executed. The commissioner made a report in February 1829, by which it appeared, that there was a large amount of profits of the slaves in question for which the defendant Fox was accountable, and that some of the slaves had been sold, among whom were the above mentioned slave James and another named Henry, and the proceeds of the sales, exclusive of the proceeds of the sale of Henry, amounted to 1326 dollars. And the cause coming on for hearing on the report, in May 1829, the court decreed, that the defendant should pay one moiety of the sum due for profits, and one moiety of the 1326 dollars, proceeds of the sales of slaves exclusive of Henry, to the administrator of Browne, and the other moieties to the administrator of Morton; (that is, the court decreed, that Fox should pay those parties the proceeds of the sale of the slave James, but not those of the slave Henry); "the plaintiffs waiving any decree against Fox for the value of the slave Henry, and reserving liberty to apply for further relief against Fox as to that slave."

In June 1835, the circuit superior court of Spotsylvania, (to which the execution of the decrees of the former court of chancery of Fredericksburg appertained),—on the motion of the administrators of Browne and Morton, the now appellees, suggesting that since the decree of September 1817, the two slaves James and Henry, descendants of the slave Kate, had been transferred from the possession of the defendant John Fox to his son Elijah Fox, and had since come to the possession of Yeatmans Smith the now appellant,—made a rule upon Smith to show cause at the next term of the court, why he should not be ordered to deliver the slaves James and

295 \*Henry to the appellees, and to account for the profits thereof since they came to his hands, or submit to such other order in the premises as the court should think proper.

The facts of the case appearing on this rule, collected from the answer of Smith thereto, and the evidence of witnesses, were as follows—The slave James was taken by the sheriff and sold under an execution against Elijah Fox, in 1827, and was purchased at the sheriff's sale, by Smith, who had ever since and still held possession of him. As to the other slave Henry, he was conveyed by a deed of trust in January 1827, to a trustee, to secure a debt due to Smith: and afterwards, during the same year, this slave was in Smith's possession for one or two days, and Smith desired and intended to purchase him; but it appeared he did not; for the slave was taken sick, declared he would not live with Smith, ran off, and returned to the farm of Fox; and then Fox

\***Lis Pendens**.—The principal case was cited in Osborn v. Glasscock, 30 W. Va. 760, 761, 20 S. E. Rep. 706. On this subject, see generally, monographic note on "**Lis Pendens**."

sold him to one Alsop, and Smith had him carried from Fox's farm and delivered to Alsop, who, by Fox's directions, paid the purchase money to Smith. Smith had no actual notice of the decree of September 1817, whereby these slaves were declared to be the property of the appellees, or that they had any claim to them.

The circuit superior court was of opinion, that Smith was liable for the slaves James and Henry, as the purchaser thereof pendente lite, and therefore made the rule absolute, and directed Smith to deliver the slave James to the appellees, and to pay them 350 dollars the purchase money of the slave Henry, which he had received from Alsop; but the court refused to make Smith account for the profits of James, or for interest on the purchase money he had received for Henry. From which order, this court, upon the petition of Smith, allowed him an appeal.

Stanard, for the appellant.

Moncure and Harrison, for the appellees.

296 \*TUCKER, P. The plaintiffs in equity, by proceeding to take a decree against Fox for the value of the slave James, abandoned their proceeding in rem, and could not afterwards proceed for the specific property against the purchaser pendente lite, as the title of the slave was changed by a decree for his value. As to Henry, he was sold by Fox to Alsop; and as Smith was in the transaction neither buyer nor seller, he is not liable to refund the proceeds, though the same may have been paid over to him in satisfaction of his claim against Fox.

The order is to be reversed, and the rule discharged, with costs.

297 \*Chapman v. Chevis.\*

March, 1838, Richmond.

(Absent BROOKE and PARKER, J.)

**Sheriffs—Default—Motion—Parties—Representative of Dead Surety.**—Where a sheriff makes return on an execution that he has received the money, and makes default in paying the same to the creditor, it is lawful for the creditor, upon a motion under the statute, 1 Rev. Code, ch. 134, § 48, to obtain judgment against the sheriff and such of his sureties as are alive, without including the representatives of a surety who is dead.

**Same—Demand of Money Received under Execution by Creditor's Attorney—Sufficiency of.**—Where an execution is delivered to the sheriff of a county other than that in which the creditor resides, and the creditor employs an attorney at law, practising in the sheriff's county, to collect the money, without, however, giving the attorney a written order, and then the attorney makes a demand of the money from the sheriff, such demand, if no objection be made at the time to the authority of the attorney to receive the money, is, notwithstanding the statute, 1 Rev. Code, ch. 134, § 54, a sufficient demand to justify a judgment against the sheriff.

**Same—Agent of Creditor—Quære.**—Question, upon evidence, whether person filling the office of sheriff, and having an execution in his hands, was

\***Sheriffs—Motion against Notice.**—See principal case cited in Lyon v. Horner, 32 W. Va. 435, 9 S. E. Rep. 875; foot-note to Stone v. Wilson, 10 Gratt. 529.

not the agent of the creditor, and whether the sureties of the sheriff should not be exonerated, on the ground that the amount of the execution had been received by him in the character of agent.

Motion in the circuit court of King George county, under the 48th section of the act concerning executions, 1 Rev. Code, ch. 134, p. 542.\* On the 27th of April 1825, a writ of fieri facias issued from that court, in favour of William I. Chapman administrator of Jane Chapman deceased, against William S. Jett and two others, for 876 dollars 65 cents, to be discharged by the payment of 438 dollars 32 cents, with interest from the 11th of October 1824 till paid, and the costs; which

298 \*writ was directed to the sheriff of King George county, and was returnable to the first Monday in July following. Upon this execution the following return was made—"Executed and ready to satisfy. David T. Chevis, sheriff." In April 1830, notice was given that a motion would be made for judgment against Chevis, and John H. Smith, Thomas Smith and John G. Stuart, his sureties. Only the sureties made defence.

Upon the hearing of the motion, the plaintiff gave in evidence the official bond of the sheriff, bearing date the 3d of March 1825. It was a joint and several obligation, executed by Chevis with Austin Smith, Thomas Smith, John G. Stuart and John H. Smith as sureties; and the commission from the governor, recited in it, was stated to bear date the 4th of January 1825. The plaintiff also gave in evidence an order of the county court, which shewed that Chevis qualified to his commission on the 3d of March 1825. The statement on the execution was as follows:

Principal	\$ 438 32
Interest from 11 October 1824 to 11 August 1826	48 21
Costs	5 78
	<hr/>
	\$ 492 31
Sheriff's commissions on first	\$300 00 \$15 00
Sheriff's commissions on first	192 31 3 84
	<hr/>
	18 84
	<hr/>
	\$ 511 15"

\*This section provides, that "if any sheriff, undersheriff, or other officer shall make return upon any writ of fieri facias or venditioni exponas, that he hath levied the debt, damages or costs, as in such writ is required, or any part thereof, and shall not immediately pay the same to the party to whom the same is payable, or his attorney,"—"it shall and may be lawful for the creditor at whose suit such writ of fieri facias or venditioni exponas shall issue, upon a motion made in the next succeeding general court, or other court from whence such writ shall issue, to demand judgment against such sheriff, undersheriff or other officer, or the securities of either of them, or their legal representatives, jointly, for the money or tobacco mentioned in such writ, or so much as shall be returned levied on such writs of fieri facias or venditioni exponas, with interest thereon at the rate of fifteen per centum

The plaintiff's counsel proved, that about April 1828, he was employed by the plaintiff as his attorney to collect \*the execution, which was then in the hands of Chevis. That, in the character of such attorney, he immediately afterwards examined into the situation of the execution, and found that it had not been returned. That he thereupon called upon Chevis, and, as attorney for the plaintiff, required him to return the execution : which was accordingly returned in June 1828. That as soon thereafter as he could meet with Chevis (which he could not do for some time) he, as attorney, made a formal demand of the money from Chevis, which he failed to pay. Whereupon a notice was immediately prepared ; but the indisposition of the judge caused a failure of the court for several terms.

The counsel by whom this proof was made, was not the attorney who prosecuted the original suit, wherein the judgment was obtained on which the execution issued against Jett and others. The attorney in that suit was Thomas Smith, one of the defendants in the motion.

The said counsel also proved, that at the time he first called on Chevis as attorney, and at the time he made the demand, he had no formal written authority to act, and presented none ; but that he was at that time regularly qualified, and regularly practising, as an attorney in the court of King George county, and acted on the authority conferred on him by the plaintiff, as his counsel or attorney. That since he was first spoken to by the plaintiff, he had received various letters from him, on the subject of his claim, and in relation to the steps to be taken ; which steps he had since taken. He further proved, that at the time when he first called on Chevis as attorney, Chevis admitted 300 that the execution \*had been satisfied, and mentioned that his sureties meant to contend that they were not liable for the debt, on the ground that he had collected the money as agent of the plaintiff ; but that no such defence could be made, because he had received the money as sheriff, and not by virtue of any agency.

The plaintiff also proved, that Austin Smith, one of the obligors in the sheriff's official bond, died before the notice in this case was given. It appeared, however, that administration had been granted on the estate of Smith, and that the administrator was living in the county of King George.

To sustain the defence, the sureties offered evidence to prove that Mrs. Chapman, the plaintiff's intestate, owned a tract of land in King George county, and that before it was sold, Chevis rented it out, and received the rents : that the land was sold to William S. Jett, and the two deeds prepared on the occasion were drawn at the request of Chevis ; one being a deed from Mrs. Chap-

man, conveying the land to Jett, which was to be sent to her to execute ; the other, a deed of trust from Jett to Chevis, to secure the purchase money. By the deed of trust, which was produced, it appeared that the debt thereby secured was for 800 dollars, and was due by two bonds for 400 dollars each, one payable the 1st of April 1824, and the other the 1st of April 1825. The bond payable in 1824 was produced, and appeared to be in the handwriting of Chevis. Judgment had been obtained on it, and execution having issued, a forthcoming bond was taken ; and on that forthcoming bond the judgment was obtained, on which the execution issued that was mentioned in the notice. The deed of trust bore date the 15th of April 1823, and the witness who drew it, thought it was written on that day. He was sure the deeds were written about that time. He did not recollect distinctly what passed between Jett and Chevis during the negotiation, but his impression was, that some difficulty

301 arose between them as to the time of payment, which made it necessary that letters should pass between Chevis and Mrs. Chapman, who resided in the county of Elizabeth City. Subsequent to the sale, the witness saw the bonds for the purchase money in the possession of Chevis. He did not recollect the precise time, but remembered seeing them in the possession of Chevis after he qualified as sheriff. It appeared that Chevis qualified in the first instance as sheriff in May 1824, and that the suit on the bond payable in 1824 was commenced in July of that year. The witness further testified that he once had a conversation with the plaintiff, in which the plaintiff stated, that he had often pressed Chevis for money, and could not get any ; that he told Chevis he did not wish Mr. Jett sued, but wished him to get the money as soon as he could, and transmit it to him, his mother having left some debts which he wished to pay. The plaintiff also told the witness, that he had been deceived in Chevis ; that he had thought, if there was an honest man in the world, he was one. This remark was made in a conversation in which the plaintiff was complaining that Chevis had pressed Jett for the money, and had made use of it himself. He complained that Chevis had sued Jett contrary to his wishes. Yet, though he would not have wished Jett sued, he did not say that Chevis had no right to bring the suit. The witness being asked if he knew whether Chevis had levied the execution against Jett, stated, that he did not know any thing about it, but that Chevis had stated to him that he had levied it on negroes.

Another witness testified, that in 1825, he went from Norfolk to Richmond in the steamboat Richmond, the captain of which was a gentleman named Chapman ; who, learning that the witness was from King George, told him that he had relations in that county, and asked the witness about Chevis. He stated that he had put some claims arising out of the sale of his mother's land to Jett, in the hands of Chevis to collect, and enquired whether he was good ; to which the witness answered,

per annum, from the return day of the execution until the judgment shall be discharged ; and such court is hereby authorized and required to give judgment accordingly, and to award execution thereon : provided, such sheriff or officer have ten days previous notice of such motion."

302 \*he believed he was. The plaintiff in this case is the same gentleman who was captain of the steamboat. In the winter of 1826-7, the witness being in Richmond, was called on by him, and he again made enquiries as to the solvency of Chevis. The witness, not having confidence at that time in Chevis, rather evaded the question. The plaintiff stated that he had been disappointed in Chevis. In the winter of 1827-8, the plaintiff again expressed to the witness uneasiness about his claim, and stated that Chevis had written to him, promising to meet him in Richmond and pay him the money, but had failed to do so. The plaintiff did not, in any of these conversations, intimate that a suit had been brought against Jett. No impression was made on the mind of the witness of a suit having been brought. And the witness expressed his belief, that the plaintiff did not know, at the time, that there had been a suit.

After the sureties had closed their evidence, the plaintiff, in farther support of his motion, introduced a receipt in these words: " \$230. Received April 16th 1825, of mr. William S. Jett, the sum of 230 dollars, in part of the within stated execution. David T. Chevis, sheriff"—together with a statement endorsed on the back of said receipt, and referred to thereby, in the words and figures following:

"Chapman's adm'r v. Jett &c. Fi. fa. Debt	\$438 32
Int. from 11th day of October 1824 till 16th day of May 1825, say 7 months 5 days	15 71
Costs	5 78
	<hr/> \$459 81
Sheriff's commission on first \$300, is	\$15 00
and on \$159 75, at 2 per cent. is	3 19
	<hr/> 18 19
	<hr/> \$478 00'

303 \*and also another receipt in these words: "Received December 9th 1825, of mr. William S. Jett, the sum of 200 dollars, in part of an execution, Chapman's adm'r against said Jett. David T. Chevis, sheriff"—with a statement thereon as follows:

"Debt	\$438 32
Interest from 1st October till 16th May 1825	16 51'

and proved that the said receipts and statements were in the handwriting of Chevis. It appeared that these receipts had been obtained from the possession of Jett a short time previous to the motion; Jett himself being unable to attend.

The plaintiff also gave in evidence a deed of trust, bearing date the 1st of February 1827, from Chevis to Edward Smith and William Cotton as trustees, for the benefit of the sureties in his official bonds as sheriff, conveying real and personal property for their indemnity; which deed was duly recorded in King George county court on the day of its date.

A grandchild of mrs. Chapman testified,

that she died in 1823, in Hampton, where she then resided; that the plaintiff was in the county of King George on the 23d of January 1824, and had never been in the county since, until the spring of 1828; and that he had never resided in the county.

Upon the whole evidence, the circuit court gave judgment for the plaintiff against Chevis, but overruled the motion as to the sureties. The plaintiff excepted to the opinion, and appealed to this court.

The cause was argued by Harrison for the appellant, and by Robinson for the sureties.

I. Harrison relied upon *Norris v. Crumme* and others, 2 Rand. 323, as establishing the binding effect of the sheriff's return upon his sureties. They could only be exonerated by shewing that the return was false, and was procured by a fraud in which the creditor participated. Nothing of the sort was here pretended.

304 \*II. He relied upon *Wilson v. Stokes* and *Betts*, 4 Munf. 455, as establishing, that notwithstanding the 54th section of the execution law, 1 Rev. Code, ch. 134, p. 544, judgment may be entered against the sheriff for the nonpayment of money mentioned in an execution, where a demand has been made by an attorney at law. If, upon demand being made, the sheriff fail to require a written order, he is considered as waiving it.

III. He said, that if this were a proceeding by action, and one obligor were dead, the action would be properly brought against the surviving obligors. Such being the regular common law mode of proceeding, the statute giving a motion ought not to be construed as requiring the motion to be proceeded in differently.

Robinson replied, that he should endeavor to sustain the judgment without repudiating the case of *Norris v. Crumme* and others. In the statement on the back of the execution, he said, interest is calculated to the 11th August 1826. If that was the time of receiving the money, it was not only after the return day of the execution, but after the year had expired for which these sureties were bound. To get over this difficulty, the plaintiff had introduced original receipts; but they did not help the case; for one was dated before the date of the execution, and the other after the return day. Take these dates as correct, and neither payment could have been valid as a payment to the sheriff *virtute officii*. To the last payment, the case of *Chapman v. Harrison*, 4 Rand. 336, is strictly applicable. According to that case, if Chevis had no other authority to receive from Jett the 200 dollars paid on the 9th of December 1825, than his authority as sheriff, Jett might be compelled to pay the money a second time. Now, suppose there had been no return on the execution, and the plaintiff had sued out another, and endeavoured to make Jett pay the 200 dollars again; could the plaintiff have succeeded in this? Unquestionably not; because Chevis had

305 authority \*to receive the money independently of his authority as sheriff. If the debtor, paying after the return day, would be discharged on the ground that the payment was not to the sheriff as such, but as

agent of the plaintiff, how can the sureties be made responsible? They are not responsible for his agency. But again, suppose the money was paid to Chevis as sheriff; it is certainly competent to the sureties to prove that the sheriff has paid the debt, and that Chevis owes it in his individual character. If another had been the agent of Chapman, they might have proved payment by the sheriff to that agent. The sureties ought not to be in a worse condition, because the sheriff and agent are the same person. The money received by him as sheriff should be considered as paid to himself as agent. In *Cook &c. v. Palmer*, 6 Barn. & Cress. 739, 13 Eng. Com. Law Rep. 305, the bailiff had levied as such, but the surplus beyond the amount of the executions was held to be received by him as agent and not as bailiff. In *Gorham v. Gale*, 7 Cow. 739, the money was considered to have been received by the sheriff not as such, but as agent. The 54th section of the execution law requires, in such a case as this, that the creditor shall name some person in the county, to be his agent for the purpose of receiving the money on the execution. It is impossible to doubt that Chevis was the agent named, and that he had complete control over the money. If he was not the agent, there was none. It is only by supposing him the agent having authority to receive the money, that we can account for the plaintiff's lying by from 1825 to 1830. The case is one in which the plaintiff trusted Chevis individually. Chevis has committed a breach of trust; and the plaintiff wishes to visit the consequences of his own confidence, upon others, who are not in fault.

II. The case of *Wilson v. Stokes and Betts* goes to shew that the name of the plaintiff's attorney endorsed on the execution is a written order within the meaning of the statute. That argument will not avail here. For the attorney who made the demand is not the attorney whose name was endorsed on the execution.

III. In *Royster &c. v. Leake*, 2 Munf. 280, there was first a judgment against the deputy, and afterwards a separate judgment against the sureties. This was objected to, but sustained. Since then, the statute has been altered by the introduction of the words "or the securities of either of them, or their legal representatives, jointly." The statute may have been altered to prevent defendants being burthened with the costs of separate motions. But it matters not why the alteration was made. We are not now trying a common law action, but a motion. Whence does the plaintiff get his authority to make the motion? From the statute, and from the statute alone. The statute makes it lawful, on a motion, to give judgment against the parties or their representatives jointly. It does not make it lawful to give a judgment against the surviving obligors separately. It follows that the judgment asked in this case upon motion, was not authorized by law, and that the motion ought to have been overruled.

TUCKER, P. I am of opinion that there is not sufficient proof of Chevis's agency for Chapman, to absolve the sureties of Chevis

from responsibility for his omission to pay over the amount of the execution made by him, to the plaintiff's attorney. I am farther of opinion that as no objection was made by Chevis to the attorney's authority to collect the demand, this defence cannot now be made by himself or his sureties. Notwithstanding the provisions of the statute, the demand of the attorney upon record, has been decided to be sufficient to fix the sheriff (4 Munf. 455); and it is equally clear to my mind, that if the sheriff acknowledges the authority of any other attorney, or, by his silence and his conduct, may be fairly presumed to have admitted \*it, it is too late to make the objection when a motion is made against him.

I am also of opinion that upon a fair construction of the statute, although the creditor may move against the sheriff and the surviving sureties, and the representatives of the deceased sureties, jointly, yet as the obligation is several as well as joint, the creditor has a right to a several as well as joint remedy. Next, it would seem from the case of *Leftwich v. Berkeley*, 1 Hen. & Munf. 61, and other cases in this court, that though the obligee in a joint and several bond cannot proceed against more than one obligor unless he proceeds against all, yet if one be dead, he may proceed jointly against all the survivors. It was, therefore, regular in this case to proceed against all who were living, unless the act imperatively requires the joining of the representatives of the deceased. This at common law could not have been done, and it is not by this act commanded to be done, but only declared to be lawful. I am therefore of opinion to reverse the judgment, and enter it against the sureties as well as the principal.

The other judges concurred. Judgment of circuit court reversed, and judgment entered against all the defendants in the motion.

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\*Hairston v. Woods.

March, 1838. Richmond.

(Absent BROOKE, J.)

**Forthcoming Bonds\*—Variance between Execution and Recital Thereof in Bond—Case at Bar.**—By a fieri facias, the sheriff is commanded to cause principal, interest and costs to be levied of the goods and chattels of J. W. deceased in the hands of S. H. his administrator, if so much thereof he hath, but if not, then out of the goods and chattels of S. H. There being no goods and chattels of J. W. in the hands of S. H. the sheriff levies the execution on the individual property of S. H. and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H. administrator of J. W. deceased: HELD, there is no substantial variance between the execution and the recital thereof in the forthcoming bond.

**Case Distinguished.**—This case distinguished from *Glasscock's adm'r v. Dawson*, 1 Munf. 605.

**Supersedeas—Abatement.**—Where there are two

\*Forthcoming Bonds.—See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.



plaintiffs in a supersedeas, if one of them die, the cause will abate as to him, and proceed in the name of the surviving plaintiff.

A writ of fieri facias was sued out of the circuit court for the town of Lynchburg, upon a decree of that court in chancery, directed to the sheriff of Franklin county, commanding him that of the goods and chattels of John Woods deceased, in the hands of Samuel Hairston senior, his administrator, to be administered, if so much thereof he hath, but if not, then out of the goods and chattels of the said Samuel Hairston senior, he should cause to be made the sum of 1006 dollars 72 cents with interest, which Peter Woods had recovered against the said Samuel Hairston senior, administrator of John Woods deceased; also 68 cents costs. Upon this execution, the sheriff made the following return: "There being no goods and chattels of John Woods deceased in the hands of the defendant Samuel Hairston senior, his administrator, I levied the execution, on the 20th day of March 1834, on three negroes

309 and one wagon and team, the \*property of Samuel Hairston senior, the defendant, and duly advertised the sale of said property to be at Franklin courthouse, on the 5th day of May 1834, it being court day, that being the day and place appointed for the sale thereof; at which time and place, the said property was not delivered agreeably to the bond taken for that purpose, and herewith returned as forfeited." The bond was from Samuel Hairston senior and Samuel Hairston junior to Peter Woods, with a condition reciting that Woods had sued out of the circuit court of the town of Lynchburg, a writ of fieri facias "against the goods and chattels of the above bound Samuel Hairston senior, administrator of John Woods deceased." The circuit court awarded execution on the forthcoming bond against the obligors; and they obtained a supersedeas, upon a petition assigning as error the variance between the execution and the recital thereof in the condition; for which Glasscock's adm'x v. Dawson, 1 Munf. 605, was cited as authority.

Robinson for plaintiffs in error.

The attorney general for defendant in error.

BROCKENBROUGH, J. In the case of Glasscock's adm'x v. Dawson, the execution issued, for the greater part, against the goods and chattels of the decedent, in the hands of the administratrix to be administered; and for the residue, against the proper goods and chattels of the defendant. The condition of the forthcoming bond recited that the execution issued, for the whole sum, against the goods and chattels of the defendant administratrix of the decedent. If we consider, with the majority of the court in that case, that the appendage to the name of the defendant was a mere descriptio personæ, there was a clear variance; for the execution did not issue against the goods of the defendant, at least not for the whole sum for which the judgment was rendered.

310 \*The case before us is different. The execution here was, it is true, in

the alternative: it was for the whole sum against the goods and chattels of John Woods in the hands of Samuel Hairston senior to be administered, if so much thereof he had, but if not, then the same was to be made out of the proper goods of the said Samuel Hairston senior. The return on the execution shews that the first part of the mandate could not be complied with, because there were no goods of John Woods in Hairston's hands to be administered; the second part, therefore, of the mandate was obeyed in levying on the proper goods of the defendant. The condition of the forthcoming bond reciting that the fieri facias had issued against the goods and chattels of Samuel Hairston senior, administrator of John Woods, was strictly true, in the event which had taken place, to wit, that of there being no goods of John Woods in his hands; and it was unnecessary to encumber the condition with a recital of that fact. I am of opinion that there is no substantial variance between the execution and the bond, and that the order awarding execution on the bond should be affirmed.

TUCKER, P. I deem the variance in this case between the forthcoming bond and the execution not material. The names of the parties, the character in which the defendant was proceeded against, the amount decreed and the date of the execution are all right. The circuit court, therefore, was enabled to see, upon the face of the bond, enough to direct its judgment upon it; which was, of course, that the plaintiff's demand should be levied of the proper goods and chattels of the parties to the bond.

The case is not like Glasscock's adm'x v. Dawson. There the administratrix was to be liable, in the event of there being no assets, for the damages and costs only; yet her own proper goods were seized for the 311 \*whole debt. The bond was therefore properly quashed. Here, as there were no goods of the decedent, the defendant was liable for the whole. It was, therefore, unnecessary to preserve the distinction in the recital of the bond; nor was there any thing illegal in levying on his own proper goods for the whole, since the court would intend, even if it did not appear by the return, that the officer could find no goods of the intestate on which to levy.

I am of opinion that the order of the circuit court awarding execution on the forthcoming bond be affirmed.

CABELL, J., concurred in the opinion of the president.

PARKER, J., concurred in affirming the order of the circuit court.

Before the affirmance was entered of record, a suggestion was made that Samuel Hairston senior, one of the plaintiffs in error, had died; and it became necessary for the court to decide whether the defendant in error could have process of revivor in this court against his executors, or whether the cause must abate as to him, and proceed in the name only of the plaintiff in error who survived. Upon this point, the following opinion (in which the other judges concurred) was delivered by

TUCKER, P. At common law, the death of one of several plaintiffs in error abated the whole writ. But since the statute of 8 & 9 Will. 3, ch. 11, § 7, which has been held to apply to writs of error, the writ does not now abate if the action survives. Tidd's Prac. 1219, 20, 1 Saik. 261, 319, Carth. 236, 1 Lord Raym. 244. So with us, the case of a writ of error seems to be within the statute

1 Rev. Code, ch. 128, § 38, p. 497, 312 \*which provides that an action shall not abate by the death of one plaintiff, if the cause of action survives to the others, but the writ or action shall proceed at the suit of the surviving plaintiffs. But by our statute, a joint judgment may be revived against the representatives of the deceased defendant. Thus the judgment of the circuit court may be revived in this case against the representatives of the decedent. Roane's adm'r v. Drummond's adm'r's, 6 Rand. 182. Suppose it erroneous: shall the estate of the decedent be without remedy? I presume not. If the judgment below were revived against his representative, he would be entitled to his writ of error. But the law has not provided a scire facias to revive the writ of error here: its provision is, that the suit shall proceed in the name of the survivors, where one of several plaintiffs dies. Such a scire facias would indeed be an embarrassing proceeding. If the plaintiffs in error were plaintiffs in the court below, there would be two sets of plaintiffs in error, and if the judgment should be reversed and the cause sent back for a new trial, there would be two new trials and separate proceedings against the defendants. If the plaintiffs in error were defendants below, and the cause should be sent back, the same state of things would exist; whereas, if the death had occurred before the judgment, the action would have abated in the court below as to the party dying, and the plaintiffs must have commenced a new suit against his representatives.

Moreover, great embarrassment would exist when this court, reversing the judgment below, should proceed to enter such judgment as the court below should have entered. This could not indeed be done, as the state of things would be entirely changed.

Upon the whole, I think we can only suggest the death, and proceed to judgment in the name of the survivor.

### 313 \*The James River and Kanawha Company v. Turner.

April 1838, Richmond.

(Absent BROOKE and CABELL, J.)

**Condemnation Proceedings—Assessment of Damages—What Benefits to Be Considered.**—The charter of the J. R. & K. Company provides, that the assessors for ascertaining damages to proprietors of lands required for the company's canal and improvement, shall take into consideration the quantity

\*Condemnation Proceedings—Assessment of Damages—What Benefits to Be Considered.—As to what benefits are to be deducted in assessing damages in condemnation proceedings, see foot-note to Muire v. Falconer, 10 Gratt. 13, where all the cases citing the

and quality of the land to be condemned, the additional fencing that will be required thereby, and all other inconveniences that will result to the proprietor from the condemnation thereof, "and shall combine therewith a just regard to the advantages which the owner of the land will derive from the improvement for the use of which his land is condemned." HELD, that the advantages to be derived to the owner of the land condemned for the company's use, from the improvement, to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned—not advantages of a general character, which may be derived to the owner in common with the country at large from the improvement. **Same—Same—Consideration of General Benefits—Unconstitutional.**—And it seems, that if the charter had provided, that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of the land condemned and the actual damages sustained by the owner, such a provision would have been unconstitutional.

The act of incorporation of The James River and Kanawha Company (Acts of 1831-2, ch. 82, Supp. to Rev. Code, ch. 377, § 29, 30, 31, 32, p. 481-3,) provides, that the company may enter on any lands of individuals, through which it may desire to conduct its road or canal, or any feeders of the canal, or against which it may desire to abut any dam, and may lay out its road, canal, feeders and abutments, and sites of other works, according to its pleasure, under certain restrictions: that the company shall lay out and describe the lands it shall 314 \*desire to occupy for the purposes of its works, by certain limits, and may purchase and hold the lands so laid out: that, in case it cannot agree with the proprietors on the terms of purchase, five freeholders shall be appointed by the county court of the county in which such lands may lie, to ascertain the damages, which will be sustained by the proprietors, from the condemnation of the lands wanted for the use of the company: and that the five freeholders so appointed, or any three or more of them, after being duly sworn to perform the duty impartially, justly, and to the best of their ability, shall proceed to assess the damages. And the 30th section of the charter specially directs, that the freeholders, "in performing this duty, shall consider the proprietor of the land as being the owner

principal case—save Watts v. N. & W. R. Co., 39 W. Va. 200, 19 S. E. Rep. 522—are collected.

See further, monographic note on "Eminent Domain" appended to James River & Kanawha Co. v. Thompson, 3 Gratt. 270.

**Same—Same—Elements of Damages.**—It is well settled, that in cases where state constitutions provide that private property shall not be taken for public use without just compensation, the damages to the residue of the tract, a part of which was taken, is an element of damages to be considered by the commissioners or jury, as the case may be. B. & O. R. R. Co. v. P. W. & Ky. R. R. Co., 17 W. Va. 859, citing the principal case.

of the whole fee simple interest therein;" and that "they shall take into consideration, the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof, and shall combine therewith a just regard to the advantages, which the owner of the land will derive from the construction of the road or canal, for the use of which his land is condemned." The charter then prescribed the form of the report to be made by the freeholders; directed, that the report should be returned to the county court; and prescribed the manner and course of proceeding there, for confirming the report, or disaffirming it and correcting the assessment of the damages.

But by an act for amending the charter of the company (Sess. acts of 1835-6, ch. 110, § 3, 4, 5, 6, 7, p. 85-6-7,) it is provided, that for the purpose of assessing damages to the proprietors from the condemnation of lands for the use of the company, there shall be appointed by The Board of Public Works, five assessors, discreet, intelligent and impartial men, neither stockholders of the company, nor owners of any land through

315 \*which the improvement of the company shall pass, who, or any three or more of them, shall constitute a board for the assessment of such damages, throughout the whole line of the improvement: that the assessors shall take the following oath of office—"I, A. B. do solemnly swear (or affirm) that I will impartially and justly, to the best of my ability, perform the duties of my office of assessor to The James River and Kanawha Company; that I will well and truly, according to the best of my judgment, ascertain the damages which will be sustained by the proprietor from the condemnation of his land for the use of the company; that in performing this duty, I will take into fair consideration the quantity and quality of the land to be condemned, the additional fencing that will be required thereby, and all other inconveniences which in my judgment will result to the proprietor from the condemnation thereof; that I will combine therewith a just regard to the advantages which the owner of the land will derive from the improvement for the use of which his land is condemned;\* and that I will unite with the other assessors in truly certifying our proceedings to the proper tribunal." The act then provides, that the assessors shall make their assessments of damages in the true spirit of their oath of office: prescribes the form of the report to be made by them;

\*This provision, for having regard, in the assessment of damages, to the advantages which the owner of the land will derive from the improvement for the use of which his land is condemned,—was adopted into the charter of The James River and Kanawha Company, from the general law concerning turnpike companies, 2 Rev. Code, ch. 234. § 8, p. 214. And a similar principle in regard to the assessment of damages to proprietors of lands, has been introduced into most, if not all, the late charters of railroad companies, and the like.

and directs that their reports shall be returned to the circuit superiour court of the county in which the land, or the greater part thereof, may lie; to which the jurisdiction is given to confirm the reports, or 316 for good cause shewn \*to disaffirm the same: and it is provided that, in case any such report of assessment of damages shall be disaffirmed, "the court may, in its discretion, remand the case to the assessors for a new report, or may pro hac vice supersede them, or any of them, and appoint others in their stead, and in so remanding it, may give such instructions on the law as may be proper."

In November 1836, the board of assessors made and returned to the circuit superiour court of Campbell, a report of assessment of damages for land of A. D. Turner condemned for the use of the company, in the following words:

"We the undersigned assessors to The James River and Kanawha Company, do hereby certify, that after due notice of the day and place appointed for our meeting, we, on the 4th October 1836, that being the day so appointed by notice to the proprietor herewith filed, met together upon the lands of Mrs. A. D. Turner, below the town of Lynchburg in the county of Campbell, which the company aforesaid propose to condemn for their use; and after having viewed the premises, and heard such proper evidence as either party offered to us, we proceeded to estimate the quantity and value of the land aforesaid, the quantity of additional fencing which would probably be occasioned by its condemnation, and the following which seemed to us to be all the other inconveniences which were likely to result therefrom to the proprietor of the said land, that is to say, for the condemnation of one rood fifteen and a half perches, for the use of The James River and Kanawha Company for the construction of a canal (the plat and description of which is herewith filed); it being understood and agreed by the company, that the two houses on the lower side of the old turnpike road are to be removed by the company by private agreement with the proprietor, and that a sufficient space between the houses on the south side of the canal bank is to be left for a cart way,

317 we have \*not estimated the inconveniences which may accrue to the proprietor from the want of the conveniences which the company have agreed to supply her as aforesaid; that we have not foreseen or estimated any other inconveniences than those above enumerated; and that we combined with those considerations, as far as we could, a just regard to the advantages which would be derived by the proprietor of the land, from the construction of the improvement, for the use of which the said land is to be condemned: that under the influence of these considerations, we are of opinion, that the proprietor of the said lands will sustain no damage from the condemnation thereof for the use of the company, and therefore we assess her none."

The circuit superiour court, at its April term 1837, upon a hearing of the parties, dis-

affirmed the report; and considering it proper to supersede the assessors pro hac vice, and to appoint others in their stead, pursuant to the provisions of the amendatory act of 1835-6, appointed five freeholders of Campbell assessors to do and perform what the board of assessors so superseded should do and perform, according to law, if the case had been remanded to them for a new report. And with a view to prevent continued litigation, the court deemed it proper to instruct the assessors, so by it appointed, as to the construction of the law applicable to the case; and gave them the following instructions:

"That although a just regard should be had to the advantages, which will be derived by the proprietor of the land from the construction of the improvement, for the use of which his land is condemned; yet such advantages, if any to be regarded, are to be of a character particularly and exclusively affecting the particular lot, parcel or tract of land, whereof a portion is condemned, and not advantages of a general character, which may be derived to the country at large, by the improvement and canal in question; because, for the latter advantages, the company is already paid in the grant of 318 its \*charter; and these advantages (if they exist, or ever shall exist) of increasing the value of land on James River, and on the whole line of contemplated improvement, by means of a safer and cheaper carriage of produce and other subjects to market, form the principal consideration for which the charter and monopoly of tolls were granted; so that, by estimating the actual value of the land condemned to the use of the company, thereby ascertaining the damages which the proprietor will sustain by having so much taken from his lot or tract, according as it may be affected by the position and form in which the condemned portion may be located, the assessors will arrive at the amount of damages which ought to be allowed on account of the quantity of land condemned; and such amount is not to be diminished by any deduction for speculative advantages on account of the general improvement of the navigation, which advantages, uncertain in their nature, may never be realized."

That "if, besides the damages aforesaid, which may be denominated the certain and real damages, there be speculative damages, arising from inconveniences to which the proprietor of the lot or parcel of land must be subjected, by having a portion taken for the use of the company, such speculative damages must be estimated; but the amount thereof may be diminished by any special and exclusive advantages, which the proprietor of the lot or parcel of land will derive from having a portion condemned for the use of the company; and these special advantages may be set off against the inconveniences above mentioned; and both being of the same character, having no certain standard by which their amount can be ascertained, they may balance each other, if supposed to be equal; but if the inconveniences aforesaid are greater than the special advantages, the excess in value must be added to what is

above denominated the certain and real damages; and thus will be combined 319 the \*consideration of inconveniences and advantages contemplated by the law."

That "a contrary construction of the laws creating and regulating the charter of this company, would make the same null and void, for it would make them unconstitutional; because it would be taking away private property, and appropriating it to the use of others, without any consideration. For if the proprietors of lands along the whole line of the canal, through which the same is to be conducted, are to have deducted from the actual or real value of that portion which may be condemned for the use of the company, an amount equal to the whole speculative value of the advantages, which such proprietors may derive from the constructing of the canal, and the improving thereby of the navigation of James River, they will pay a very great portion of the cost of making a general improvement, against their consent and without any consideration. If the improvement shall be, as it is supposed it will be, of great general advantage to the community at large, it will be so on account of an increased safety and expedition in the navigation of James River, and the diminution of cost in the transportation of articles of commerce to and from market, and thus increasing the value of lands along the canal, and contiguous thereto, to the full extent of the whole country that may use the canal for the transportation of produce and other articles; and the increased value of the lands will be in proportion to the diminution of cost of such transportation. Suppose such diminution shall be fifty per cent., more or less; this advantage is not exclusively an advantage to the proprietors of lands on the margin of the canal, or to those a portion of whose land is taken for the use of the same, but is equally an advantage to the whole valley of James River, and to all the country which may use the navigation. If the produce of the farms on the margin of the canal, portions whereof have been 320 taken \*from the proprietors, shall be carried to market more safely and at fifty per cent. less cost, so likewise the produce of the farm near by, and at a distance, and indeed throughout the whole valley of the river, will be carried at the same reduced cost; and the proprietor of lands at a distance, contributing nothing, will be benefited at the same rate with the proprietors whose lands are taken from them."

That "thus it is clear, that to the extent of any deduction made from the real value of the land condemned as aforesaid, on account of any supposed advantages of improved navigation, so much would be taken from the proprietor unjustly and without consideration, and against all constitutional principles."

And the court "ordered that these instructions should accompany the order appointing the assessors."

The special assessors appointed by the court returned a report; wherein, after stat-

ing the inconveniences which would result to the proprietor from condemning the land (one rood and fifteen and a half perches) for the use of the company, in the form required by the charter, they added—"We combined with these considerations, as far as we could, a just regard to the advantages which will be derived by the proprietor of the land, from the construction of the improvement for the use of which the said land is to be condemned; and under the influence of these considerations, and of the construction of the law contained in the instructions of the judge in the order aforesaid, we have estimated and do hereby assess the damages which will be sustained by the proprietor of the said land, from the condemnation thereof for the use of the company, at the sum of 350 dollars."

The case coming on to be heard on this report of the special assessors, at September term 1837, the company objected to the confirmation thereof, but only on the ground that it was made in conformity with 321 the instructions \*which had been given by the court, and to which they then and now objected as erroneous. The proprietor of the land made no objection. And the court adjudged and ordered, that the report should be confirmed and recorded; and that the company should pay the defendant the damages in and by the report assessed, and that upon payment of the same, the title of the one rood and fifteen and a half perches of land described in the report and condemned, should be vested in the company in fee simple; and that the company should pay the defendant her costs.

The James River and Kanawha Company applied by petition to this court for a supersedeas to the judgment; which was allowed.

The cause was argued here, by Johnson for the company, plaintiff in error, and by Standard for the defendant.

PARKER, J. It is to be regretted, that in the determination of the very important principles involved in this case, we could not have had the advantage of a full court. Any decision we may now come to, short of unanimity, will settle, indeed, the rights of these parties, but not the law of the land; and will leave the subject in some of the uncertainty which has heretofore attended it. Yet this circumstance diminishes the weight of responsibility attaching to each member of the court now sitting; for whilst he gives his present opinions, and affirms or reverses this judgment, of little consequence in amount, he feels that the precedent is not binding upon him as authority, and may, upon fuller consideration, be disregarded.

This controversy has arisen out of certain proceedings had under the charter of The James River and Kanawha Company, for the purpose of condemning a part

322 \*of the lands of the defendant, for the use of that company. The board of assessors, after considering the quantity and quality of the land to be condemned, and all other inconveniences resulting to the proprietor, and "combining therewith a just regard to the advantages, which she would derive from the construction of the canal, for

the use of which the land was condemned," came to the conclusion that she would sustain no damages, and therefore they assessed none. This report being returned to the circuit superior court was disaffirmed, on the ground, that in every case arising under this charter, the proprietor is entitled to at least the full value of his land, whatever may be the advantages of the improvement; and that the advantages spoken of in the 30th section of the act of 1831-2, ch. 82, for incorporating The James River and Kanawha Company, are not to be applied to the diminution of that value, but are only to be set off against the speculative damages arising from inconveniences, to which the proprietor might be subjected, other than the loss of the land; that the advantages to the owner of the land, to be considered by the assessors, are to be special and exclusive advantages to the lot, parcel or tract of land, whereof a portion is condemned, and not advantages of a general character, shared by the owner in common with others using or having it in their power to use the canal, for the transportation of their produce; and that if these exclusive and special advantages were equal to the speculative inconveniences, they should be made to balance each other; if the inconveniences were greater, the excess should be added to the value of the land; but if the advantages were greater than the inconveniences, no deduction should on that account be made. This I take to be the meaning of the instructions given by the court to the second set of assessors appointed by its authority, under which they gave damages to the proprietor to the amount of 350 dollars.

323 \*The instructions of the court, then, affirm these propositions: 1. That, in every case of land condemned for the use of the company, the proprietor is to be compensated for the full value of the land, without regard to advantages of any character or description. 2. That the appreciation of the value or price of the land by the greater facility of navigation, is only an ideal or speculative advantage. 3. That the inconveniences arising to the proprietor, from the additional fencing that may be required, from the overflow of his other land, from one portion of it being cut off from the other, or from any other cause, independent of the value of the land taken, as affected by the position and form in which the condemned portion may be located,—are also speculative inconveniences, and being of the same character as the advantages, namely, both speculative, and having no certain standard by which either can be measured, they may balance each other, if supposed to be equal; but if unequal, the excess of speculative inconvenience may be added to what is termed the certain and real damage, but not e converso (for so I clearly understand the instructions). And lastly, that the use of the canal, and the additional value given to the remaining part of the tract or parcel of land of which a portion is condemned, is not an advantage contemplated by the legislature to be taken into computation; or if contemplated, it would

be a violation of that provision of the constitution of Virginia, which declares, that the legislature "shall not pass any law, whereby private property shall be taken for public uses without just compensation."

Much of this appears to me to be inconclusive, and unwarranted by the terms or spirit of the law in question. I do not, for example, perceive, why the additional fencing which a proprietor may find it necessary to make, or the overflow of his land by leaks or drains, or its separation into distinct parcels connected by bridges at a distance  
324 from each other, or the annoyance \*to his property by boatmen and others,—should be called speculative inconveniences, and not real ones. Nor can I comprehend, why the use of the canal, and the additional value given to a lot or parcel of land, should be termed speculative advantages only: nor why, if speculative inconveniences exceeding advantages said to be of the same character, are allowed under this law to be added to the value of the land condemned, the excess of advantages ejusdem generis shall not be taken from that value. These advantages and inconveniences, though not certain, are appreciable, and admit of as much accuracy of valuation as annuities, or many other subjects which the law notices; and if we exclude them because the assessors cannot precisely estimate their amount, we shall go near to annul the law. The advantages derived from the structure of the canal, from the embankment of stone or earth, or the probable conversion of marsh into arable land, which the able counsel for the defendant admitted might be taken into the estimate, and set off against the value of the land (but which the instructions of the court exclude), are, it seems to me, as speculative as that which he attempts to get rid of. If, by the use of a road or canal, produce can be sent to market, after paying the tolls exacted, for a less sum than it could otherwise be carried, the difference will, in general, enhance the value of the land, in a ratio which can be easily estimated, and is a positive advantage, as little speculative, ideal, or contingent, as any other which the assessors could be called upon to value. In human affairs, approximation to justice is all we can in general hope to attain.

After mature consideration, it occurs to me, that the only difficulty in this case is in ascertaining the true meaning of the several acts of assembly respecting The James River and Kanawha Company. If, in doing so, we come to the conclusion that the legislature meant to authorize the assessors, in  
325 estimating the damages to the \*owner of the land, to combine therewith the advantages derived from the use of the improvement in the enhancement of its value, such a provision cannot, in my judgment, be objected to on the ground of unconstitutionality. It is conceded, on all hands, that the legislature may take private property for public uses; and it is equally clear, both on principles of natural law and constitutional inhibition, that it cannot be taken without making just compensation to the owner. "This com-

pensation" (says judge Carr, in *Creshaw v. Slate River Co.* 6 Rand. 264) "must always be made under some equitable assessment established by law." But it need not be made in money, nor in any thing admitting of certain, precise and invariable value. It consists, as Blackstone expresses it (1 Comm. 139), in giving to the individual "a full indemnification or equivalent for the injury sustained." The very word compensation means amends, recompense, or counterbalancing advantage; and for such equivalents, private property is every day, in the form of taxes or otherwise, taken for public uses. Now, to carry a road or a canal from one's usual market to his door, and thereby to double the value of his remaining land, is as much an equivalent, recompense or indemnification, as if the value of his land were paid for in money. Should the value exceed this recompense, it is paid for. Should it fall short of it, he gets all the additional benefits, without the loss of a cent's worth: and herein consists the preeminent advantage to the riparian proprietors; for in ninety-nine cases out of a hundred, they receive more than a compensation for the strip of land condemned even should they not be paid a dollar in damages.

But, it is said, "this is an advantage not exclusive to the proprietor of the land a portion of which is taken, but shared equally by the owners of farms near by and at a distance, and throughout the valley of the James River, who have contributed little or  
326 nothing to \*the improvement; and, therefore, to the extent that any deduction is made from the real value of the land condemned, on account of any supposed advantages of improved navigation, so much is taken from the proprietor unjustly, and appropriated to the use of others, without consideration and against all constitutional principles." I do not perceive how this conclusion is fairly drawn from the premises. It is true, the law may operate unequally, as most human laws do. One class of persons may receive equal benefits with another, and may contribute less, or lose nothing. But so long as the other class receives a fair equivalent for losses, how can it be said, that the property of those who belong to this class is taken without consideration, and in violation of the constitution? The simple fact is, that they get the worth of their property, whilst others, who lose no land, share the benefit: This is inequality, but not injustice. It is the case of the labourers in the vineyard, who bore the burden and heat of the day, but received only the penny which was given to the eleventh hour man. No wrong is done if the riparian proprietors are justly compensated, although all the inhabitants of the James River valley partake of the bounty of the state. And, as I have already hinted, this inequality is, in a great majority of the cases, more imaginary than real, since the benefits so far exceed the losses, and are so much more certainly experienced by those through whose lands the canal is carried, as to make the exceptions a matter of little consequence in the estimation of a wise legislature establishing a general system of internal

improvement. Inequality, and even injustice, is incident to every imposition of burdens, for the use of the public; but these are considerations more properly addressed to the legislator than to the judge, except as they may aid in the true interpretation of the statute.

I repeat it, then, that the true inquiry here is, to ascertain the meaning of the legislature, when it directed \*that lands should be condemned for the use of The James River and Kanawha Company, and how the damages should be assessed. To enable us to do this, we must recollect a few general rules of construction not inapplicable to the present case. One is, that we must construe statutes according to the plain and popular meaning of the words, it being safer to adopt what the legislature has actually said, than to suppose what it meant to say. Another is, that we should take all laws which relate to the same subject, whether expired or superseded, as one system, to be construed consistently. And a third is, to construe a statute made *pro bono publico*, in such a manner that it may, as far as possible, attain the end proposed, without inconvenience, or danger of thwarting the policy which gave it birth. *Pierce v. Hooper*, Stra. 253; *New River Co. v. Graves*, 2 Vern. 431.

The 30th section of the act of incorporation of the company, directs, that in assessing damages to the proprietors of the land condemned, the assessors shall "take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof; and shall combine therewith a just regard to the advantages which the owner of the land will derive from the construction of the road or canal, for the use of which the land is condemned." This law must be considered in connexion with others on the same subject. The state, in establishing a general system of internal improvement, meant, undoubtedly, to adopt a uniform rule in the assessment of damages to individuals. By a former law in relation to this same company (Acts of 1819-20, ch. 56, § 3, 4,) lands were to be condemned, in the manner prescribed by the act entitled "an act prescribing certain general regulations for incorporating turnpike companies," for the condemning land for the use of any turnpike road, varying the forms of the proceedings \*as the nature of the case might require. And by the general law concerning turnpike companies, 2 Rev. Code, ch. 234, § 8, the valuers were directed to combine with their assessments of the value of the land, and of the inconveniences resulting thereto from the opening of the road, "a just regard to the advantages which the owner of the land will derive from the opening of the road through the same." The same policy was afterwards extended to rail roads by several acts, and to all the roads of the country, by the statute of the 20th January 1834, which enacts, that whenever a jury shall be impanelled, according to the direction of the second section of the road

law, the sheriff shall, in addition to the charge prescribed by that section, "charge the said jury to combine with the estimate of the damage to be occasioned by opening the road, a just regard to the advantages which the proprietor and tenants will derive from the passing of the same through their lands." These are all acts in *pari materia*, and to be construed as one law. Whatever rule the legislature intended to adopt in the one case, it meant to prescribe in the other. And, therefore, I do not think the criticism of the counsel on the words "construction of the road or canal" (found in the original act of incorporation of 1831-2, ch. 82, § 30,) by which he would confine the advantages to be set off, to those arising from the structure of the improvement, a sound one. That change of phraseology was manifestly used as synonymous with opening or passing through; the terms employed in the other acts.

What was then the obvious meaning of the legislature, collecting it from the language it has employed, without indulging in refinements, or resorting to presumptions, or being guided "by the crooked cord of discretion," which has so often induced a departure from the plain and literal construction of statutes? The advantages derived to the owner of the land condemned, are to be estimated, considering him as owner of that land, and no other. These advantages must accrue to him, in the character of proprietor of the land through which the road or canal passes, and in no different character. All advantages are to be considered, which are in their nature appreciable; for the law makes no reservation, restriction or exception. How can we say, that the legislature meant only a certain kind of advantages, when their language has excluded none? Is the use of the canal, and the additional value given to land along its immediate line, no advantage? Then the assessors will allow nothing for it. Is it a great, obvious and appreciable advantage? Then, by what rule of construction shall we exclude it from their estimate? It appears to me, that this was the chief advantage within the legislative contemplation; for, in the greater number of cases, it is the only one. In the case of common roads, or of railroads, what possible advantage does the owner of the land through which they pass derive from them, except from their use? And so of turnpike roads and canals, if you exclude this element of benefit, the law, framed with so much care, and applied to every case of internal improvement by roads and canals, might as well be repealed; for little is left on which it is to act.

Plausible objections to this construction may be made, and have been made, by stating hypothetical cases of hardship and inequality. I have already said, that no general system of legislation is exempt from such imputations; but I cannot admit that this is a reason for rejecting the plain words of a statute. This law seems to me to be as little obnoxious to the objection, as most others of a similar character. When it is said, that the riparian possessors will thus



"be made to pay a very great portion of the cost of making a general improvement, against their consent and without any consideration;" or that, upon the same principle, a charge might be levied in

330 favour of the company for \*the excess of value, and thus all the advantages held out to the proprietors be extinguished, and they alone be excluded from the benefit of the improvement; I cannot perceive the force of the objections, applied to the actual facts, and to the known condition of the country. The slips of land condemned would not pay a hundred thousandth part of the cost of the improvement; in a vast majority of cases they bear a very inconsiderable proportion to the enhanced value of the remaining land; and if the improvement was taking another direction, the proprietors would, with a few exceptions, gladly give them to the company to obtain the location. The legislature adapts its laws to the state of things as known commonly to exist, and not to imaginary or rare cases of hardship. The system deliberately adopted has hitherto worked well; and if we change it now, and give to the owner of the land, in every instance, the full value of his land, enhanced in value by the actual location of the road or canal through it, without abatement, I very much fear a serious blow will be given to the cherished policy of the state.

There is only one consideration more, to which I shall advert. The 9th section of the act of 1819-20, ch. 56, for clearing and improving the navigation of the James River, and for uniting the eastern and western waters by the James and Kanawha, has been relied on to prove, that in no case can the whole saving of the cost of transportation be taken into consideration, as an advantage to the riparian owner. That section contains a pledge, on the part of the legislature to the company, that it will authorize tolls to the amount necessary, with other resources, for the payment of the interest on the money expended on the work; provided that such additional tolls should not exceed one third of the saving of transportation, taking an advantage of three years. I construe this proviso as limiting the pledge of the state to the company, but in no

331 wise affecting the present \*question.

If it could be taken as a limitation of the power of the legislature over the amount of tolls, still it would not prove that the excess of benefit derived to the proprietor of lands through which the improvement passes, may not be constitutionally set off against the value of the part condemned. If the legislature, for the general benefit, had given a pledge to abolish all tolls, the proprietor of the land condemned might complain of the inequality, but of nothing more.

Upon the whole, I am of opinion, the judgment should be reversed, and the first assessment confirmed.\*

BROCKENBROUGH, J. The question before us is, what is the proper construction of the act of assembly which directs the assessors "to ascertain according to the best of their judgment the damages which the proprietor of the land will sustain by the condemnation thereof for the use of the company." The constitution declares, that "the legislature shall not pass any law whereby private property shall be taken for public uses without just compensation." The legislature must have had this excellent provision in their view, when they granted the new charter in 1832. I consider it to be the duty of the court to look on that provision as their best guide in the construction of the charter. Endeavouring to keep it in

332 view, I am happy to say, that, "according to my strongest conviction, the legislature have not deviated from it. I proceed to state the construction which in my opinion must be given to the charter. The 30th section of the act of 1831-2, ch. 82, declares, that the valuers of the land, in the performance of their duty, "shall take into consideration the quantity and quality of the land to be condemned, the additional fencing which will be required thereby, and all other inconveniences which will result to the proprietor from the condemnation thereof." Not only the land itself to be condemned shall be valued, but the inconveniences which seem clearly to result from the seizure of the property are also to be valued. The additional fencing is the only one specified, but there are others. One palpable inconvenience is the leakage of the canal, which renders it necessary for the proprietor to cut ditches and drains to carry off that water from his arable land: another is, the being compelled to pass the canal from one part of the farm to another, at one or two points only, whereby his servants and teams will be subjected to greater labour and loss of time, than they would be subject to, if they could go as they were accustomed, by the ways which convenience had previously laid out for them. There are many other such inconveniences, the value of which may be ascertained by those who have a view of the ground on which the canal runs. These inconveniences, incident to the condemnation of the land, are all local in their character. The damages to be given for them attach to the owner, as owner of that particular tract, parcel or piece of land, which is taken from him without his consent.

The law proceeds to say, that the valuers "shall combine therewith a just regard to the advantages which the owner of the land

used in former laws; but a proviso is added, "that not less than the actual value of the land, without reference to the location and construction of the road, shall be given by the commissioners." This shews, that without such a proviso, the actual value need not have been given, and that in the case of railroads the legislature in March 1837 changed its policy. Under this law the enhanced value is not to be given, but only the actual value without reference to the improvement. The office of a proviso is to limit and restrain general words used before.

\*Note by the judge. Since this opinion was delivered, I have seen the act of the 11th March 1837, prescribing general regulations for the incorporation of railroad companies. The clause respecting the assessment is in the same words with those



will derive from the construction of the road or canal, for the use of which his land is condemned." What is the character  
 333 of the advantages to \*which a just regard is to be had? It is, the advantages to the owner of the land. What land? That on which the canal is to be constructed. If the same proprietor owns another tract or parcel of land at the distance only of half a mile, but separated from the canal tract by the land of another owner, the advantages which he will derive from the navigation as to that land, are not to be taken into consideration, because it is not the land on which the canal is constructed. The advantages derived to the owner from the improvement are as great, or almost as great, on account of that tract, as of the canal tract, if the two tracts are of equal size and fertility; but those advantages are not to be valued, by the very words of the act. Yet it is an advantage to him, and if all advantages conferred on him are to be valued and charged to him, this advantage should be so valued and charged. There are some advantages, then, which are to be excluded from the view of the valuers. What, then, are the advantages to be valued?

As the land which is condemned is itself to be valued according to quantity and quality, and the inconveniences to be valued are incidental to the condemnation, and local in their character, so it would seem, that the advantages to be valued are such as are incidental to the condemnation, and local in their character. The advantages are placed in contrast with the inconveniences; they are both of like character. There may be many such: take, for example, the cases put by the counsel. The digging of the canal may drain a marsh for the proprietor; the walls of the canal may give to the proprietor a line of permanent fencing which will save to him a great deal of the expense of inclosing. There may be many others apparent to those who go upon the land. Whatever advantages the construction of the canal gives to him as owner of the particular tract, piece or parcel of land, on which it is constructed, shall be justly regarded,  
 334 and shall be combined with the inconveniences \*for which the damages are to be assessed; and the value of these advantages, when ascertained, may be deducted from the value of the land condemned, and of the incident inconveniences.

Does the charter contemplate that the assessors shall charge to the riparian proprietor the value of the advantages derived to him from the improvement of the navigation? I think not. I admit that these advantages may be very great, and that their value is ascertainable. But they are not advantages peculiar to him. On the contrary, they are common to him with all the rest of the inhabitants along the whole line of the improvement, who are within its influence. From Richmond to the Ohio, every man (whether his lands touch the canal or road, or not) who will be enabled to increase his products by turning more land into cultivation, or by importing with greater ease and cheapness fertilizing minerals and other

manures, who will be induced to open new mines or quarries, who will be enabled to carry his increased productions to market, and to bring from market his supplies, with greater ease and less expense,—will be benefited, if the canal and road should get into successful operation. Indeed, these advantages are the very objects which the legislature had in view in granting the charter. They are general advantages. To the great mass of that community, to ninety-nine out of a hundred, they operate, and are intended by the legislature to operate, as a benefit, without requiring them to pay the price of the construction. Shall this benefit be withheld from the hundredth? Shall it be withheld from him, unless he will make compensation for it different from all the rest? This could not, I think, have been the intention of the legislature. It could not have intended to authorize the company to seize on and sequester the property of an individual, and under the pretext of making him a compensation for that property, to claim a set-off for a general  
 advantage, which will deprive him

335 \*of the just compensation intended by the constitution. It is not credible, in my opinion, that the legislature intended to compensate the riparian proprietor for the land taken for public uses, by the value of the real or supposed advantages derived from the improved navigation, when those same advantages were conferred freely on all others, without being looked upon as a compensation.

For these general advantages conferred on the community, the company has a separate and sufficient consideration. That consideration is the receipt of the tolls from all those who navigate the river. In proportion to the extent of these general advantages, is the compensation increased. If the individuals on the line of the improvement increase their products and their trade, all this increase produces new advantages to the company, by increasing its tolls. This is its compensation for all its outlay. That outlay consists not only of money paid for labour, materials and services, but of money paid for land on which to construct its improvements. If, then, it obtains a consideration or compensation for the general advantages which it confers on the country, why should it expect another consideration from the landholders, whose land it takes?

But even if there were no tolls, or if the tolls were surrendered, and the navigation thrown open to the public, still I should think, that the riparian proprietor could not be required to pay for the general advantages resulting from the improvement. His land is taken from him without his consent, and for that he is entitled to just compensation. The advantage which he obtains from the improved navigation is not of his own seeking; he obtains it from the public legislation, pursuing the public policy of the country. Obtaining it fairly in that way, why should he be deprived of it? Why should he pay for an advantage which is in some sort forced upon him by the public, and which it  
 336 confers on him, \*not with the particular view of benefiting him, but for its own wise purposes?

With respect to the particular case under consideration: By the report of the board of assessors, which was set aside by the court, the proprietor of the land condemned was adjudged to receive no damages. It seems from the report, that the land was valued by them: but the special inconveniences to the proprietor seem not to have been valued; or rather, the agreement of the company to supply the proprietor with convenience equivalent to her inconveniences, was taken as a sufficient compensation for those inconveniences, and then the advantages, not specified, were held sufficient to counterbalance the value of the land. These advantages, I presume, are the general advantages resulting from the improved navigation. The report was rightly disaffirmed.

The judge then proceeded to supersede the board *pro hac vice*, and appointed other assessors in their stead, and gave them instructions.

The first part of these instructions is, I think, entirely correct. That part declares, that the advantages to be valued are to be of a character particularly and exclusively affecting the particular lot, parcel or tract of land whereof a portion is condemned, and not advantages of a general character, derived from the improvement in question, and which the proprietors share in common with all of the community affected by them.

The last part declares, that after the damages are assessed for the value of the land condemned, the special inconveniences to which the proprietor of the parcel of land is subjected, shall be estimated, and damages assessed for them; that the special advantages derived to the proprietor from the condemnation of his land shall be valued, and that that value may be set off against the damage assessed for the special inconvenience:

if the special advantages are equal to the special inconveniences,\*then they may balance each other; but if the special inconveniences are greater than the special advantages, then the excess in the value of the inconveniences must be added to the damage assessed for the land.

There is one case which seems not to have been provided for by the instructions. Suppose the special advantages more than counterbalance the special inconveniences, can the excess of those advantages be set off against the damages assessed for the land? It may perhaps be inferred, that the judge was of opinion, that such excess of advantage could not be set off against the damage for the land. If such was his opinion, I should probably differ from him in this particular; being of opinion, that the value of special advantages may be set off against the damages assessed for the land condemned, as well as for the incident inconveniences, and that the result, after that set-off, furnishes to the proprietor a just compensation for his land condemned. But although such inference may perhaps be drawn, yet the instructions do not in terms extend so far. The latter part of the instructions, as far as they go, is, I think, correct. I see no error in them, nor in the report of the substituted assessors, founded on them.

I am of opinion, that the judgment should be affirmed.

TUCKER, P. This case has been very justly said to be one of very great importance; and fully impressed with its magnitude, I have given to it my most earnest consideration. The result of my reflection is, that there is no error in the instructions of the circuit superior court of which the plaintiffs in error can complain.

The constitution of Virginia, art. 3, § 11, has provided, that the legislature shall pass no law, "whereby private property shall be taken for public uses, without just compensation;" and the naked question is, whether the general advantages of a public improvement, enjoyed by an individual in common with the rest of the community, are to be regarded as constituting that just compensation which the constitution enjoins? I am of opinion, that they are not.

It is obvious, as has been justly observed by my brother Parker, in the able opinion just delivered, that, in a vast majority of cases, the value of the land condemned for a public improvement will bear a very small proportion to the enhancement in the value of the remainder of the tract; I mean an enhancement not arising from advantages peculiar to that tract, but extending to the whole community upon its line, and arising out of the salutary influence of improved facilities of transportation, upon the value of all the real estate within the circle of that influence. If, therefore, in a vast majority of the cases, the value of the condemned land will be exceeded by the enhancement of the residue, and if that enhancement is to constitute the compensation, then it is obvious, that, in a vast majority of cases, the constitution will have nothing to operate upon; and this great and important principle will be confined to the few solitary cases (if indeed any case shall ever exist) in which the proprietor of the condemned property does not derive from the public work, advantages of a general character, equivalent to the value of what is taken from him.

Moreover, it is obvious under this construction of the instrument, that its principle may be extended to a variety of other cases, so as to render this boasted provision of little or no value. Thus, it may be provided, that if an acre of one man's land is essential for the abutment of his neighbour's milldam, it shall be condemned without compensation for its value, provided a jury shall believe the conveniences of the mill to the owner and his posterity, will more than equal the value of the portion of land taken from him. And so with respect to public roads and landings. So too, if a court-house is to be erected upon one's land, two acres may be condemned without the allowance of a cent, because the adjoining property is rendered more valuable for the establishment of inns, storehouses, and other like advantages. If such be the meaning of this clause of the constitution, "it keeps the word of promise to the ear, but breaks it to the hope." It is a mockery, instead of a wise, just and salutary safeguard

of the rights of the people. The *jus publicum*, though an absolutely essential attribute of sovereignty, should be exercised by every wise and paternal government, with just respect to the rights of individuals. It is enough, that it deprives the citizen of his property without his assent: it is enough, that it deprives him of that monopoly, which might enable him to exact exorbitant terms for his property: it is enough, that it takes from him the privilege of bargaining for himself, and appoints others to bargain for him. It therefore makes compensation for what it takes; it does not put a charge upon him which others do not bear; it aims to place the public burdens equally upon all, by paying the proprietor for that which is taken from him. This is the very object of the constitution. But this object is utterly frustrated, if private property is sunk, and its value extinguished, by setting off a part of those incidental advantages to which the owner is entitled in common with all others within the sphere of the improvement. He is not only deprived of the right of making the most of his monopoly, but his possession of property essential to the canal, which, according to the ordinary view of things, would give him great advantages, is actually converted to his loss. He is in a far worse condition than his neighbour who has not his advantages; for the neighbour enjoys all the benefits of the canal, and loses none of his land, while the owner pays, in the price of his land, for those advantages which others get for nothing. What benefit does the constitution, in this view, confer

340 \*on the owner of the land condemned?

What protection does it afford for his rights? His situation is just the same as if the provision of the constitution had never been made. Without it, he would have enjoyed all the common advantages of the canal, and have lost his land: and under its protection, what more does he get? Absolutely nothing. For while he enjoys the benefit of the public improvement, in common with his fellow citizens, he receives not a cent for the property taken from him.

The whole argument, in truth, appears to me to be founded in a want of due attention to the true meaning of the terms of the constitution. "Compensation" means "a recompense given for a thing received." But the general advantages received by the public from a public improvement, cannot properly be said to be a "recompense given" for the land, for they are equally conferred on those who lose no land. Neither, indeed, are they gifts to any body. They are a mere incident, or accident, arising out of the existence of the improvement. They are like the benefit conferred on me by my neighbour, when he builds a merchant mill convenient to my barn. I am benefited, indeed, but that benefit, though conferred by him, gives him no claim against me. In the adventure, he has proceeded with a view to his own profit, not with a view to mine. The benefit I enjoy, I do not owe to his liberality. It is neither a gift *ex mero motu*, nor can it be tortured into a price given for what he has taken from me. It

can create no debt; it can pay no debt. It can neither give a right of action for benefits conferred, nor can it give a right of set-off for damages done or property condemned. If it could give such right of set-off, it is not perceived why it should not give a right of action for the excess of the benefit over and above the value of the property taken. Nor can I imagine how the company is to compensate the defendant for her 350 dollars worth of land, by setting off 341 \*a claim for benefits conferred, which they never could enforce by suit, and for which they can have no pretence of claim, legal or equitable.

For these reasons, I am of opinion, that the instructions of the circuit superiour court did not trench upon the company's rights, and were not too liberal to the proprietor. Whether the court has gone too far in allowing what are called "the peculiar and exclusive advantages of the proprietor" to be set off, I do not think it necessary to decide. My impression, indeed, is, that although the value of the land condemned must be compensated, and cannot be extinguished by setting off any speculative advantages, because it is herein under the protection of the constitution, yet if incidental damage is done to the residue of a tract (such as the necessity of additional fencing, leakage of the canal, and the like), such incidental damage may be set off by the incidental benefits which the residue of the tract may derive from the canal, other than those general benefits which are equally enjoyed by the whole community. For the right to compensation for those incidental damages, resting upon legislative grant, not upon constitutional provision, it was competent to the legislature to limit and qualify it, and to set off against them any incidental benefits, peculiar to himself, which the riparian proprietor derives from the improvement. I am of opinion that the judgment should be affirmed.

Judgment affirmed.

342 \*Wilson's Curator v. Shelton's Adm'r.

April, 1838, Richmond.

**Curators—Liability to Suit.**—A curator of a decedent's estate appointed under the 24th section of the statute 1 Rev. Code, ch. 104, is not liable to suit of the decedent's creditors in chancery; and though a curator appointed under the 42d section, is liable to be sued in like manner as an administrator, it must be shewn by the record, in a suit against a curator, that he is such a curator as is in law liable to be sued, and capable of defending the decedent's estate.

**Sale of Land—Recital of Payment in Deed—Estoppel.**—A vendor of land executes a deed of conveyance to the purchaser, in which he acknowledges receipt

\***Curators—Liability to Suit.**—A curator may now "be sued in like manner as an executor or administrator." Va. Code 1849, p. 520, § 24; Va. Code 1887, § 2534.

†**Sale of Land—Recital of Payment in Deed—Estoppel.**—In accord with the principal case, see *Radcliff v. High*, 2 Rob. 271. See also, monographic *note* on "Estoppel" appended to *Bower v. McCormick*, 23 Gratt. 310.

of the purchase money, and subjoins to the deed a receipt in full for the same; yet upon proof that in fact the whole purchase money was not paid, he is not concluded from claiming the balance due him in equity.

Josiah Shelton exhibited a bill in the superiour court of chancery of Williamsburg, against Thomas Russell curator of Willis Wilson deceased, and John Shepherd executor of Benjamin Coleman,—alleging, that the plaintiff Shelton and Harriet the wife of Baker Rudd being entitled as tenants in common to a parcel of land in York county, Shelton and Rudd contracted with Wilson and Coleman, during their lives, to sell the same to them for 2200 dollars; and Wilson and Coleman being jointly interested in the purchase, it was understood and agreed that Wilson should pay Shelton one half of the purchase money for his moiety of the land, and Coleman should pay Rudd the other half for his wife's moiety. That Shelton executed a deed of conveyance to Wilson and Coleman of his undivided moiety of the land, and Rudd's wife being an infant at the time, Rudd covenanted with the purchasers for the conveyance of her moiety to them when she should attain to full age. That Coleman paid the moiety of the purchase money due to Rudd; and Rudd's wife having attained to full age after the death of both

Wilson and Coleman, a deed was executed \*by Rudd and wife to Russell the curator of Wilson, and Shepherd the executor of Coleman, conveying her undivided moiety to them. That of the moiety of the purchase money (1100 dollars) which was due to Shelton, Wilson paid him only 625 dollars, leaving 475 dollars still due, for which Wilson agreed to give him his bond and a mortgage of the land to secure the payment, but he died without having executed the bond or mortgage, or paid the debt. That Shelton brought an action at law against Russell the curator of Wilson, for the balance of the purchase money due him; but being advised, that his acknowledgment of the receipt of the whole consideration, contained in his deed of conveyance of the land to the purchasers, would be an estoppel against his demand at law, he had dismissed that suit. And the bill, without shewing what kind of curator the defendant Russell was, or what authority the order appointing him curator had conferred, prayed a decree against the personal estate of Wilson in the hands of the curator, for the balance of the purchase money due to Shelton, and that the land should, if necessary, be subjected to the debt.

Russell, the curator of Wilson, nowise contested his liability in that character, for the debt claimed of the decedent's estate, to the extent of the personal assets in his hands, if the debt was justly due; but he earnestly denied the justice of the claim. He relied not only on the acknowledgment of full payment of the consideration contained in the deed executed by Shelton to the purchasers, but on a formal receipt for the whole purchase money subjoined to the deed and signed by him, as conclusive of the fact of payment; and he stated some extrinsic

circumstances, which, he insisted, corroborated that written evidence.

The answer of Shepherd executor of Coleman averred the full payment by his testator to Rudd, of the half of the purchase money due to him for his wife's moiety of the land, which Coleman had undertaken to pay.

344 \*The order appointing Russell curator of the estate of Wilson, was not exhibited; nor did it appear in any way, what was the nature of that appointment.

The deed executed by Rudd and wife to Russell the curator of Wilson, and Shepherd the executor of Coleman, and the deed of Shelton to Wilson and Coleman, were exhibited. The latter contained the acknowledgment of the payment of the purchase money due to Shelton, and there was subjoined to it Shelton's receipt in full for the same, as stated in the answer of the defendant Russell.

But there was full and clear proof, that in fact only the sum of 625 dollars was paid by Wilson to Shelton, and that Wilson, when he received Shelton's deed with the receipt thereto subjoined, agreed to give him his bond for the balance of the purchase money yet due to him, and a mortgage of the land to secure the payment.

The plaintiff dying pending the suit, it was revived in the name of his administrator. And it was discontinued as to the defendant Shepherd executor of Coleman, without prejudice, however, to the plaintiff's claim against that defendant hereafter.

The cause having been transferred to the circuit superiour court of Elizabeth City, that court, upon the hearing, decreed, that the defendant Russell curator of Wilson, should, out of the estate of that decedent in his hands, pay Shelton the balance of the purchase money due to him, with interest &c. And from this decree, Russell, by petition to this court, prayed an appeal; which was allowed.

Harrison, for the appellant, objected, 1. That such a bill could not be maintained against a mere curator of a decedent's estate, such as (for aught that appeared in the record) Russell was; Wynn's ex'or v. Wynn's adm'rs, 8 Leigh 264.—2. That the heirs and administrator of Wilson, as well as the heirs or devisees 345 and executor of \*Coleman, were proper and necessary parties. 3. That the formal receipt of Shelton for the whole purchase money from Wilson, subjoined to his deed, shewed that the acknowledgment of payment in the deed itself was not merely formal, and that this concluded Shelton in equity, as well as at law, from alleging that he had not received the purchase money. 4. That the deed made by Rudd and wife to the curator of Wilson and the executor of Coleman was nugatory; and the court, in all events, ought not to have decreed the payment of the purchase money, till the title of Rudd and wife was conveyed to the heirs of the purchasers.

Daniel and Robinson, for the appellee, answered, 1. That this case was distinguishable from that of Wynn's ex'or v. Wynn's adm'rs. There it appeared, that the curator had been appointed under the 24th section of

the statute, 1 Rev. Code, ch. 104, p. 380, merely to collect and preserve the goods of the decedent, during the pendency of a contest for the administration, and the objection to the proceeding against the curator was presented by the pleadings. Here, the curator, while he controverted the claim upon its merits, nowise denied his responsibility in that character, to the extent of the decedent's estate in his hands, if the debt was justly due; and as a curator appointed under the 42nd section of the statute (Id. p. 386,) was liable to the suits of creditors in like manner as an administrator, this court ought to regard the defendant in this case, as such a curator liable to be sued. 2. That as Coleman had paid all he was bound to pay, and as the curator of Wilson had assets in his hands to pay the debt, and those assets were primarily liable for it, the objection for want of parties was merely formal and immaterial. 3. That the proof was full and clear, that the purchase money due to Shelton had not been paid; and as to the alleged estoppel, though it concluded the plaintiff at law, it could not bar him of relief in equity. \*Shelly v. Wright, Willes 9; Ford v. Grey, 1 Salk. 285; Gillespie and wife v. Moon, 2 Johns. Ch. Rep. 585, 596. 4. That Shelton having executed a conveyance of his moiety, was entitled to payment of the purchase money due to him, which Wilson had agreed to pay him, and to a lien on Wilson's share of the land; and it was incumbent on the heirs of the purchasers to procure from Rudd and wife a proper conveyance of her moiety. That was their lookout, not Shelton's.

**PER CURIAM.** The decree is erroneous in decreeing against the appellant as curator of the estate of Wilson, though it nowise appears, either from the allegations of the bill or the facts stated in the record, that he was such a curator as is by law liable to be sued or capable of defending the estate of the decedent. It is also erroneous in decreeing payment of the purchase money of the land, when no proper title had been made to the heirs of Wilson, to whom, and not to his curator, the property should have been conveyed. The heirs of Wilson, together with the heirs and devisees of Coleman, ought to be made parties. The deed to the curator ought to be vacated and annulled, and a proper conveyance decreed to the heirs of Wilson; upon the execution of which, payment of the balance of the purchase money should be decreed against Wilson's personal representative, with liberty to resort to the land, if the decree against the personal representative should be unavailing. The decree is, therefore, to be reversed with costs, and the cause remanded to the circuit superiour court, to be proceeded in according to the principles above declared.

Decree reversed.

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\*White v. Toncray.\*

April, 1838, Richmond.

(Absent BROCKENBROUGH, J.)

**Pleading and Practice—Rejected Plea—When Part of**

\*For sequel of the principal case, see White v. Toncray, 6 Gratt. 179.

**Record.**—Pleas tendered by a defendant in an action at law, and rejected by the court, are not part of the record, unless made so by bill of exceptions to the rejection of them, or by order of the court that they shall be made so; and a mere memorandum, that, when the pleas were rejected, the court declared that the matter thereof might be given in evidence without the pleas being filed, and that this was done at the trial, does not make the rejected pleas part of the record.

**†Pleading and Practice—Rejected Plea—When Part of Record.**—Pleas rejected by the court are not a part of the record unless made so by a bill of exceptions, or the express order of the court. As authority for this proposition, the principal case is cited with approval in *Morrissett v. Com.*, 6 Gratt. 674 (see also, *foot-note* to this case); *Colley v. Sheppard*, 31 Gratt. 322; *Lawrence v. Com.*, 86 Va. 579, 10 S. E. Rep. 840; *Fry v. Leslie*, 87 Va. 275, 12 S. E. Rep. 671; *Sweeney v. Baker*, 13 W. Va. 202, 212, 214; *Hughes v. Frum*, 41 W. Va. 452, 23 S. E. Rep. 607; *Quesenberry v. People's, etc., Ass'n*, 44 W. Va. 519, 30 S. E. Rep. 75; *foot-note* to *Bowyer v. Hewitt*, 2 Gratt. 198; *foot-note* to *Dickinson v. Dickinson*, 25 Gratt. 321. See further, monographic note on "Bills of Exception" appended to *Stoneman v. Com.*, 26 Gratt. 887.

In *Sweeney v. Baker*, 13 W. Va. 212, the court, while approving the proposition laid down in the principal case, said: "It is true JUDGE TUCKER in his opinion in the case of *White v. Toncray*, 9 Leigh 347, would seem to think, that a formal bill of exceptions was necessary, if the defendant wanted the rejection of his plea reviewed. His reasons are, first, that the rejected plea may be identified, and second, that in the formal bill of exceptions the court might have an opportunity for assigning its reasons for the rejection of the plea. There seems to me but little force in either of these reasons. \* \* \* If then there be no special reason in a particular case, why a rejected plea should not be ordered to be made a part of the record, and exception to its rejection be entered on the record book, I can see no reason why a court ought not to be permitted in its discretion so to do; or why it should be uselessly required in every case, to have a formal bill of exceptions written out and signed. And this is, I think, the decision in *White v. Toncray*, 9 Leigh 347, and the subsequent Virginia cases, and also in *Hart v. B. & O. R. Co.*, 6 W. Va. 336." In this same case, at p. 212, the principal case is distinguished. See *foot-note* to *Herrington v. Harkins*, 1 Rob. 591.

In this same case (*Sweeney v. Baker*, 13 W. Va. 202), the clerk copied at the end of the record a certificate signed by the judge stating that a demurrer had been filed and overruled by the court but that no entry of it had been made by the clerk. The record book failed to show the filing of the demurrer at any time; and this memorandum of the judge was not referred to on the record book. It was held that the memorandum of the judge could not be considered as a part of the record in the case, though the clerk did certify that it was a transcript of a paper in the cause: the court citing the principal case, *Morrissett's Case*, 6 Gratt. 673, *Cunningham v. Mitchell*, 4 Rand. 189, *Bowyer v. Chesnut*, 4 Leigh 1, *Snydam v. Williamson*, 20 How. (U. S.) 439, *Young v. State*, 23 Ohio St. 578, and *Read v. Gardner*, 17 Wall. 409, as its authority.

To the point that a paper which does not appear in the record to have been relied on, cannot be made a part of record by the clerk's certificate, the prin-

**Same—Same—Failure to Take Exception—Presumption in Appellate Court.**—If pleas be tendered by a defendant and rejected by the court, and he takes no exception to the rejection of them, he shall be presumed in the appellate court to have acquiesced.

**Carriers—Covenant for Transportation of Salt—Election of Annual Quantity.**—Covenant between a carrier and a manufacturer of salt, whereby the carrier agrees to transport from 1200 to 5000 barrels of salt, annually for three years, from the manufacturer's salt works to certain specified places, for a stipulated reward per barrel transported: *HOLD*, that the manufacturer, not the carrier, had the right to elect what quantity of salt, not less than 1200 nor more than 5000 barrels, should be transported by the carrier annually.

In an action of covenant, brought by Toncray against White, in the circuit court of Washington, the declaration set forth a covenant, dated the 25th August 1823, between the plaintiff Toncray, a carrier, and the defendant White, a manufacturer of salt at Saltville (the name of King's salt works in Washington), to the following effect—that the plaintiff should transport for the defendant, from Saltville, down the Holston and Tennessee rivers, from 1200 to 5000 barrels of salt annually for three years next succeeding the date of the covenant, if the state of the water permitted, and should deliver the same safely to the defendant or his consignees, on the top of the bank of the Tennessee, at any point the defendant should direct from Florence below the Muscle Shoals to the mouth of the river, except one

principal case, *Cunningham v. Mitchell*, 4 Rand. 187, and *Roanoke, etc., Co. v. Karn*, 80 Va. 589, were cited in *Offending v. Ford*, 86 Va. 920, 12 S. E. Rep. 1.

In *Mandeville v. Perry*, 6 Call 88, JUDGE TUCKER, speaking for the court, said: "The question is, what this court will consider as constituting the record of which it is to take notice in cases at common law? I answer the writ, for the purpose of amending by, if necessary. The whole pleadings between the parties. Papers of which a profer is made, or oyer demanded. And such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in court, until the rendition of the judgment, constitute the record in common law suits, and are to be noticed by the court, and no others." As approving this statement, the principal case was cited in *Roanoke, etc., Co. v. Karn*, 80 Va. 591; *C. & O. R. Co. v. Sparrow*, 96 Va. 687, 37 S. E. Rep. 302.

**Same—Same—Failure to Take Exception—Presumption in Appellate Court.**—To the point that, if pleas be tendered by defendant and rejected by the court, and he takes no exception to the rejection of them, he shall be presumed in the appellate court to have acquiesced, the principal case was cited in *Herrington v. Harkins*, 1 Rob. 608 (see also, *foot-note* to this case); *Fry v. Leslie*, 87 Va. 276, 12 S. E. Rep. 671; *Morrisett v. Com.*, 6 Gratt. 674; *Hart v. B. & O. Ry. Co.*, 6 W. Va. 343; *Thompson v. Boggs*, 8 W. Va. 71; *foot-note* to *Bowyer v. Hewitt*, 3 Gratt. 198.

**Carriers.**—See monographic note on "Common Carriers" appended to *Farish v. Reigle*, 11 Gratt. 697.

348 third part of the salt \*so transported, which the plaintiff reserved the right to deliver at Marathron at the head of the Shoals; for the transportation of which the defendant was to pay the plaintiff 25 dollars per ton for all delivered at Florence and below, and 22 dollars per ton for all delivered at Marathron; and for all salt received by the plaintiff at Saltville, and not delivered to the defendant or his consignees at some point on the Tennessee, the plaintiff was to be charged 1 dollar 25 cents for each bushel, and 46 cents for each barrel containing it, or he was to be charged the Tennessee money selling price at Saltville, in part payment of what should be due to him for the transportation; and the balance due him on that account, should be paid him by the defendant, in Tennessee money, within twelve months from the delivery of the salt to the plaintiff at Saltville to be transported; but if any of the salt delivered to the plaintiff be transported, should be lost by the staving or the sinking of the boats, on satisfactory proof made thereof by the plaintiff, he should be charged only 50 cents per bushel for the salt so lost, and 46 cents for each barrel containing the same. And, after declaring the intent and effect of the covenant to be, that the defendant should annually during the term of the three years, when required, furnish to the plaintiff at Saltville, to be by him transported, from 1200 to 5000 barrels of salt, at the plaintiff's election, and should keep the quantity of 5000 barrels annually to be transported by the plaintiff, when called for, and should have consignees ready at all times to receive the salt so transported,—the declaration averred, that the plaintiff did, in pursuance of the contract, transport and deliver large quantities of salt, having commenced the day after the date of the covenant, and continued to transport and deliver large quantities until the 19th August 1825, on which day the defendant refused to deliver any more salt to the plaintiff, whereby the plaintiff was prevented from further performing the

349 covenant on his part; that \*the plaintiff had made large engagements with wagoners to carry salt from Saltville, and had made expensive preparations for the transportation of the salt the expense whereof was wholly or in a great measure lost to him, by reason of the failure of the defendant to perform the covenant on his part by furnishing the salt for transportation, and thus the plaintiff had been deprived of the profit he should have made from the contract; that of the salt which the plaintiff had received from the defendant for transportation, 605 barrels were lost by the staving and sinking of four boats, whereof he had offered to make satisfactory proof to the defendant, who refused to hear the same; and that the residue of the salt he had received from the defendant, had been faithfully delivered, except — barrels, for which he was ready to credit the defendant at the rates fixed by the covenant. And then, averring that the plaintiff had in all things performed the covenant on his part, the declaration alleged the following breaches of the cove-

nant on the defendant's part—1. that the defendant had not delivered, or permitted the plaintiff to receive, at Saltville, for transportation, from 1200 to 5000 barrels of salt, annually for the three years, and especially, that he had refused to deliver any salt during the third year of the term, though the plaintiff had elected to take 5000 barrels during that year, and gave notice thereof to the defendant; 2. that the defendant had not appointed agents or consignees to receive the salt which was transported by the plaintiff, whereby he had been subjected to much expense, and to loss of time; and 3. that the defendant had failed to pay the plaintiff the freight of the salt which he had transported.

The defendant pleaded covenants performed, and covenants not broken; on which issues were made up. And at a subsequent term (the same at which the issues were tried) he tendered "pleas of set-off, which were objected to by the counsel for the plaintiff, and rejected \*by the court." The

defendant did not file a bill of exceptions to the rejection of these pleas, nor were the pleas inserted in the record: but there was a memorandum at the end of the record, stating, that when the defendant tendered his plea of set-off, the court declared that no objection was perceived to the exhibition of the accounts shewing all the defendant's claims to set-offs before the jury, and in point of fact, at a subsequent stage of the trial, his accounts of set-offs were submitted to the jury for their consideration in forming their verdict, except two items in one of them, which were the subject of one of the bills of exceptions filed by the defendant.

Many points arose at the trial and were decided by the court, and the defendant filed four bills of exceptions to opinions given against him: the last of them stated six several propositions, on which instructions of the court to the jury were asked, and instructions given or refused. But of these numerous and various points, this court decided but one (which was the main point in the cause) and that alone, therefore, is necessary to be here stated; namely, the first point stated in the defendant's fourth bill of exceptions, which was this: The defendant moved the court to instruct the jury, "that according to the legal effect of the covenant, the defendant White had the right to elect what quantity of salt should be transported, not less than 1200 nor more than 5000 barrels, by the plaintiff, annually; and that the plaintiff had no right to demand for transportation, more than 1200 barrels annually:" which instruction the court refused to give, and the defendant excepted.

There was a verdict and judgment for the plaintiff for 4000 dollars, from which the defendant appealed to this court.

Johnson, for the appellant, conceiving that the pleas of the set-off tendered by the defendant, and rejected \*the court, and the accounts of particulars therewith filed, were made, by the memorandum respecting them, part of the record, and ought to have been inserted therein, to enable this court to judge whether those pleas were properly rejected by the circuit

court or not, and suggesting a diminution of the record in that particular, asked a certiorari to bring up a full record.

TUCKER, P. I am of opinion, that a certiorari ought not to be awarded upon the matter suggested; because, in the first place, I do not think that the pleas of set-off which were tendered by the defendant, and rejected by the court, are a part of the record; and 2dly, if they were, yet as the defendant acquiesced in the rejection of them, and took no exception, he cannot now bring that matter in question before this court.

1. The pleas are not a part of the record. The record, we are told, is made up of "the writ (for the purpose of amending by, if necessary); the whole pleadings between the parties; papers of which profert is made or oyer demanded, and such as have been specially submitted to the consideration of the court by a bill of exceptions, a demurrer to evidence, or a special verdict, or are inseparably connected with some paper or evidence so referred to. These, with the several proceedings at the rules, or in court, until the rendition of the judgment, constitute the record in common law suits, and are to be noticed by the court, and no others." *Mandeville v. Perry*, 6 Call 78, 83. Now, the pleas which were tendered in this case, come within no part of this description. They constitute no part of the pleadings between the parties. The defendant desired to make them so, but the court, for good reasons doubtless, refused to permit them to be filed. They were of course not filed. Though placed among the papers by the party or the clerk, they were not filed, and were of course no part of the record. What function

352 could \*they perform? None. If it was designed to assign the rejection of them as error, the defendant should have filed his exceptions, and thus have identified the papers offered, and have made them part of the record, and afforded the court an opportunity of assigning the reasons of the rejection. He has not done this; he has not even had them so spread upon the record as to identify them. The certificate of the clerk cannot supply the defect; *Cunningham v. Mitchell*, 4 Rand. 189; *Bowyer v. Chesnut*, 4 Leigh 1. Indeed, they are not to be presumed to be among the papers, as they were rejected, and no exceptions were filed. The defendant not excepting, is taken to acquiesce; and as the court refuses him leave to file his plea, he may put it into his pocket. If he did so, could he be prosecuted for purloining a record? I apprehend not; for when his motion to file a plea is refused, the plea is still in his possession and control, and will so continue, unless he elects to compel the court to make it a part of the record, which he may do by bill of exceptions. This seems to me the true view of the matter. If the plea is received, it becomes part of the record at once, by the voluntary act of the court. If the court refuses it a place among the records, which is the effect of the rejection, the defendant may then require it to be made a part of the record by bill of exceptions; or the court may by its order identify



the paper, and set forth upon the order book the reasons of its refusal to receive it.

This brings me to remark, 2. that even if the pleas had been spread upon the record, and constituted a part of it, this court must take it that they were properly rejected, as the defendant did not except. His acquiescence in the rejection must be presumed; and as it is possible there may have been good reason for the rejection, that reason must be taken to have existed, as he did not call upon the court to sign a bill of exceptions, in which its reasons would have  
353 been stated. A \*contrary practice would lead to absurdity and mischief.

If a continuance is refused, or a motion for a new trial overruled, the court must load the record with its reasons, though the party does not except. This would be contrary to reason, and is at war with well established principles and practice. The rejection, then, in this case, must be taken to be right; and if so, for what purpose have the pleas inserted in the record? I see no use of them, which would avail the defendant, and I therefore do not think the cause should be delayed for that which (if a part of the record at all) is an unimportant part of it, in relation to the questions before this court.

It may also be remarked, that if a bill of exceptions had been filed in the present case, and had merely stated the fact of the rejection of the pleas, without shewing any reason for the delay in not offering them sooner, this court, under the authority of the case of *Martin v. Anderson*, 6 Rand. 19, must have affirmed the judgment rejecting the plea.

The other judges concurred. *Certiorari* denied.

The cause was then argued on its merits, by Johnson for the appellant, and Stanard for the appellee.

TUCKER, P. This is an action of covenant upon a contract between a salt manufacturer and a carrier, for the carriage of a quantity of salt. By the contract, Toncray agreed to transport for White, from 1200 to 5000 barrels of salt, annually, for three years. The carrier contends, that, by this provision, he was entitled to demand that the manufacturer should deliver to him, or have ready for delivery, each year, the full quantity of 5000 barrels, or such quantity between 1200 and 5000 as he might elect. The defendant White  
354 denies Toncray's right of election, and on the trial of the cause, \*moved the court to instruct the jury, that he, and not the plaintiff, had the right of election. The court refused the instruction, and, in effect, gave the opinion to the jury, that the plaintiff had the right of election.

It is sufficiently obvious, as was said at the bar, that the right of election cannot exist in both parties, since the exercise of the right would, in that case, be conflicting. It is also clear, that as a broad latitude is allowed as to quantity, there must be in one or other of the parties the right to fix the quantity to be delivered for transportation. To which of the parties did that right belong? I answer, to the manufacturer.

This will be abundantly clear, whether we proceed upon technical principles, or upon the reason and nature of the contract. According to well established principles, the words here, being the words of the carrier, are to be taken most strongly against him. And what, then, is their meaning? He agrees to transport from 1200 to 5000 barrels: the quantum is not fixed: but it must be fixed. To allow him to fix it, would be to take the words most strongly in his favour. He cannot, therefore, have the privilege; and as one or the other must have it, the defendant must have it. Indeed, I consider the agreement to transport for White from 1200 to 5000 barrels, as being equivalent to an agreement to transport any quantity between 1200 and 5000; not any quantity the plaintiff or covenantor might name, but any quantity that the other party might name. For, if the carrier could name the quantity, the contract would in fact not bind him farther than the 1200 barrels; for he cannot be said to be bound, who has an election to do or not to do the act. So that though he expressly binds himself to transport any quantity within the named limits, he could absolve himself therefrom by electing to transport a single bushel more than 1200 barrels. This would be a  
total perversion of the rule of law.

355 \*I am persuaded, however, that this matter is rather to be decided upon a just attention to the objects and design of the parties, than upon any technical rule whatsoever. It may be difficult to evolve the true principle which should govern such cases: but I will venture the suggestion, that, in general, where a latitude is given in contracts of this description, the right to fix the quantum must depend upon the question,—what is the principal motive to the contract? and he whose concern constitutes that motive, must have the election in preference to the other party. Thus in a contract for the transportation to the market, of salt, or wheat, or flour, or coal, or other merchandise, the primary and moving consideration of the contract, is the getting the article to the place of sale. The carriage is secondary and dependant. The manufacturers have no idea of doing more than send their own articles. It does not enter into their conception, that they are to look about them, and, if their own stock falls short, to make up the deficiency aliunde. An engagement of this character is not made with a view of compelling the manufacturer to furnish employment for a certain number of wagons or boats, but, on the other hand, to bind the carrier to furnish adequate transportation for a quantity, more or less, of produce that is going to market. Who would ever think of binding himself to employ carriers, when he had nothing to transport? or more carriage than would be necessary for his transportation? No one. Hence it is, that in such contracts, a certain amount is first fixed, and then a latitude is given beyond it to some definite limit. This latitude, in the nature of the thing, is inserted for the benefit of him who has the articles for transportation. How absurd would it be to give to the carrier the power of compelling the employer to pay for more carriage when



he had nothing more to carry! The same principles prevail in other cases. If a brick-maker engages with a builder, to burn 356 for him from \*500,000 to 800,000 bricks, it is obvious, that the latitude is given because the builder may want more than 500,000, and perhaps not so many as 800,000. His wants constitute the true gauge, and he is the person to judge of them. So, if a man offers to build from five to ten houses for another, the employer must of necessity have a control over the number to be built, since it cannot be supposed that he builds merely to furnish employment to workmen. He builds to meet his own wants, and they are the measure of extent to which he is willing to be bound. With the workman it is otherwise, as he can usually expand or contract his operations with comparative facility.

I do not think it necessary to say any thing on the other points presented by the bills of exceptions. I am of opinion, that the judgment should be reversed, and the cause sent back for a new trial, at which the first instruction asked by the defendant and stated in his fourth bill of exceptions, should be given by the court to the jury, if again required.

The other judges concurred. Judgment reversed, and cause sent back for a new trial.

### 357 \*Kayser Ex'or &c. v. Disher.

April 1838, Richmond.

**Legatees—Action on Promise of Executor as Such to Pay Legacy—Judgment.**—In assumpsit by a legatee against an executor for a legacy, one count in the declaration alleges a promise made by the defendant, as executor, to pay the legacy: **HOLD**, this is a count against the executor in his representative character, upon which the judgment can only be *de bonis testatoris*.

**Same—Recovery of Legacy\*—How Action Must Be Brought—Judgment.**—An action at law by a legatee, against an executor for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative, character; and the judgment in such case must be *de bonis propriis*.

**\*Action for Recovery of Legacy—Assent of Executor Necessary.**—It is well settled that no action can be maintained at law for a legacy against the executor without an express promise to pay. No admission of assets or mere acknowledgment will be sufficient; for without such promise the executor has a right to require a refunding bond which a court of law cannot compel the creditor to give or the executor to receive. *Whitehead v. Coleman*, 81 Gratt. 789, citing the principal case as its authority.

And in *Nelson v. Cornwell*, 11 Gratt. 787, it is said: "No suit will lie at common law to recover a legacy, unless the executor has assented thereto. If no such assent has been given, the remedy is exclusively in the courts of equity. 1 Story's Equ. Jur. § 591. Since the decision of *Deeks v. Strutt*, 5 T. R. 690, it has been considered as the settled doctrine in England, that no action at law will lie to recover a general legacy; even though there be assets, and the executor expressly promised to pay it. 2 Roper on Legacies 1798; 1 Story's Equ. Jur. §§ 591, 592. This doctrine, however, has not been recognized in any case decided by this court; and *TUCKER, P.*, in *Kay-*

*Executors—Suits against—Misjoinder of Counts.*†—If in a declaration in assumpsit against an executor, there be one count against him in his representative, and others against him in his individual character; this is a misjoinder of action, fatal on general demurrer.

**Assumpsit by Disher against Kayser executor of Circle**, in the circuit court of Alleghany. The declaration complained of Kayser executor of Circle, and contained five counts. The first count alleged, that the defendant executor as aforesaid, by his promissory note in writing, was indebted to the plaintiff one of the legatees of Circle, in the sum of 459 dollars, the balance due the plaintiff as such legatee from the defendant as executor as aforesaid; and being so indebted, the defendant as executor as aforesaid, in consideration thereof, undertook and promised, by his said promissory note, to pay the sum of money to the plaintiff, when the defendant should be thereto requested.—The second count was like the first, except that it alleged, that defendant executor as aforesaid (not as executor) promised to pay the money, when the defendant executor as aforesaid should be thereto requested.—The third count alleged, that the defendant executor as aforesaid was indebted to the plaintiff as one of the legatees of Circle, in the sum of 459 dollars, for so much money by the defendant executor as aforesaid had and received to the use of the plaintiff as such legatee; 358 and \*being so indebted, the defendant executor as aforesaid promised the plaintiff to pay him the same.—The fourth count alleged, that the defendant executor as aforesaid, by his promissory note in writing, acknowledged, that on a final settlement of all accounts between the plaintiff one of the legatees of Circle, and the defendant executor of Circle, there was a balance due the plaintiff of 459 dollars; and in consideration thereof the defendant executor as aforesaid, by his said promissory note, promised to pay the same to the plaintiff. The fifth count alleged, that the defendant and the plaintiff accounted together of and concerning divers sums of money due from the defendant executor as aforesaid, to the plaintiff as one of the legatees of Circle; and upon that account, the defendant executor as aforesaid was found indebted to the plaintiff the sum of 459 dollars; and being so found indebted, the defendant executor as aforesaid, in consideration thereof, promised to pay the same to the plaintiff.†

*ser, ex'or, v. Disher, 9 Leigh 357*, seemed to be unwilling to admit it in its whole extent."

In *Hairston v. Hall*, 8 Call 218, it was held that a legatee cannot recover a slave devised to him without proving the assent of the executor to the legacy.

The principal case was also cited in *Staples v. Staples*, 85 Va. 81, 7 S. E. Rep. 199.

†**Executors—Suits against—Misjoinder of Counts.**—See *Epes v. Dudley*, 5 Rand. 437; *Bishop v. Harrison*, 2 Leigh 532; monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

‡The instrument on which the action was founded, called a promissory note in the declaration, was copied into the record, though it was not a part of

The defendant demurred generally to the declaration, and pleaded non assumpsit. The court overruled the demurrer. Upon the trial of the issue, the jury found a verdict for the plaintiff for 459 dollars with interest &c. for which the court gave him judgment against the defendant, to be levied de bonis testatoris. The defendant applied, by petition to this court, for a supersedeas to the judgment; which was allowed.

Standard for the plaintiff in error.

Johnson for the defendant.

TUCKER, P. It is a subject of regret, that a good cause should be lost for want of form in the pleadings; \*but we do not perceive how we can sustain this judgment, without an utter disregard of the essential forms of the law.

The questions argued at the bar arise out of the declaration, to which there is a general demurrer. Upon this demurrer, the objection to the misjoinder of action may be made, together with any other objection, which is matter of substance, and goes to the whole of the counts.

As to misjoinder. The writ is against "J. D. Kayser executor of Circle." The declaration complains of "J. D. Kayser executor of Circle." The first count alleges, "that the said defendant executor as aforesaid" by his promissory note &c. was indebted &c. to the plaintiff "as legatee;" and being so indebted, in consideration thereof, "he the said defendant as executor as aforesaid promised &c." This is distinctly the form of the declaration against an executor in his representative character. 1 Chitt. Plead. 205-6, 1 Wms. Saund. 111, 112; Brigiden v. Parkes, 2 Bos. & Pull. 424; Hawkins & ux. v. Saunders, 1 Cowp. 289, 292; Epes's adm'r v. Dudley adm'r, 5 Rand. 437; Bishop v. Harrison's adm'r, 2 Leigh 532. No other form, indeed, could well be devised for distinguishing the action against the executor, from the action against the individual. It is necessary that some form should be adopted, which shall enable the court, where there is judgment by default, or on demurrer, to decide in what character the judgment should be rendered against the defendant. On this first count, the judgment can only be against the executor as such, for the promise is distinctly laid to have been made by him as executor. It must, therefore, be against the goods and chattels of the testator, and not against the executor personally.

The court does not find it necessary to enquire, whether the other counts are against the executor as such, or not: quacunqve via data, the declaration is bad. Take 360 \*it, that they are against him individually: then, as the first is not, there is a misjoinder. Take it, that they are all against the executor as such: then, they are all of them demands against the estate. But the demand of a legatee for his legacy, is

not a demand against the estate; it is a demand against the executor personally, for part of the estate. And if, as was contended, an action at law will lie for a legacy, either upon an express or implied promise, it is perfectly clear, that it must be brought against the executor in his individual, and not in his representative, character; and the judgment must be de bonis propriis, not de bonis testatoris. This is clearly shewn by the cases decided in the time of lord Mansfield; Atkins & ux v. Hill, 1 Cowp. 284; Hawkes & ux. v. Saunders, Id. 289. See also Rose & ux. v. Bowler's ex'ors, 1 H. Black. 108. Taking all the counts, then, to be of the same character, they are all against the defendant in his representative character, and are, therefore, all of them bad.

In this view of the case, the question mainly argued at the bar, need not be decided: the court gives no opinion upon it. Yet I am myself well satisfied, 1. That an action at law against an executor for a legacy, does not lie without an express promise of the executor to pay. 2. That it does lie upon such promise, where there is a good consideration; for example, where there are assets to pay the legacy. 3. That if the promise of the executor be unqualified, it amounts to a waiver of the refunding bond which he might have required of the legatee, and removes a great difficulty in the proceeding at law. 4. That if the promise be on condition of a refunding bond being given by the legatee, then, on ordinary principles, there can be no recovery without proof of the performance of that condition. 5. That no admission of assets, or mere acknowledgment of indebtedness, without an express promise, will sustain the action; for, in those cases,

the objection exists, if no other, 361 \*that the executor has a right to require a refunding bond from the legatee, which a court of law cannot compel him to give.

Judgment reversed; and judgment for the defendant upon the demurrer to the declaration.

### Miars and Others v. Bedgood Ex'or of Fulgham.

April, 1838, Richmond.

**Wills — Construction — What Passes by Residuary Clause\* — Case at Bar.**—A testatrix, by the first clause in her will, desires that her negro man Kit shall have his freedom, and receive from her estate \$50. By the second, she gives to D. A. her negro Harry, and directs that D. A. receive from her estate \$100 for the purpose of supporting Harry during his life. By the third, she gives to S. C. \$20. By the fourth, she gives to D. A. A. one buffet and one large trunk; and to K. D. one trunk and one

\***Wills — What Passes by Residuary Clause.**—On this subject, see Stephen v. Swann, 9 Leigh 404, 417; Gallagher v. Rowan, 86 Va. 823, 828, 11 S. E. Rep. 121; Irwin v. Zane, 15 W. Va. 646, 654, all citing and approving the principal case. See also, Smith v. Smith, 17 Gratt. 268, and foot-note.

**Same — Construction — Intention of Testator Governs.**—As the law gives the power to dispose of property by will at the discretion of the testator, his intention must always govern in the construction of his last

It. It was in these words: "On a final settlement of all accounts with C. Disher, one of the legatees of P. Circle deceased, and J. D. Kayser executor of said P. Circle, there is a balance due said Disher 459 dollars, this 27th December 1827. (Signed) J. D. Kayser."—Note in Original Edition.

patched bed cover. The fifth and last clause is as follows: "I give to my negro Kit above named a blue cotton bed cover, and to the above named negro Harry one yarn bed cover. I do hereby appoint James Bedgood my executor to this my last will and testament, and that he shall receive the balance of my estate, if any." The testatrix, besides some furniture worth about \$200, dies possessed of \$2978 in money.—HELD, that Bedgood is entitled to the money, as well as to any other balance of the estate.

**Same—Same—Same—Parol Evidence.**—Whether parol evidence is admissible in such a case, to show that the testatrix did not intend that money should pass by the residuary clause.

The will of Elizabeth Fulgham contained the following clauses:

"1. After my funeral expenses and just debts are paid, my desire is that my negro man Kit have his freedom, and that he receive from my estate the sum of 50 dollars, to defray his expenses to any free state or country that he may prefer. 2. I give 362 to Daniel Aswell my negro \*Harry, and that the said Daniel Aswell receive from my estate 100 dollars, for the purpose of supporting the above named Harry during his life. 3. I give to Sarah Cathen twenty dollars. 4. I give to Diza Ann Arthur one buffet and one large trunk: to Keziah Deans, one trunk and one patched bed cover. 5. I give to my negro Kit above named a blue cotton bed cover, and to the above named negro Harry one yarn bed cover. I do hereby appoint James Bedgood my executor to this my last will and testament, and that he shall receive the balance of my estate, if any."

The will bore date the 11th of September 1833, and was offered for probat to the court of Nansemond county the 14th of September 1835. The record of the court of probat states, that it "was opposed by Nancy Miars; and upon the examination on oath of James S. Arthur and John Benston, the witnesses to said paper writing, and the arguments of counsel, it was the unanimous opinion of the court that the said paper writing, purporting to be the last will and testament of Elizabeth Fulgham, be received as her said last will and testament, and ordered to be recorded as such." Bedgood thereupon qualified as executor.

The bill in this case was filed in the circuit court of Nansemond by Nancy Miars (who

opposed the probat of the will) and other plaintiffs, claiming to be the next of kin; and set forth that the decedent had no children or descendants, and left no father, mother, brother, sister, or descendant of any, and no grandfather or grandmother. In such case, supposing the decedent to have died intestate, the estate would be divided into two moieties, one of which would go on the paternal and the other on the maternal side, to uncles, aunts, and their descendants. The bill stated that the plaintiff Nancy Miars was a cousin of the decedent, and that the other plaintiffs were children of cousins.

It farther stated that the decedent died 363 possessed of a large sum of \*money, which was never intended to pass by the residuary clause; and in support of this construction, alleged declarations of the decedent at the time her will was drawn, and of the executor since her death. It called for a discovery from the executor, of the circumstances attending the execution, and as to his belief in regard to the intention of the testatrix.

The answer of Bedgood stated, that the decedent was possessed of a little furniture worth about 200 dollars, and had in money 2978 dollars. It stated his belief that the complainants would, in the legal course of distribution, be entitled to the decedent's estate if it had not been differently disposed of by her will, but insisted that under the will the balance of the estate, by force of the residuary clause, passed to him. It stated also the circumstances under which the will was written, as follows—On the day the will bears date, the decedent came to defendant's house, he being a near neighbour, and in the habit of attending to her business. She informed him that she had come to make her will, and requested him to write it for her; which he did according to her directions, and, as near as he could, in her own language. Towards the conclusion of the will, as well as he recollected, he enquired of her if she had seen any one who would act as her executor? having been previously applied to by her to act as such, and having advised her to get some other person. Upon her replying that she had not, and being still solicited to act as such, he mentioned himself as executor, and by her directions he was named the residuary legatee. The will was read over and explained to her in the presence of the attesting witnesses, signed by her, and delivered as her will. She stated that her object in making a will was to exclude the Miarses from any portion of her estate; and that such was her dislike for Nancy Miars, the female complainant, that if by any act of hers she could prevent it, she

364 should not have so much as the \*wappings of her finger.—The defendant further stated, that he was sent for by the decedent and visited her in her last illness, and she expressed not the slightest dissatisfaction with the will she had made, and manifested not the least disposition to have it altered. He admitted that the decedent said her estate was not much, and that she might have said at the time of making her will, as charged in the bill, "that the balance of

will and testament; and, if that intention be consistent with the rules of law, it will be carried into effect whether the will be draughted with technical accuracy or not. The consequence of these principles seems to be, that, in the construction of wills which carry evidence upon their face that they have been the work of ignorant testators, and not of experienced and enlightened scriveners, adjudicated cases can afford little aid. This language used by TUCKER, P., in the principal case was approved in *Bartlett v. Patton*, 38 W. Va. 76, 10 S. E. Rep. 22.

In *foot-note* to *Wootton v. Redd*, 12 Gratt. 196, many cases are cited to support the proposition that, in the construction of wills, the true intention of the testator must govern with absolute sway, if it is clear, and no rule of law is thereby violated.

her estate would not exceed 30 or 40 dollars." Such, he said, might have been her opinion, as she was then in good health, and the prospect was a fair one that she would live many years, and the little estate she had be entirely consumed in her support. But, in his opinion, one great reason for such a remark was to conceal from the world the amount of money she had, she living alone, and fearing the same might be a temptation to rob and despoil her of it. He said that he knew nothing as to her intention to give him her money, except what appeared on the face of the will. Taking that as the basis of his opinion, he claimed the money as his property, and could not suppose a different intention.

An amended bill was afterwards filed, making the specific legatees parties, and charging that the estate which came to the hands of the executor, apart from the money, was more than sufficient to pay the debts and legacies, and that after paying them there remain some estate, exclusive of the money, for the residuary clause to operate upon.

The answer of the specific legatees and the executor admitted that there was estate enough to pay the specific legacies, independently of the money, but the executor said that he did not believe the estate, exclusive of the money, would be more than sufficient to pay the debts and legacies.

There was no replication to either of the answers.

The only evidence in the cause was the deposition of James S. Arthur, one of the attesting witnesses, taken by agreement, without notice, to be read as evidence.

365 \*Arthur deposed that the will was written by Bedgood; that after all the provisions of the will had been written except the last clause, the deponent asked the testatrix what she would do with the balance of her estate; that she replied, there would be none, but afterwards said, there might be 30 or 40 dollars, and that the man might have it who attended to her business; which the deponent understood to mean Mr. Bedgood her executor. The deponent stated, that Bedgood afterwards said, he hardly thought she intended him to have her money. But the deponent added, that he had no doubt she intended Mr. Bedgood to have what should be found in her house at her death.

Upon the hearing, the circuit court decreed that the bills be dismissed, and that the defendants recover against the plaintiffs their costs.

From this decree an appeal was allowed.

The cause was twice argued in this court. Upon the first argument, only four judges were present, and they were equally divided. The second argument was before a full court, by Carter M. Braxton for the appellants, and Robinson and Howard for the appellee Bedgood.

I. Braxton contended, that the terms of the will directing that the executor "shall receive the balance of the estate," only repeated the injunction of the law, and the executor must be considered a trustee for the next of kin.

The counsel for the appellee answered, that this ground was taken away by the previous

clauses of the will, where the same language is used with a manifest intention that the legatee shall have the thing received. If, however, the word receive could be considered ambiguous, and it should be deemed necessary or proper to look dehors the will, to ascertain in what sense it was used, both the answer and the evidence established that it was used as meaning have, and that 366 whatever might be embraced by the words "the balance of my estate," was the property of the executor absolutely, and not as trustee.

II. Braxton said, that if the term receive should be construed have, still it remained to enquire what the testatrix intended to pass by the words "the balance of my estate, if any." The court should hold, that the residuary clause passed only what the testatrix intended to pass thereby. And it might go out of the will to ascertain the intention. It was evident from the answer of the executor and the evidence of the witness, that the testatrix did not contemplate any thing but her slaves and furniture. The legacy to the executor should be applied only to things ejusdem generis. She never designed to pass the money. He cited *Cook v. Oakley*, 1 P. Wms. 302; *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201; *Timewell v. Perkins*, 2 Atk. 103; *Ex parte Fearon*, 5 Ves. 638; 2 *Roper on Legacies* 533; *Philips v. Melson*, 3 Munf. 76, and particularly relied on *Minor v. Dabney*, 3 Rand. 191.

The counsel for the appellee replied that there was no ambiguity on the face of the will, and that no case could be found admitting parol evidence to prove that the testator declared his intention to be exactly the opposite of what he had said in his written will. They cited *Chichester v. Oxenden*, 3 Taunt. 147; 4 *Dow's Par. Cas.* 65; *Leighton v. Bailie*, 9 Cond. Eng. Ch. Rep. 30; *Mounsey v. Blamire*, 4 Russ. 384; 3 *Cond. Eng. Ch. Rep.* 718; *Reno's ex'ors v. Davis*, 4 Hen. & Munf. 291; *Puller's ex'ors v. Puller*, 3 Rand. 90; *Bowyer v. Martin*, 6 Rand. 525. But if the court could look out of the will, neither the answers nor the evidence shewed, that when the testatrix said she wished Bedgood to have the balance of her estate, she did not mean that he should have it. They only shewed that for some reason, best known to herself, she did not wish it to be known in her lifetime

how much she had. She could not 367 foresee what the balance of her estate would amount to at the time of her death; but if there should be any, she wished him to have it, whatever the amount might be. The doctrine of ejusdem generis was examined, and the following cases cited in regard to it: *Mayo v. Carrington*, 4 Call 472; *Crooke v. De Vandes*, 9 Ves. 192; *S. C.* 13 Ves. 330; *Bland v. Lamb*, 2 Jac. & Walk. 398; *Fleming v. Burrows*, 1 Russ. 276; *Arnold v. Arnold*, 8 Cond. Eng. Ch. Rep. 40. It was denied that the doctrine had any application to this case. Where certain things are left to A. and in the same clause the residue is given to him, the doctrine, it was said, was applicable; but it had no application where a testator gives specific legacies to other persons, and in a general clause (without any particular enumeration of things) gives the

residue to A. Yet if it were conceded that the words "if any" imported any balance of such estate as is mentioned, still it would not help the plaintiffs; for in the previous clauses of the will, there are bequests of money as well as of other things. Moreover, in this case, if the money be not held to pass by the residuary clause, there will be nothing at all for that clause to operate upon.

PARKER, J. The clause in the will of Elizabeth Fulgham under which James Bedgood her executor claims the whole residue of her estate is in the following words: "I do hereby appoint James Bedgood my executor to this my last will and testament, and that he shall receive the balance of my estate, if any."

There is no difficulty about the import of the word receive, whether we look to other clauses in the will, where that word is used as synonymous with give, or to the parol testimony in the cause, proving that no resulting trust was intended to the next of kin. Whatever Bedgood takes, he is to take as his own property. This is plain, and has scarcely been contested.

368 \*The only serious question that can be made in the case, is whether, taking the words of the will in connexion with the facts proved or admitted, the testatrix has made a valid bequest of the money left in the house (amounting to the sum of 2978 dollars) to the appellee.

On the words themselves, no doubt can arise. In relation to the balance of the estate, they are general. The testatrix could have employed no words more significant to give the whole residue of her property, than those she has used. The word estate (as lord Mansfield said in *Urry v. Harvey*, 5 Burr. 2638,) "carries every thing, unless tied down by particular expressions;" and the balance if any, comprehends all. These words are not equivocal of themselves, nor doubtful and ambiguous, and therefore I think it is not proper to resort to parol averments or extrinsic circumstances, to control or to restrain them. The difficulty here is suggested by the fact appearing aliunde, that she had a considerable sum of money in the house; and hence it is inferred that she could not intend to bequeath it by words implying, as it is said, a doubt whether she would leave any balance. The words, however, are plain and comprehensive; and being so, they should not be limited by such considerations.

This would be putting something in the will that did not previously stand there, and drawing inferences of intention, not from the words of the will, but from extrinsic proof. The cases in which this may be done are accurately stated by judge Cabell in *Puller's ex'or v. Puller*, 3 Rand. 90, and are referred to, more at large, by Powell in his treatise on devises, pp. 338 and 341,—but there is no case, not even that of *Cole v. Rawlinson*, 1 Salk. 234, or *Fonnereau v. Poyntz*, 1 Bro. C. C. 472, there mentioned, which would justify us in restraining the general, unequivocal, and clear words of this will, to a small part of the balance of the testatrix's property, instead of the whole.

369 \*If, however, we look to the circum-

stances of the testatrix, and to the facts stated in the deposition and the answers (which the complainants admit to be true, by not replying to them) there is nothing which ought to induce us to say that the testatrix died intestate as to the sum of money left in the house, or that she did not intend to give it to the executor to whom the law formerly gave the whole undisposed of residuum. She had no near relations. The complainants are distant connexions, towards whom she seems to have entertained some prejudice, for she has not once mentioned them in her will. The appellee was a near neighbour, and had been in the habit of attending to her business; and it is more likely that she would have wished him to have the residue of her property, than distant relations, to one of whom, at least, she expressed the strongest aversion. The witness who was present when she made her will, has no doubt she intended the whole residue to go to Bedgood; and certainly she could have used no word more effectually excluding her next of kin, than words giving all the balance of her estate, if any, to her executor.

It is said, however, that the testatrix could not have intended to pass this money, but something necessarily of small amount, of which there might probably be nothing left. This is mere matter of conjecture founded on the words "if any," connected with the proof that she probably had, at the time of making her will, a large sum of money by her. But those words might have been added, because she thought she might spend the greater part or the whole of her money before her death: or because she wished to conceal the fact of her having so large a sum in the house: or because, at the moment, she did not advert to it: or for some other reason, which was satisfactory to her but unknown to us. In this uncertainty, is it not bet-

370 ter to abide by the plain construction of the words, than to reply on circumstances in themselves equivocal and doubtful?

It is very evident that the testatrix did not mean to die intestate as to any portion of her property. No one does, who makes a residuary bequest. And if she did not mean to die intestate, all her residuary estate will pass by force of the words, although she might have had no reference to this money. There are many cases to shew that property not intended to pass under a residuary clause, as where it is given to charitable uses void by the statutes of mortmain (*Durour v. Motteux*, 1 Ves. sen. 320,) or where the legacy lapses, or where the specific legatee cannot claim in consequence of fraud practised on the testator (*Kennell v. Abbott*, 4 Ves. 803,) does yet go to the residuary legatee. The cases of *Cambridge v. Rous*, 8 Ves. 14; *Bland v. Lamb*, 5 Madd. 412, and several others cited in 2 *Roper on Legacies*, ch. 24, § 1, are of the same character. Sir John Leach, in the case of *Bland v. Lamb*, observed that "the question is not what the testator had in his contemplation, but what the words he has used will embrace according to their ordinary signification, which must prevail unless qualified by other expressions in the instrument;"

and lord Eldon, in afterwards affirming the decree, remarks in allusion to this rule, that it has sometimes operated directly contrary to the intention of the testator, but notwithstanding, has been allowed to prevail. I know that a testator may, by terms of the will, so circumscribe and confine the general residuary clause, as that the residuary legatee shall be a specific instead of a general legatee. This may be done by a clause particularly enumerating certain things, and then using general terms in the same clause, and is the disposition to the same person. This is what has been known as the doctrine of *ejusdem generis*, established in the cases of *Cook v. Oakley*, 1 P. Wms. 302; *Trafford v. Berrige*, 1 Eq. Cas. Abr. 201; *Timewell v. Perkins*, 2 Atk. 103, 371 and \**Minor's ex'x v. Dabney*, 3 Rand. 191,—to which may be added the more modern cases of *Fleming v. Burrows*, 1 Russ. 276, and *Arnold v. Arnold*, 8 Cond. Eng. Ch. Rep. 40, explaining, and, as I think, limiting that doctrine. Taking it, however, as broadly as it is stated in *Minor's ex'x v. Dabney*, it does not apply to this case; first, because money was given in the previous clauses, and upon the doctrine of *ejusdem generis*, ought to pass in the residuum; and secondly, because that doctrine does not permit a reference to be made to other clauses of the will, giving specific property to different persons. The clause in this will in favour of Bedgood contains no enumeration, but gives all the balance, if any. Taken per se, it passes every thing; and unless the words had been restrained by something in the context, they cannot be limited.

I am of opinion that the decree should be affirmed.

**BROCKENBROUGH, J.** The only difficulty in this case arises from the use of the words "if any," in the residuary clause. They indicate a doubt in the mind of the testatrix whether there would be any balance of her estate over and above her debts, funeral expenses, and legacies. I was at first strongly inclined to think that from the expression of this doubt by the testatrix, she had in contemplation only the disposition of her furniture, and other little property in possession, independently of the large sum of nearly 3000 dollars which was found in her house at her death, and that this sum did not pass to the residuary legatee. But my first impression is removed.

To what time does the doubt in the mind of the testatrix apply? Not to the time of making the will, but to the time of her death. She could not doubt that there was a balance, and a large balance, when she made the will. She knew there was a large sum of money then in her house. Her debts were small, and \*her legacies trivial. The words "if any" were used to express a doubt whether there would be any balance at the time of her death. She was then in good health, she might live a long time, and might spend the money; or, as she lived alone in the world, she might lose it by pilfering or plunder.

Understanding these words in that sense, the question is, whether the words of the

residuary clause will pass the money to Bedgood. "He shall receive the balance of my estate." This is a very comprehensive word, and carries every kind of personal estate, money, slaves or furniture, unless restricted by the plain meaning of the testator. The argument of the appellants' counsel is, that the bequest of the balance must be restricted to things *ejusdem generis* with those specifically bequeathed. I am disposed to think that the rule laid down by judge Coalter, in *Minor's ex'x v. Dabney*, 3 Rand. 203, is correct. "If a testator gives to A. specific legacies, and also to B. C. and D. and in a general clause gives the residue to A. he is undoubtedly residuary legatee of every thing not perfectly disposed of. But when certain things are left to A. and in the same clause the residue is given to him, it is either a general residuary clause to him, of every thing not perfectly disposed of, or to be construed and restrained to things of the like kind, according as a sound and just construction of the whole will demands." The decision in that case was undoubtedly correct. The bequest was of "my books, medicine and shop furniture, and all the estate not before devised, including my gig and saddle horses." The judgment was that lots in a town (including the lot on which the shop was erected) and slaves, did not pass, but that the legacy should be restricted to property *ejusdem generis*. That case will not apply to this, because there is no specific legacy to Bedgood, either in that or any other clause of the will, with which to connect the residuary legacy, so as to make the latter of the like kind with the former.

373 \*But if it were right to make a farther restriction of the legacy, to things of the same kind with those given to the other legatees by the other clauses of the will, still it will not apply to this case, because this residuary legacy is *ejusdem generis* with those of the other legatees. The testatrix bequeathed money to three several persons; namely, to the freedman Kit, to Aswell for the support of the slave Harry, and to Sarah Cathen; and the residuary clause to Bedgood bequeaths money to him.

I am for affirming the decree.

**CABELL, J.**, concurred in affirming the decree.

**BROOKE, J.** I shall say very little on this case. Parol evidence is admissible to prove the person intended by the devise, the condition of the testator, or the amount and condition of the property on which the will is to operate. Nothing in all this contradicts or varies the meaning of the words of the will. It only explains the object and subject to which the words of the will were intended to apply. Thus, in the case of *Harris v. The Bishop of Lincoln*, 2 P. Wms. 136, parol evidence was held admissible to ascertain which of two persons named John, and equally answering the description in the will, was meant by the testator to take under the devise. So as to the property intended to be bequeathed: in *Fonnereau v. Poyntz*, parol evidence was let in to prove that the testator intended to give specific sums of

money, and not annuities. Now, in the case before us, if parol evidence is let in to prove what the testatrix said at the making of the will, there can be no doubt that she did not mean the residuary clause to comprehend the large sum of money found in her house at her death; and whether she feared to let it be known that she had so much money or not, is immaterial. When asked how she meant to dispose of the balance of her

374 property after \*the payment of the legacies, she said, there could not be more than 30 or 40 dollars, and that she intended to give to her executor (who was then writing the will) for his trouble; on which he drew the residuary clause, and inserted the words if any; which words certainly had reference to the 30 or 40 dollars, and not to the sum found in the house. They could not refer to the probability that the testatrix was to live long enough to spend the whole of it. Her age, her circumstances, in short, every thing discountenances the suggestion. By this exposition, the words in the residuary clause are not changed in their meaning. "The balance of my estate, if any," it is true would comprehend any property coming to her, whether she knew of it or not: but the parol evidence of what she said when the executor was writing the will, if admissible, as I think it is on authority, confines the clause to the property in her contemplation at the time, and negatives the idea that she intended to give more than expressed by her.

Very little aid is to be gotten from cases in the construction of wills. In *Minor's ex'x v. Dabney*, I cited none, because the words in the residuary clause were peculiar; and though as broad as the words in the clause before us, they were held not to embrace the whole of the estate not before devised.

I am of opinion that the decree should be reversed.

TUCKER, P. I have seen no reason to change the opinion which I gave in this case on the first argument; but as it has been so much discussed, and as I am so unfortunate as to differ with some of my brethren, it may not be improper that I should endeavour to present, in a clearer manner than before, the considerations which have led me to this result. In doing so, I shall altogether avoid most of the topics discussed and the cases cited in argument, which appear to me irrelevant; and confine myself to the single question of the true construction of the residuary clause in the will before us.

375 \*I begin with the postulate, that as the law gives the power to dispose of property by will at the discretion of the testator, his intention must always govern in the construction of his last will and testament; and I will add, that if that intention be consistent with the rules of law, it will be carried into effect, whether the will be draughted with technical accuracy or not. The consequence of these principles seems to be, that in the construction of wills which carry evidence upon their face that they have been the work of ignorant testators, and not of experienced and enlightened scriveners, adjudicated cases can afford us little aid. As has been truly said by the great luminary of this court, "adjudged cases upon wills have more frequently been produced to disappoint than to illustrate the intention." It is better that we should look to the situation and circumstances of the testator, to the probable intelligence of the draughtsman of the will, to the sense in which he, if a common man, unskilled in technical niceties, has probably used the words of the will, than incur the hazard of defeating his legitimate intention, by affixing to them the meaning a professional man would give them. In these views, I found myself not only upon the principle established by the common law for centuries, but also upon the decisions of this court itself. *Kenyon v. M'Roberts & ux.* 1 Wash. 99, 100; *Shermer v. Shermer's ex'ors*, Id. 271.

With respect to the facts of the case, I shall proceed upon the assumption that the sum of 2978 dollars was in the testatrix's possession at the date of the will. If this matter were doubtful, I should deem it important to send the cause back to have it ascertained. But in truth the case has proceeded upon that hypothesis, and the answer of the defendant impliedly admits it, since he declares that in his opinion one great reason for the remark attributed to her, "was to conceal from the world the amount of money she had."

376 \*The case, then, stands thus. A single woman (said in the argument to be an old lady) has by her upwards of 2900 dollars, together with a very small personal property, estimated (exclusive of two slaves) at about 200 dollars. One of the slaves is emancipated, and has a legacy of 50 dollars: the other is bequeathed to a friend, with 100 dollars for his support. A buffet, two trunks, three bed covers, and twenty dollars constitute the bequests of the will, which concludes with the following clause: "I appoint James Bedgood my executor, and that he shall receive the balance of my estate, if any." Under this clause, he claims the 2978 dollars. On the other hand, the testatrix's next of kin claim it. These are Nancy Miers, and the descendants of three other stocks, to wit, Nancy Powell, James Cathen and William Cathen. With the first, the defendant tells us she was at variance: but it seems that she was not so with the rest. Thus circumstanced, she sends for Bedgood to draw her will; and at the time it was preparing, she said, in speaking of the balance of her estate, that it would not exceed thirty or forty dollars.

The first question which presents itself in the case, is as to the admissibility of this declaration. It cannot be denied, that in construing the will, we must look to the subject upon which it is to operate; and evidence is therefore proper to prove the value of the personal estate of the testatrix, and the fact of the possession by her of this 2978 dollars. But this is not all. The declaration of the testatrix, as to her supposed estate, is also evidence to explain the ambiguity as to her intention in relation to the bequest of the sum in question, which is disclosed by the proof of the fact of its existence. She is in

possession of a large sum in money, and yet says, she wills the balance of her estate, if any, to her executor. Now, if she looked upon the money as comprehended by the word estate, she could have no doubt that there

377 would be a balance to the amount of \*nearly 3000 dollars. When, therefore, she speaks in those doubtful terms "the balance of my estate, if any," we are forced to doubt whether, by the word estate, she did mean to comprehend her money. To explain this doubt, the evidence is introduced of her declaration that "there might be 30 or 40 dollars, and that the man might have it who attended to her business." Such evidence is not in conflict with the statute of frauds; at least that part of it which relates to her estimate of the probable balance of her estate. The cases clearly shew its admissibility. I might content myself with referring to the case of Langham v. Sanford, 17 Ves. 435; S. C. 19 Ves. 641, where parol evidence was admitted of what passed at the time the will was written; and although declarations of the testator prior and subsequent to the making of the will weighed little, his declarations when it was made were deemed important. I will add, however, that all of the cases decide that in the construction of wills, we may and must look to the circumstances of the testator, of his estate, and of his connexions; and this is distinctly admitted and acted upon in the case of Puller's ex'ors v. Puller, 3 Rand. 83. See also Bucher's Case, Goul. 99; Reat v. Lee, 2 Eq. Ca. Abr. 298; Fonnereau v. Poyntz, 1 Bro. C. C. 472; Dyose v. Dyose, 1 P. Wms. 305; Duke of Rutland v. Dutchess of Rutland, 2 P. Wms. 210, 1 Ball & Beatty 449, 481, 6 Eng. C. L. Rep. 244, 245, 246; Goodinge v. Goodinge, 1 Ves. sen. 231; Shelton's ex'ors v. Shelton, 1 Wash. 56; Kennon v. M'Roberts & ux. Id. 99, 100; Guthrie v. Guthrie, 1 Call 14; 3 Binney 484; 2 Maule & Sel. 448. In Goodinge v. Goodinge, evidence was admitted to prove that the testator knew he had poor relations living in a distant county. The knowledge of the testator of such facts, therefore, seems admissible, and the fact of such knowledge is best derived from his own declarations. So, too, with respect to the property of the

378 testator. If, at the time of making the will, he makes \*a declaration in reference to his property, such declaration may be resorted to, to explain a latent ambiguity in his will. Thus, in the present case, in looking to the estate which is the subject of the will, and considering it in reference to the expressions "the balance of my estate, if any," a doubt at once suggests itself whether the testatrix did or did not design to embrace, under the term estate, this large sum of money. To explain this doubt, we have evidence of the testatrix's declaration that the balance of her estate would not exceed 30 or 40 dollars; whence the inference is irresistible, that she did not mean to comprehend the 2978 dollars. This evidence seems to me beyond all exception.

Taking, then, the evidence of the testatrix's declaration, let me proceed to state some of the considerations which induce a conviction

on my mind, that she never designed this sum of money for Bedgood.

1. Because, without any assignable reason, she thus cuts off those united to her by the ties of blood, with only one out of seven of whom is it pretended she had any disagreement; and the allegation as to that one is not proved. It is said, indeed, she has shewn her disregard of them by not mentioning them; but that is begging the question, if, as I suppose, she designed to leave the 2978 dollars to the legal distribution among them.

2. Because she has given her property to a stranger, who had no claims upon her, except that she named him her executor; and it is not conceivable that she would give 2978 dollars as a compensation for administering 200 dollars.

3. Because her declaration that there might be a balance of her estate of 30 or 40 dollars, and that her executor might have it, clearly negatives the idea of her designing to give him this large sum. If those words had been inserted in the will, they would have excluded all doubt. They ought not to have less weight, upon the proofs in the cause.

379 \*4. Because that declaration clearly shews, that the testatrix used the word estate in a more limited sense than it has in legal parlance; for as, on the one hand, she must have known that she had this money, so, on the other, if she had looked upon it as a part of her estate, she could have no doubt that the balance would have been 3000 dollars instead of 30. Now, the word estate, however comprehensive, is often limited and restricted in its signification. Thus in Minor's ex'x v. Dabney, the testator clearly thought his gig and saddle horses were not embraced by the words "all the estate not before devised;" and the court decided that those words did not comprehend undevised lands, slaves and other personal estate. So also is it with other general expressions: they are susceptible of limitation according to the plain intention. Thus, in Trafford v. Berrige, the bequest was of all the testator's goods, chattels, household stuff, furniture and other things in the house. Yet £265. in ready money in the house was not included under the words goods, chattels or other things. So in Timewell v. Perkins, the devise was of plate, jewels, linen, household goods and coach horses, and every other thing whatsoever or wheresoever. Yet goldsmiths' notes and bank bills were held not to pass under this sweeping expression. And truly I think they were rightly rejected. For money, particularly where it is in large sums and composes the bulk of the testator's property, cannot reasonably be supposed to be thrown into a residuary clause, which, from its very character and phraseology, is designed to cover unremembered fragments of a testator's personality. Still less can this be believed where that personality is a beggarly property not exceeding 200 dollars in value. To include the bulk of the estate in such a residuary clause, while the testator has enumerated and bequeathed personal things of far inferior value, would violate every known principle of human na-



380 ture. In 1 Ves. sen. 273, a case is \*cited from Precedents in Chan. 8, where it was held "that a large sum of money did not pass, because, if the testator had intended it to pass, he would not have couched the gift under such general words;" and in the case itself in Vesey, it is clearly implied that a large sum of money would not be held to pass under the general expressions "goods and chattels in my house."

All these cases prove, that however general a term may be, its signification will be limited and restricted to meet the views of the testator. The word estate in this will may therefore be so limited; and the rather, as it is a word that an ignorant person may well be supposed to use in a restrained signification, confining it sometimes to landed property, or, if used in reference to personality, embracing by its slaves, stock, moveables, and other like articles, but rarely comprehending money, bonds, &c. In the case of Minor's ex'x v. Dabney, the testator's language shewed that he doubted whether the word would include gig and saddle horses, and the court decided that it did not include certain undevised lands, slaves and other property. So too in Arnold v. Arnold, the testator, by the use of the terms "wines and property," seems to have had some doubt whether wines would pass under the word "property." Such discrepancies in the use of the most common terms are of every hour's occurrence. In the present case there can be no doubt that money was not intended to be comprehended, as it is impossible, if it had been, that the testatrix could have expressed any doubt of the existence of a balance of her estate, after the deduction of the insignificant legacies she had specifically given.

For these reasons, and without any reference to the cases on the doctrine of ejusdem generis, I am of opinion to reverse the decree. Decree affirmed.

### 381 \*Sutton v. Burruss.

April, 1838, Richmond.

[38 Am. Dec. 246.]

(Absent BROOKE and BROCKENBROUGH,\* J.)

**Statute of Limitations—New Promise—Acknowledgment of Debt—Sufficiency—Case at Bar.**—On a plea of non assumpsit within five years, it was proved that within five years the defendant acknowledged the items in the plaintiff's account to be just, but

\*He decided the cause in the circuit court.

†**Statute of Limitations—New Promise.**—A new promise to remove the bar of the statute of limitations must be determinate and unequivocal; and, to imply a promise of payment from a subsequent acknowledgment, such acknowledgment must be an unqualified admission of a subsisting debt which the party is liable for and willing to pay. *Coles v. Martin*, 99 Va. 232, 37 S. E. Rep. 907, citing the principal case. To the same effect, the principal case was also cited in *Dinguid v. Schoolfield*, 32 Gratt. 808. See further, on this subject, *Bell v. Crawford*, 8 Gratt. 111, 120, 121, 123, 129, 132, and *foot-note*; *Rowe v. Marchant*, 86 Va. 182, 9 S. E. Rep. 995; *foot-note* to *Aylett v. Robinson*, 9 Leigh 48; *Quarrier v. Quarrier*, 36 W. Va. 317, 15 S. E. Rep. 156, all citing the principal case. The principal case was also cited in *Johnston v. Wilson*, 29 Gratt. 388.

said that he had some offsets; and that at a subsequent time, the defendant promised the plaintiff that he would settle all their differences and accounts fairly, and would not avail himself of the act of limitations: HELD, this proof is not sufficient to justify the jury in finding for the plaintiff.

Assumpsit in the circuit court of Caroline county, by Henry Burruss executor of the will of Thomas Burruss deceased, against John Sutton. Pleas, non assumpsit and non assumpsit within five years.

The action was brought the 18th of July 1826, to recover a balance of £48. 14. 7. alleged by the plaintiff to be due from the defendant to the said plaintiff's testator. The first item in the account was as follows: "1807, Jan'y. To 35½ acres of land, valued by reference to 58s. per acre, £102. 19. 0." None of the other debits were of later date, but there were some credits in 1811.

At the trial, the plaintiff gave in evidence a copy of the will of his testator, bearing date the 7th of March 1824, and admitted to record the 12th of April in the same year, which contained the following clause: "The thirty-five acres of land that I sold to John Sutton, I wish my executors to make a title to, provided he will pay the balance that may be due with the interest thereon, after the settlement of our accounts; but should he fail to do so, I desire my executors to sell the said thirty-five acres, and refund Sutton the money he advanced, without interest, and apply the balance to the

382 \*payment of my debts." The plaintiff also gave in evidence a copy of a deed bearing date the fifth of June 1825, from himself as executor, conveying to Sutton the land, which is stated in the deed to contain by estimation thirty-five and a half acres. Evidence was given, that in 1824, the defendant acknowledged the items in the plaintiff's account to be just, but said at the same time, that he had some offsets. It also appeared, that the defendant had accepted the deed for the land, for the purchase money of which the suit was in part brought; that both grantor and grantee went together to the clerk's office on the 5th of June 1825, when the deed was acknowledged by the grantor, and admitted to record; and on that occasion, the plaintiff said there was a balance due to his testator, and the defendant promised the plaintiff that he would settle all their differences and accounts fairly, and would not avail himself of the act of limitations. This being all the evidence adduced by the plaintiff to sustain the issue joined on the plea of non assumpsit within five years, the defendant moved the court to instruct the jury, that even if they believed the whole of the said evidence, it was not sufficient to justify them in finding the issue on that plea for the plaintiff; which motion the court overruled, and the defendant excepted to the opinion. The jury found a verdict for the plaintiff for the whole balance stated in his account to be due, with interest thereon from the first of January 1812, and the court gave judgment accordingly. Whereupon the defendant obtained a supersedeas from a judge of this court.

Stanard for plaintiff in error.

Johnson for defendant in error.

PARKER, J. I think it is necessarily to be inferred from the record in this case, that there never was such an accounting together between the plaintiff and defendant,

383 \*as would support the count of insinual computassent between Sutton and the plaintiff as executor. If there had been, no question could have arisen on the act of limitations, since five years had not elapsed from the death of the testator until the bringing of the action, and any liquidation of the accounts within that period would have been conclusive evidence to rebut the plea of the statute. The bill of exceptions, however, states that the only evidence offered by the plaintiff upon that plea, was that the defendant had acknowledged the debit side of the testator's account to be just, but that he had some offsets; and that he afterwards promised the plaintiff, he would settle all differences, and would not avail himself of the act of limitations. These were the only promises or acknowledgments made to the plaintiff the executor, and they are the acts relied on to take the case out of the influence of the statute. But these acknowledgments and promises made to the executor do not maintain the issues, that the defendant had not accounted with the testator within five years, and that he had made no such assumptions to him within five years—issues made up on the first, third and fourth counts. That promises to the executor, or an accounting with him, will not cohere with promises charged to be made to the testator, or an accounting with him, is shewn by the cases of *Green v. Crane*, 2 Ld. Raym. 1101; *Sarell v. Wine*, 3 East 409; *Ward v. Hunter*, 6 Taunt. 210; *Pittam v. Foster*, 1 Barn. & Cres. 248; and *Tanner v. Smart*, 6 Barn. & Cres. 603, 13 Eng. C. L. Rep. 273. And see *Jones v. Moore*, 5 Binney 573.

Nor do they support the second count, of an insinual computassent between the plaintiff as executor and the defendant, since they do not shew that any account had been stated, settled and liquidated between them, without some evidence of which, or of something equivalent, a plaintiff cannot recover on that count. *Evans v. Verity*, 1 Ryan & Moody 239, 21 Eng. Com. Law Rep.

384 \*427, and cases referred to in 1 Saunders on Plead. & Evid. 31. On the contrary, the evidence clearly proves that the defendant did not intend to admit an ascertained balance due from him, nor indeed any balance; for he spoke of offsets to be adjusted and settled afterwards, which might amount to more than the items he acknowledged to be just, and render evidence necessary of the precise sum due.

I am inclined, indeed, to think, that under no form of pleading, could the acknowledgments and promises proved in this case, coupled with a claim of offsets to an indefinite amount, have had the effect of taking the case out of the statute of limitations. I had occasion to advert to the modern decisions on this subject, in the recent case of *Aylett's ex'or v. Robinson*,\* and I heartily approve

their spirit. If an acknowledgment is relied on, it ought to be a direct and unqualified admission of a present subsisting debt, from which a promise to pay would naturally and irresistibly be implied. Where the amount is left open, and is to depend on proof aliunde, the wholesome objects of the statute, in affording security against stale demands, would be defeated; for it might be as difficult for the defendant, from forgetfulness of the transaction, or the death or removal of witnesses, to prove his offsets, as to explain the original transaction. The very claim of offsets rebuts the presumption of a promise to pay, and shews that the acknowledgment goes no farther than to the original justice of the account; which is not sufficient. See *Clementson v. Williams*, 8 Cranch 72, and the cases cited in *Aylett's ex'or v. Robinson*. To allow an acknowledgment of an unsettled demand, liable to be diminished by offsets, to take the case out of the statute, lets in most unsatisfactory proof of the quantum of damages, and has induced the jury in this very case to imply a promise to pay the whole amount of the account, although the

385 defendant insisted he had \*some offsets against it, which, after the lapse of time, he might have been unable to prove. Thus a promise is raised by implication of law, from an acknowledgment coupled with a claim, which shews conclusively that the defendant never intended to promise to pay the entire debt.

The subsequent promise to settle all differences, is subject to the remarks made in the case of *Aylett's ex'or v. Robinson*, and in that of *Bell v. Morrison*, 1 Peters 351, where similar expressions occur. If the promise to settle is construed into an admission that some balance was owing, it is no ground from which to imply a promise to pay any balance which a party may assert or prove before a jury. See the case last cited, p. 366.

The promise by the defendant that he would not, after a fair settlement, take advantage of the act of limitations, could only avail the plaintiff (after shewing that such a settlement had been made inter partes) as a justification to the jury in implying a promise to pay the balance, without proof of an express promise. No consideration arises upon such a promise, until the debt is established.

For these reasons, I am of opinion to reverse the judgment.

CABELL, J. It was well said by judge Story, in *Bell v. Morrison*, 1 Peters' Rep. 360, that the statute of limitations was "intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transactions may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses." If this principle be correct (and I believe it to be incontrovertibly so) no promise which is founded merely on the consideration of the old debt, and which still leaves the

386 \*party exposed to the inconveniences which the statute was intended to rem-

\*Reported ante, p. 46.

edy, ought to revive the old debt, and take the case out of the statute.

Let us see what were the facts of this case. The original justice of the plaintiff's demand was admitted; but the defendant insisted that he had offsets against it, the nature and amount of which he did not specify: he said, however, he would settle fairly, and would not plead the statute of limitations. The utmost that even a jury could infer from all this, is a promise to pay an unascertained balance. That balance might be one cent only; or it might be within one cent of the original amount of the plaintiff's demand. What it really was, depended on testimony aliunde. This promise, then, certainly left the defendant exposed to all the inconveniences arising from the loss of testimony in relation to his offsets; and we cannot therefore give effect to it, without frustrating the great object of the statute. This very case shews the evils of such a course; for here, the promise relied upon was a promise to pay a part only of the demand, and yet the jury have given the whole.

I am of opinion to reverse the judgment, and to award a new trial.

TUCKER, P. Following, as I feel bound to do, the decision in Aylett's ex'or v. Robinson, I do not see how the acknowledgment in this case can be considered as taking the demand out of the operation of the statute. The superiour court ought therefore to have given the instruction asked for. Having refused to do so, the judgment must be reversed, and a new trial awarded, upon which the instruction asked for must be given, if it should be required.

Judgment reversed.

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\*Yerby v. Grigsby.

April, 1838, Richmond.

**Real Estate—Contract of Sale—Agent Acting under Parol Authority—Effect.\***—A person owning lands may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing, signed by the person authorized to make it.

**\*Real Estate—Contract of Sale—Agent Acting under Parol Authority.**—A person owning land may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the land may be charged by virtue of the contract, provided there be a memorandum thereof in writing signed by the person authorized to make it. *Conaway v. Sweeney*, 24 W. Va. 649, citing the principal case.

And in *Kennedy v. Ehlen*, 31 W. Va. 558, 8 S. E. Rep. 408, it is said: "The West Virginia statute of frauds requires the memorandum of the purchase of realty in writing to be signed by the agent to bind. But the agent may have had verbal authority. The English statute, on the contrary, provided that 'the agent shall be thereunto lawfully authorized in writing.' This was designedly omitted from our statute. See *Conaway v. Sweeney*, 24 W. Va. 648; *Brown v. Brown*, 77 Va. 619; *Yerby v. Grigsby*, 9 Leigh 287; *Johnson v. Somers*, 1 Humph. 298; *Doughaday v. Crowell*, 11 N. J. Eq. 201; *Shamburger v. Kennedy*,

**Same—Same—Signing by Agent.**†—The signing by the agent of his own name is sufficient. The statute does not make it indispensable that he should sign the name of the party to be charged therewith.

**Same—Same—Authority of Agent Making Contract to Receive Purchase Money.**‡—When the owner of lands authorizes another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase money as is to be paid in hand, is a necessary incident to the power to sell.

1 Dev. 1." To the point that the owner of lands may by parol authorize another to make a contract for the sale thereof, the principal case is also cited in *Davis v. Gordon*, 87 Va. 580, 13 S. E. Rep. 35. See further, monographic note on "Fraud, Statute of" appended to Beale v. Digges, 6 Gratt. 533; monographic note on "Agencies" appended to *Silliman v. Fredericksburg, etc.*, R. Co., 37 Gratt. 119.

**Same—Sale—Agent—Authority of.**—Where an agent is authorized to make a sale of land he has authority to execute such writing, or enter into such written agreement as may be necessary; for the authority to sell implies an authority to do everything necessary to complete the sale and make it binding. *Smith v. Tate*, 82 Va. 665, citing principal case.

†**Same—Contract of Sale—Signing by Agent.**—The principal case was cited in *Conaway v. Sweeney*, 24 W. Va. 649, for the proposition laid down in the second headnote.

On this subject, see the principal case also cited in *Creigh v. Boggs*, 19 W. Va. 251.

‡**Same—Same—Authority of Agent Making Contract to Receive Purchase Money.**—In *Mann v. Robinson*, 19 W. Va. 58, GREEN, J., speaking for the court, said: "In the case of *Yerby v. Grigsby*, 9 Leigh 287, a decree was rendered, which impliedly affirmed, that an agent, who had been appointed by a verbal authority to sell land, had under the circumstances appearing in that case authority to receive the cash payment. The court says not one word on this subject; and this inference is to be drawn only from the decree. The reporter too fails to state, what the circumstances or evidence was: in stating the law he merely says: 'In the opinion of the court below as of this court the evidence established, that John Green was authorized by Charles to make such a contract as was made with the complainant.' The contract which was made was a sale of two lots for \$425.00, of which \$250.00 was to be paid and, as the agreement states, was paid in cash to John Green. So far as I can see, there was no authority from anything appearing in this case to justify the reporter in stating in the syllabus of this case, that so broad a proposition was held in it, as that 'when the owner of lands authorized another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase-money, as is to be paid in hand, is a necessary incident to the power to sell.' Nothing of the sort is said by the court; and no such broad proposition can possibly be inferred from the statement of the case or the decree entered. But be this as it may, there is certainly nothing in this or in any other case, which I have seen, that gives any countenance to the idea, that a simple parol authority to sell land or, what is the same thing, to make a contract of sale would impliedly authorize the agent making the sale to receive the deferred payments of the purchase-money. Such implication

**Chancery Practice—Decree between Codefendants—**

**Case at Bar.**—Case in which, upon the state of the pleadings and proofs between the plaintiff and defendants, it was not deemed proper to decree in favour of one defendant against another; and in which the court would not delay the cause, to have the account between the codefendants adjusted before a commissioner.

On the 8th of September 1830, Charles Green made a deed to William G. Yerby, conveying, for the consideration of 225 dollars, a tract of land containing seventeen and five elevenths acres, more or less, devised to him by his father, and adjoining the land of Yerby. Soon afterwards, a bill in equity was filed against Charles Green and Yerby by Nathaniel Grigsby, which alleged that Charles had authorized his brother John to sell the same land; that John made a contract with the complainant on the 30th of August 1830, whereby he agreed to sell him, for the sum of 425 dollars, of which 250 dollars was then paid, two lots of land, one of which belonged to himself, and the other was the land that Charles had authorized John to sell; that a memorandum in writing was made of the contract, which was signed by John Green as well as by Grigsby; and that both Charles Green 388 and Yerby had knowledge of \*this contract at the time of the sale and conveyance to the latter. The bill prayed a decree directing a conveyance to the plaintiff.

The answers of the defendants did not deny that they had heard of the contract of sale to the complainant, before the conveyance from Charles Green to Yerby; but both defendants denied that John Green was authorized to make the contract, and Yerby relied on the statute of frauds, and insisted that, under the statute, the agreement entered into by John Green was not binding.

The memorandum of the agreement was as follows: "Article of agreement between John Green of the one part, and Nathaniel Grigsby of the other part, witnesseth, the said John Green hath this day sold unto Nathaniel Grigsby two lots of land, containing about seventeen acres each, for the sum of four hundred and twenty five dollars, two hundred and fifty in hand paid, whereof the said Green acknowledges the receipt, the balance to be paid the first of November next. One of the above mentioned lots is Charles Green's property, brother of said John, being his part of his father's land, and said to be No. 5,—the other lot being John Green's own part of his father's land, and said to be No. 8,—for both of which the said John Green doth bind himself, his heirs &c. to make the said N. Grigsby a

would be entirely unnecessary in order for the agent to execute the authority conferred on him; and on every correct principle it could not be made. In such case it is clear, that no authority to the agent to collect any deferred instalments of the purchase-money can be inferred."

**Chancery Practice—Decree between Codefendants.**—On this subject, see cases and notes cited in *foot-note* to Blair v. Thompson, 11 Gratt. 442; *monographic note* on "Decrees" appended to Evans v. Spurgin, 11 Gratt. 615.

good and sufficient deed on or before the first day of November next. Witness our hands and seals, this 30th day of August 1830.

John Green [L. S.]  
Nathaniel Grigsby [L. S.]

Depositions were taken on both sides. In the opinion as well of the court below as of this court, the evidence established that John Green was authorized by Charles to make such a contract as was made 389 with the \*complainant, and that Yerby knew the contract had been made at the time that he purchased. The circuit court of Fauquier, affirming this contract in all things, decreed that Yerby should, by good and sufficient deed, release to Charles Green all right, title and interest that he had in or to the land by virtue of his purchase from Charles, and that Charles Green, upon the plaintiff's paying or tendering to him the sum of 175 dollars, should, at the costs of the plaintiff, by good and sufficient deed, convey the land to the plaintiff with special warranty. The defendants were further adjudged to pay the plaintiff his costs. From this decree, on the petition of Yerby, an appeal was allowed.

The cause was argued by Harrison for the appellant, and by Morson for the appellee, upon the questions made by the pleadings, and upon the following objections taken by Harrison to the decree: 1. that if it be proper to direct the appellant to convey back to Charles Green, the decree ought to go still farther, and direct Charles Green to pay back to the appellant the money received from him; and 2. that admitting Charles Green had authorized John to sell, yet he had given him no authority to receive payment, and the payment to John could only be valid to the amount of his half of the purchase money, so that, instead of 175 dollars, the sum mentioned in the decree, the appellee should be decreed to pay 212 dollars 50 cents.

PARKER, J. If this were a case of the first impression, and we had now, in the absence of authority, to decide upon the true meaning of the statute of frauds in relation to contracts for the sale of lands, I should be much inclined to say, that a specific execution of this contract ought not to be decreed. But our legislature has copied the provisions of the english statute of 29 Charles 2, ch. 3, almost verbatim, and our courts 390 \*have generally adopted the construction given by that statute in Westminster Hall. This is perhaps the safest course, particularly when we recollect that at the several revisals the statute of frauds has been re-enacted, with a full knowledge of the interpretation given to its words, in the courts of that country from which we borrowed them.

It has been there repeatedly settled, that an agent authorized by parol to sign a contract for lands, is thereunto lawfully authorized, within the provisions of the statute. The authority to sell implies an authority to do every thing necessary to complete the sale, and make it binding on the principal. It is on this principle that an auctioneer empowered to sell, has always been held to be the agent of the vendor empowered to sign. In

no one of the cases has it ever been required, that an express authority to sign should be superadded to the authority to sell, although the authority to sign is certainly required by the statute. It has, in all of them, been taken for granted that an agent authorized to sell lands, is empowered to do every act necessary to complete the contract. As the statute declares that no agreement for the sale of lands shall be binding, unless it is in writing, and signed by the party to be charged therewith, or some other person thereunto (that is, to the signing) lawfully authorized, it could not be presumed that he who authorizes another to sell his lands, meant to deprive him of the power to render that sale effectual and binding on the vendor. If the agent sells, and does not sign a note or memorandum in writing, the vendor has the same locus poenitentiae as if he himself verbally agrees to sell; for he may revoke the authority of the agent at any time before the agreement is executed according to the statute. So an agent to purchase must have authority to bind the purchaser by signing the agreement, although his authority may be revoked before the contract is reduced to writing and signed.

391 \*These propositions I take to be clearly established by all the cases.

The signing required by the statute must be such as to have the effect of giving authenticity to the instrument, and be so intended; but it does not seem to be necessary that the principal's name should anywhere appear. The statute is complied with, if the contract for the sale of the principal's land be in writing, and signed by his agent, with a view of authentication, and having the effect. No other construction can possibly be placed on the cases of *Kemeys v. Proctor*, 3 Ves. & Beam. 57; *Coles v. Trecothick*, 9 Ves. 234, and *White v. Proctor*, 4 Taunt. 209. In the case at bar, the authority to sell is clearly proved; the intention by John to sell the land of Charles Green is expressed in terms; and the agent signs his name at the foot of the instrument, and with a view to authentication.

Further, after the contract was signed, Charles Green was told by Chapman S. Green that his agent had sold the land to Grigsby, and Charles said he was satisfied, and glad he had sold it. Here was a ratification of John Green's act, before he conveyed to Yerby, and this would bind him, under the authority of the case of *Maclean v. Dunn*, 4 Bingh. 722.

Of this sale to Grigsby, it is proved that Yerby had express notice before he purchased or contracted to purchase from Charles Green.

Under these circumstances, I feel bound by the weight of authority to affirm the decree executing the contract of the 30th of August 1830, between John Green the agent of Charles and N. Grigsby, with the variation suggested by the president.

As to a decree between the defendants, that Charles Green refund the purchase money said to have been received by him from Yerby, it is sufficient to say, that no such matter was put in issue by the pleadings in the case, and there is no satisfactory

evidence of the fact of such payment to be found in the record. The receipt  
392 \*copied at the foot of the deed is not authenticated, and is suspicious on its face, for it is dated the 17th of September 1830, and promises that Charles Green should make a deed to Yerby when called on, although the deed had already been made (if we may judge by its date) on the 8th of September preceding. This may be accounted for; but the paper is not proved, and there is no other evidence of the payment to C. Green by Yerby than what is to be found in the deposition of Joseph Parner, in an answer to a question having no reference to such payment. He is asked, at what time Charles Green said he intended to sell his land to Yerby? and he answers, "It was a few minutes before I saw Mr. Yerby pay the money to Charles Green. I supposed it to be for the land." It is evident that this loose answer to an incidental question would not justify a decree for a specific sum, if it were otherwise proper in a case like this.

Upon the whole, I concur in the decree to be indicated by the president.

The other judges concurred in the opinion of PARKER, J.

The decree of the court of appeals was as follows:

"The court is of opinion that there is no error in the decree, except so far as it requires a release from the appellant to Charles Green, instead of decreeing a reconveyance by the appellant to the said Charles Green, with warranty only against himself and all claiming under him: therefore it is decreed and ordered that the said decree, so far as the same is above declared to be erroneous, be reversed and annulled, and that the residue thereof be affirmed; and also that the appellant do pay unto the appellee, as the party substantially prevailing, his costs by him about his defence in this behalf expended. And it is ordered that the cause be remanded to the circuit superiour court, to be further proceeded in according to the foregoing opinion and decree."

393 \**Atkinson v. Robinson.*

April, 1838. Richmond.

**Chancery Practice—Claim for Equitable Relief Should Be Exhibited within Reasonable Time.**—Every claimant who asks relief of a court of equity ought to exhibit his claim within a reasonable time, so that, in giving him a decree the court may not do injustice to the defendant.

\***Chancery Practice—Claims for Equitable Relief Should Be Exhibited within Reasonable Time.**—As holding that every claimant who asks relief of equity ought to exhibit his claim within a reasonable time, so that, in giving him a decree, the court may not do injustice to the defendant, the principal case was cited in *Etting v. Marx*, 4 Fed. 683; *Caruthers v. Trustees*, 12 Leigh 618. See also, *Smith v. Thompson*, 7 Gratt. 112.

**Same—Laches.**—A court of equity, which is never active in relief against conscience, or public convenience, has always refused its aid to stale demands, where the party has slept upon his right, and acquiesced for a great length of time. Nothing

**Same—Lapse of Time—Case at Bar.**—Bill in equity dismissed, because amount remaining due to complainant was uncertain, and could only be ascertained by a settlement of accounts in reference to transactions more than twenty-seven years old at the commencement of the suit.

Appeal from a decree of the superiour court of chancery formerly holden for the Richmond district.

On the 23d of April 1798, judgment was obtained in the district court holden at King and Queen courthouse, by Thomas Smart for the benefit of Buchanan & Young, against William Robinson and Beverley Robinson, for £1564, and costs, to be discharged by the payment of £782, with interest from the 8th of October 1796 till paid, and the costs. Beverley Robinson being taken in execution upon a judgment obtained by one Thomas Southcombe, as well as upon Smart's judgment, was, on the 26th of May 1798, brought before two justices of the peace, and thereupon subscribed and delivered in a schedule of his estate, took the oath of an insolvent debtor, and was discharged out of custody. William Robinson being afterwards taken in execution upon the same judgments, was discharged in like manner on the 18th of April 1799. The bill in this case was not filed until the 8th of May 1827.

It was exhibited by Joseph Atkinson junior, as surviving partner of Atkinson & Co. and claimed that Buchanan & Young had assigned to Atkinson & Co. the debt due from William and Beverley Robinson. After setting forth the nature of the property contained in the schedules, it stated, that property of William Robinson in Berkeley  
394 \*county was disposed of by the sheriff of that county, and produced the net sum of £323. 6. 6. which was paid by the sheriff to Southcombe; that the sheriff of King and Queen county sold merchandise mentioned in the schedule of Beverley Robinson, and undertook the collection of the debts specified therein; that some of those debts were collected by the sheriff, and money was paid over by him from time to time to James Webb esq. who was the attorney that recovered both judgments, Southcombe's as well as Smart's; that Thomas C. Morton filled the office of sheriff of King and Queen county at the time of these transactions, and had died without settling any account of the same, leaving Walker Hawes his executor; that the mother of William and Beverley

can call forth this court into activity but conscience, good faith, and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced. As recognizing and acting on this doctrine, the principal case is cited in *Doggett v. Helm*, 17 Gratt. 96, 97, and *foot-note* (many cases in point are collected in this *foot-note*): *Foster v. Rison*, 17 Gratt. 348; *Green v. Thompson*, 84 Va. 306, 5 S. E. Rep. 507, citing also *Hayes v. Goode*, 7 Leigh 487; *Caruthers v. Trustees*, 12 Leigh 619; *Carr v. Chapman*, 5 Leigh 176; *Stamper v. Garnett*, 31 Gratt. 564; *Hatcher v. Hall*, 77 Va. 576; *Harrison v. Gibson*, 23 Gratt. 312, and *Hill v. Umberger*, 77 Va. 653. See further, monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

Robinson, who was tenant for life of certain slaves mentioned in the schedules, died a short time after they took the oath of insolvency, and Beverley Robinson took possession of the said slaves and their increase; that he also took an active agency in the collection of the debts and in the management of the whole fund, with the professed intent of paying the debts for which he and his brother had been taken in execution, from funds other than the slaves, and of saving them for himself; that he moreover sold a slave named James, mentioned in his schedule; that having converted to his own use most of the property of which he had rendered a schedule, he often promised Mr. Webb, and other agents of the judgment creditors, that he would pay the balance of their debts. The bill farther alleged, that after taking the insolvent debtor's oath, Beverley Robinson acquired other property, real and personal, which would have enabled him to pay the said debts; but by his frequent promises, continued till the latter days of his life, prevented the attorney and other agents of the creditors from taking steps, by *scire facias* or otherwise, to procure satisfaction of the debts. He died, it was stated, in 1825,

395 possessed of seven slaves \*mentioned in the schedules, with their increase, which was considerable, and of other valuable property, real and personal, having made a will whereof he appointed Robert Pollard and Thomas W. New his executors, who qualified as such, and immediately received notice of the judgments, and of the fact of their being unsatisfied. The bill further alleged, that under an impression that the execution in favour of Southcombe had preference over that in favour of Smart, the attorney Mr. Webb had paid the money which he received to Southcombe, whereas the whole proceeds of the fund arising from the schedules should, as the plaintiff contended, have been applied ratably to the discharge of the two judgments. After making the proper defendants, the prayer was that Hawes the executor of Morton might be compelled to settle an account of his transactions as sheriff, ascertaining what moneys he had collected, and what he had paid over in satisfaction of the executions or either of them, and pay any balance for which he might be liable; that whatever might be yet due on the judgment of Smart might be paid out of such funds in the hands of Hawes the executor of Morton, and of the representatives of Beverley Robinson, as might be justly chargeable therewith; and that Southcombe might be compelled to pay to the plaintiff a due proportion of the money received by him on the transactions aforesaid.

Several of the defendants answered the bill. Amongst other grounds taken in the answers, the value of the property delivered up in the schedules, and the lapse of time since the property was surrendered, were relied on as reasons for presuming satisfaction, or at least as furnishing sufficient cause for not decreeing in favour of the plaintiff. Depositions were taken in the cause, and

exhibits filed; but it is not material to state their purport.

396 \*On the 4th of February 1831, the court of chancery pronounced its opinion, that if the schedules of William and Beverley Robinson had been duly attended to by the plaintiff, or those representing him, he might have received payment of the judgment mentioned in his bill, or at least the parties concerned might be better enabled to account for various matters relating thereto than they are at present, which matters, if they could be accurately stated at this distance of time, might satisfactorily shew that the debt was satisfied: Wherefore the court decreed that the bill of the plaintiff be dismissed, and that he pay to the defendants their costs. From this decree the plaintiff appealed.

Johnson for the appellant.

Daniel and Carter for the appellees.

PER CURIAM. We are of opinion to affirm the decree. Without entering into a detail of the many grounds on which the court properly dismissed the bill, it suffices to say, that even if it were clearly proved that the decedent Beverley Robinson had, in the last hours of his life, acknowledged that the debt to Smart, which the complainant claimed, had not been fully discharged, yet the amount remaining due was uncertain, and could only be ascertained by a settlement of accounts in reference to transactions more than twenty-seven years old at the commencement of this suit, and now of more than thirty-seven years standing. Such an account ought not to be decreed; for every claimant who asks the relief of a court of equity ought to exhibit his claim within reasonable time, so that, in giving him a decree, the court may not do injustice to the defendant.

397 \*Perkins and Others v. Giles  
Governor.

Same v. Same.

May, 1838, Richmond.

**Sheriffs—Action on Official Bond—What Damages Recoverable.**\*—In an action against a sheriff and his sureties, upon the official bond of the sheriff, the recovery can only be of such damages as the relator may have sustained by reason of the breach of the condition of the bond.

**Same—Escape of Debtor—Damages Sustained by Creditor.**—The damages which a creditor sustains by

\***Sheriff—Action on Official Bonds—What Damages Recoverable.**—In an action against a sheriff and his sureties on the official bond of the sheriff, the recovery is confined to the damages sustained, and these may amount to the debt or may amount to less. For this proposition, the principal case was cited with approval in *Garland v. Lynch*, 1 Rob. 571. See further on this subject, monographic note on "Official Bonds" appended to *Sangster v. Com.*, 17 Gratt. 124.

The principal case was distinguished in *McGuire v. Pierce*, 9 Gratt. 167, 182. In this case it was held that the measure of damages in an action upon a prison bounds bond is the debt, interest, and costs.

The principal case was also cited in *Com. v. Fry*, 4 W. Va. 728.

the sheriff's suffering a debtor in execution to escape, are not necessarily equal to the amount of the debt.

These were actions in the circuit court of Buckingham county, brought under the statute, 1 Rev. Code, ch. 78, §13, p. 279,\* (one of them at the relation of Walton, Hendrick & Company, the other at the relation of Walton & Garland) upon a bond given by Price Perkins on the 12th of July 1824, conditioned that he should truly and faithfully execute and perform the office of sheriff of Buckingham, during the time of his continuance therein. Breach assigned, that the sheriff had in execution the body of John T. Linthicum, a debtor to the relators respectively, and voluntarily suffered him to escape. Plea, conditions performed.

398 \*It appeared at the trial, that upon each of the judgments against Linthicum, a writ of fieri facias issued and was returned nulla bona; that afterwards his special bail surrendered him to a deputy of Perkins, and gave notice of the render to the attorney at law of the judgment creditors; that within twenty days the said attorney, in writing, charged the debtor in execution; and that subsequently the debtor delivered in a schedule of his estate, took the oath prescribed by the statute, and was discharged as an insolvent debtor. Evidence was given of a conversation of the deputy sheriff, soon after Linthicum swore out, in which the deputy said that Linthicum had been delivered to him by his special bail; that it being Buckingham court day, and a busy time, he had permitted Linthicum to go home, upon his promise to return the next day; and that Linthicum had stayed away about one month, when he returned, and thereafter swore out of the prison bounds. Another witness (the brother of Linthicum) deposed, that in a conversation with the deputy sheriff, the latter enquired where Linthicum was, and said that he should be (or probably should be) bound to pay the debt for which Linthicum had been delivered up, if he did not return as he had promised, he the deputy having permitted him to go away. Upon this evidence, the plaintiff moved the court to instruct the jury, that if they believed, from the evidence, that

\*This section enacts, that "in the name of the governor or chief magistrate, or his successors, any person or persons injured may and shall, at his, her or their cost and charges, commence and prosecute suits on such bond, against the parties therein bound, their executors or administrators, and shall and may recover all damages which he, she or they may have sustained by reason of the breach of the condition, and such bond shall not become void upon the first recovery, or if judgment shall be given against any plaintiff or plaintiffs who shall sue upon such bond, but may be put in suit and prosecuted from time to time, for the benefit and at the proper costs and charges of any party injured, until the penalty expressed in such bond shall be recovered: provided always, that if any verdict or judgment shall pass for such sheriff or his security, the person at whose instance such suit shall be brought or prosecuted, shall pay such sheriff or his security their costs."

the sheriff permitted the escape as set forth in the evidence, the law was against the defendants, and they were bound for the full amount of the debt; which instruction the court gave; and the defendants excepted thereto.

There was another bill of exceptions by the defendants; but it is not material to notice it.

The jury found a verdict for the plaintiff, upon which the court gave judgment; and the defendants appealed.

The cause was argued here by Stanard for the appellants, and Johnson for the 399 relators. The argument \*was chiefly upon the question, whether, supposing the sheriff had suffered the debtor to escape, the sureties were necessarily bound for the amount of the debt.

TUCKER, P. I take it to be a well settled principle, that where a cumulative remedy is given by statute, the party grieved may resort to his common law or his statutory remedy, at his election. But he cannot weld them together, or have the benefit of the statutory provision when he pursues the common law remedy. It may indeed happen, that the statute may authorize the redress in the common law action; but where it gives a new action with a redress unknown to the common law, that redress can only be obtained by a resort to the prescribed form of action. Thus, at common law, single damages were given in an action of waste. The statute, in that action, gives treble damages; yet in the action on the case for waste, treble damages cannot be recovered. So a tenant may bring trespasses for an illegal distress where no rent was in arrear, and recover double damages, if he founds his action upon the statute, and sets forth the illegal taking by colour of the distress; but he might also sue trespass de bonis asportatis, in the common form, and then he will not recover double damages. So a master may, under the 30th section of the act respecting slaves, 1 Rev. Code, ch. 111, p. 428, and the provisions of subsequent laws, recover double or treble the value of a deported slave, by action on the case as prescribed by the acts. Yet if he brings trespass de bonis asportatis, which is his common law remedy, he can only recover single damages. So for money made on execution, an action lies at common law, and the money, with legal interest only, may be recovered of the sheriff. If the creditor pursues the statute, and proceeds by motion, he will recover 15 per cent. interest (not as damages or as a penalty, *eo nomine*, but as interest). Would any one conceive that in

the action of debt at common law, 15 400 \*per cent. interest would be given?

So for failure to return an execution, the creditor may, by motion, recover 5 per cent. per month. But if he brings an action on the case at common law, the limit of the recovery would be the debt, interest and costs. So in case of escapes on final process, case lies at common law; and the authorities are very clear, that in such action the amount of the debt is not necessarily the measure of damages, but the plaintiff must recover damages commensurate to the injury he has sustained; *Bonafous v. Walker*, 2 T. R. 129. He

may therefore recover less than the debt; and such also is the law in an action on the case for a rescue, in which the defendant may give evidence, in mitigation of damages, of the ability of the person rescued, and that he is still amenable to justice; *Wilson v. Gary*, 6 Mod. 211. And such evidence would be clearly proper in the common law action for an escape, which is for such damages as the party has sustained; and it would be a solecism to say that the creditor was as much injured by the escape of a bankrupt or squalid beggar, as of a wealthy but obstinate debtor. In the action on the case, then, the damages would be graduated by the actual injury; for the creditor may still pursue his debtor, and if he is of ability, he may recover his whole debt, besides the damages which he has compelled the sheriff to pay. 2 T. R. 129. But the statute gave him a shorter proceeding. It provides that the sheriff who permits the debtor to escape shall be liable for the debt itself. It reasons in this way—The body is the creditor's satisfaction. When it is once taken, he can have none other. If the sheriff had received the amount of the execution in money, he would have been liable for it in debt; and as he has received the body, as satisfaction, and has released it, he ought to be charged with the debt itself, either on the presumption that he would not have discharged his prisoner without payment, or on

the ground that if he did, he ought in 401 \*justice to stand in his shoes. I have therefore never had a doubt, that in debt for an escape under the statute, the recovery was for the whole sum, and could not be reduced by proof of the debtor's insolvency, or in any other way, except by evidence of part payment or satisfaction. But in the action on the case, it would be otherwise. Nor is it a wrong to the plaintiff in the latter action, so to limit the amount of his recovery; since he may still proceed to retake his debtor, and compel payment of his whole debt from him.

Such being the law as to the action on the case, how is it as to the action on the sheriff's bond? That bond is with condition "that the sheriff shall in all things truly and faithfully execute his office;" and it will readily be admitted that a voluntary or permissive escape is a breach of the condition. But the true question is, for what are the sureties liable by occasion of such breach? The law provides that any person injured may put the bond in suit, and "recover all damages which he, she, or they may have sustained by reason of the breach." The recovery, then, is to be confined to the damages sustained; and the sureties are therefore bound to pay those damages, and those damages only. Now, if the escaping debtor was hopelessly insolvent, there could be no damage, and of course only a nominal recovery. And so if the debtor was of acknowledged ability, though the creditor might be damaged by the delay and vexation consequent on the debtor's discharge, and might fairly recover in an action on the bond, yet he has not lost his debt, and therefore his damages cannot be measured by its amount. The notion that the damages are



liquidated by statute is unsupported by any authority, and is at variance with the position already established, that in the action on the case the damages are not measured by this supposed principle of liquidation. The truth is, that in reference to the sheriff

and his sureties, a difference is clearly  
402 \*made by most of our statutes. The sureties are only liable for damages.

These may amount to the debt; they may amount to more; but they may also amount to less. The sheriff, on the other hand, is often made liable for the debt itself. Thus if, under the old law, he failed to take bail, he was himself proceeded against as bail, and if he did not enter as special bail, there was a joint judgment against him and the defendant. If he proved insolvent, so that the debt was lost, the sureties were liable on the bond—to pay what? The debt itself? By no means: for if so, they too should have been made parties, and have had the privilege of defending the suit. They were, however, liable for any damages sustained. If the debtor was solvent, and was permitted to abscond without giving bail, the sureties would have been responsible for the whole debt. But in the action on the bond, the plaintiff must have shewn, and the sureties might have contested, even the existence of the debt; for the sheriff might have done so at common law. *Gunter v. Cleyton*, 2 Lev. 85; *Alexander v. Macauley*, 4 T. R. 611. But if the plaintiff had no cause of action, the sureties could not have been charged. And in like manner, if the defendant was a bankrupt, it would have been gross injustice to charge the sureties for the debt; an injustice which will not lightly be presumed to have been designed by the legislature. So in the action for an escape; the sheriff is indeed, upon principles of policy, made responsible for the debt itself. Even this may often be a hard measure of justice, as there may be constructive escapes involving neither culpability in the sheriff nor loss to the creditor. Thus, if a prisoner steps out of the jail door for a single moment, the door being left open by the jailer, it is an escape. So if, in bringing the defendant to jail, the sheriff passes though the corner of another county, it is an escape. So if he marries a prisoner, it is ipso facto an escape.

Ought the law to have provided that  
403 in \*such cases the sureties should be responsible, not only for damages, but for the debt also, whether the debtor be solvent or insolvent? I think it ought not to have so provided; and I think it has not so provided.

I have looked into the case in 7 Serg. & Rawle 273. I am not sure that the law of Pennsylvania is like ours, in declaring the liability of the sureties for such damages as the party has sustained by reason of the breach. If it be, the case is certainly strongly in point; but it is so inconsistent, I conceive, with the reasonable construction of such a provision, that I decline to follow it.

Upon the question arising in this case, I am, for the reasons above declared, of opinion that the instruction moved for was too broad, and therefore was improperly given;

and upon the whole, am of opinion to reverse the judgment, and award a new trial, upon which the instruction asked for, and set forth in the first bill of exceptions, is to be refused, if again moved for.

I do not deem it necessary to decide the point made by the second bill of exceptions, as, upon a future trial, the fact of the escape may perhaps be proved by other testimony than the deputy sheriff's admissions.

The other judges concurred. Judgment reversed, verdict set aside, and new trial awarded.

404 \**Stephen's Heirs v. Swann.*  
May, 1838, Richmond.

(Absent TUCKER, P. and BROCKENBROUGH, J.)

*Northern Neck—Title of Lord Fairfax.*—Lord Fairfax had a good title in fee to the soil of The Northern Neck, as admitted by the act of 1786, 1 Rev. Code, ch. 89, and recognized in adjudged cases by this court.

*Wills—Devise to Alien—Validity—Treaty of 1794.*—An alien enemy, as well as an alien friend, is capable of taking lands by devise; and an alien subject of G. Britain, to whom a devise of lands was made in 1781, could, by the treaty of 1794 between the U. States and G. Britain, hold and alien the lands so devised to him.

*Northern Neck—Title of Lord Fairfax.*—Lord Fairfax had the entire interest in all lands in The Northern Neck, which he appropriated to himself, by conveyance and reconveyance, or by leases for life or years.

*Same—Effect of Statute on Lands Devised by Lord Fairfax.*—No act of assembly passed since the death of Lord Fairfax in 1781, has had, or was intended to have, the effect of inquisitions of office, equivalent to escheats, of the lands by him devised to D. M. Fairfax, an alien subject of G. Britain at the time of the devise.

*Same—Will of Lord Fairfax.*—D. M. Fairfax took under the will of Lord Fairfax, his whole estate in The Northern Neck.

Ejectment for a parcel of land in the county of Berkeley, brought by Thomas Swann against Adam Stephen in his lifetime, in the circuit court of Berkeley, as early as 1813. The defendant died pending the suit, and it was revived by consent against his heirs. After the cause had been continued from term to term of that court for many years, it was transferred, by an order to change the venue, to the circuit court of Frederick. At the trial, the defendants filed a demurrer to the evidence, and the jury found for the plaintiff the land in the declaration mentioned, namely, 674 acres according to a survey made under an order of court in the cause, subject to the opinion on the demurrer to evidence.

The demurrer shewed, that the plaintiff, to support the issue on his part, adduced the following evidence—

405 \*1. The act of the colonial assembly, passed in 1736, for confirming and better securing the titles to lands in the Northern Neck held under Thomas lord Fairfax, as printed and published 1 Rev. Code, ch. 89, p. 343-349, by the recitals of which act it appears, that the whole tract of country called The Northern Neck of Virginia, had, by force

of three grants of Charles II, and James II, become vested in Thomas lord Culpeper, and that Thomas lord Fairfax, heir at law of lord Culpeper, was then the sole proprietor of that whole territory.

2. The plaintiff proved that the land in the declaration mentioned was part and parcel of the territory called The Northern Neck of Virginia.

3. The plaintiff proved, that Thomas lord Fairfax died on the 10th December 1781, having duly made and published his will in October 1780, which was duly proved and recorded in the county court of Frederick in March 1782. And then he gave the will in evidence, whereby lord Fairfax devised as follows—"I give and devise all that my undivided sixth part or share of my lands and plantations in the colony of Virginia, commonly called or known by the name of the The Northern Neck of Virginia, with the several advowsons and rights of presentations thereto belonging or appertaining, I have therein, with the messuages and tenements, buildings, hereditaments, and all other the appurtenances thereto belonging, all or any part thereof, being formerly the estate of the honourable Alexander Culpeper esquire deceased, together with all my other lands and tenements I have, am possessed of, or have right to, in the said colony of Virginia, to the reverend Denny Martin, my nephew, now of the county of Kent in Great Britain, to him, his heirs and assigns forever, if he the said Denny Martin should be alive at the time of my death—provided always and upon the condition, that the said Denny Martin, if alive at the time of my decease"—"shall procure an act of parliament to take upon him the name of Fairfax and coat of arms."

406 \*4. The plaintiff proved, that the reverend Denny Martin in the will of lord Fairfax mentioned, complied with the condition subsequent in the devise to him therein contained, by procuring an act of parliament to take upon himself the name and coat of arms of the Fairfax family, and by taking on himself the same.

5. He gave in evidence an indenture of bargain and sale, dated on the 30th August 1797, and duly recorded in the general court of Virginia, between the said Denny Martin Fairfax and James Marshall, whereby the said Denny Martin Fairfax, in consideration of £2625. sterling, conveyed to the said James Marshall, his heirs and assigns, "all those divers tracts and parcels of land, being part and parcel of The Northern Neck of Virginia, and all and every the now remaining real estate and beneficial right and interest of him the said Denny Martin Fairfax, of whatsoever nature the same may be, of, in or to, or to arise out of or from, the same, and all or any other lands within the commonwealth of Virginia, with their and every of their rights, members and appurtenances, save and except nevertheless," certain lands and rights therein particularly mentioned and described; of which lands so excepted out of the said conveyance, the plaintiff proved that the land in the declaration in this ejectment mentioned was not a part.

6. He gave in evidence an indenture of

bargain and sale, dated the 19th April 1806, and recorded in the district court of Winchester in October 1806, between the said James Marshall and Thomas Swann, the lessor of the plaintiff, whereby Marshall, in consideration of 5000 dollars, conveyed to Swann, his heirs and assigns, two parcels of land, one of which was the land in Berkeley in the declaration mentioned, described in the deed as the parcel of land "formerly leased by lord Fairfax to a certain Robert Stephen for his life, and now in his possession."

407 \*7. He gave in evidence a deed between lord Fairfax and the said Robert Stephen, dated the 3rd May 1781, and recorded in the county court of Berkeley in the same month; whereby lord Fairfax leased to Stephen for the term of twenty-one years, or if he survived that term, for his life, the land in the declaration mentioned, the lessee yielding and paying therefor a yearly rent of £12. 10. sterling, and all public taxes and assessments on the land.

8. He proved, that the said Robert Stephen died in the year 1811; that he was at the time of his death, and always before, from the time of the separation of this commonwealth from G. Britain, had been, a citizen of Virginia.

9. He proved, that the said Robert Stephen died possessed of the land in the declaration mentioned.

10. He proved, that Adam Stephen, the son of the said Robert Stephen (and original defendant in this suit, and ancestor of the now defendants) was in possession of the land in the declaration mentioned, at the time of the institution of this suit.

11 and 12. He gave in evidence the "Definitive treaty of peace between the U. States of America and his Britannic Majesty," of the 3rd September 1783, 1 Bior. Laws U. S. p. 202, and the "Treaty of amity, commerce and navigation, between his Britannic Majesty and the U. States," of the 4th May 1796,\* Id. p. 206-224.

13. He gave in evidence the record of a suit commenced in the high court of chancery of Virginia in July 1795, thence transferred to the superiour court of \*chancery of Staunton, and there decided in November 1805, wherein Henry Bedinger was plaintiff, and James Strode, Robert Stephen, David Hunter, Moses Hunter, Philip Pendleton, and Denny Martin Fairfax, and afterwards James Marshall the purchaser from Fairfax, were defendants. Bedinger alleged in his bill, that Strode, in May 1763, obtained a warrant from lord Fairfax the proprietor's office, for 400 acres of land, which was located on land then waste and ungranted, about 300 acres of which was afterwards surveyed and reserved for lord

\*The treaty meant is commonly called the treaty of 1794. The date of the 4th May 1796, by which the treaty was referred to in the demurrer to evidence, is the date of the 1st explanatory article of the treaty of 1794. The treaties referred to in the demurrer, were not inserted; nor was it necessary they should be, since they are public laws.—Note in Original Edition.

Fairfax himself, and was parcel of the same land which lord Fairfax afterwards leased to Robert Stephen for life; that Strode remonstrated against that survey and reservation of the land for the lord proprietor, and never relinquished his right under his prior warrant and location: that in 1788, David and Moses Hunter and Pendleton, conceiving that the lands reserved by survey for lord Fairfax, but not patented to him, were subject to entry and location on treasury warrants, obtained warrants from the land office, and located them on a large quantity of those lands, including the 300 acres of land, part of Strode's entry, which were at the time in the possession of Stephen as lessee for life of lord Fairfax; but they permitted Stephen to take part of the lands on which they had laid their warrants, namely, the 300 acres included in Strode's entry for 400 acres, made in 1763: that in May 1791, Strode having procured a copy of that entry, had a survey thereof made and returned, upon which he obtained a grant in July 1792: and that Strode had, for valuable consideration, sold and conveyed to the plaintiff Bedinger, the 400 acres of land so granted to him. And the prayer of the bill was, that Stephen, David and Moses Hunter and Pendleton, Denny Martin Fairfax, or Marshall the purchaser from Fairfax, should be decreed to release to the plaintiff, all the rights which they or either of them claimed in the parcel of 400 acres of

409 \*land. David and Moses Hunter and Pendleton, in their answer, contested the regularity of Strode's survey in 1791, upon so old an entry as that made by him in 1763. And they said, that, in 1788, they obtained warrants from the land office for a large quantity of lands, and located about 3600 acres on what they conceived to be vacant and unappropriated land, which included the land that Strode afterwards caused to be surveyed under his pretended entry; but of the 3600 acres so located by them, they assigned 2100 acres to Stephen, which included the land that had been surveyed for Strode. And that they had had their surveys returned to the land office, but had hitherto been prevented by caveat from obtaining grants. Stephen, in his answer, stated, that in the year 1781, he had obtained a lease for life from lord Fairfax of a parcel of land including part of the land claimed in Bedinger's bill: that being informed in 1787, that treasury warrants were about to be located on lands in The Northern Neck, which had been leased by lord Fairfax for terms of years or for a life or lives, he informed Thomas Bryan Martin thereof; that it was at the instance of Martin that he interfered with the proceedings of the Hunters and Pendleton, and it was for the benefit of Martin, and with a view to secure the land for him, that he procured the assignment of their rights for the 2100 acres mentioned in their answer. The defendant Marshall claiming the rights of lord Fairfax's devisee Denny Martin Fairfax, in his answer, insisted, that the plaintiff Bedinger, and Strode under whom he claimed, had never acquired any rightful title to the land

claimed in the bill; that it was lord Fairfax's private property, devised by him to Denny Martin Fairfax, and by him sold and conveyed to Marshall. The chancellor, upon the hearing, dismissed the bill.

14. And the plaintiff also gave in evidence the survey of the land in controversy, 410 made under an order of \*court in the cause, with proof of the identity of that land with the land leased by lord Fairfax to Robert Stephen for life.

The defendants, then, on their part, gave in evidence—

1. An entry made by virtue of land office treasury warrants, by David Hunter in January 1788, of 2800 acres of land, "then in the possession of Robert Stephen and sundry others," and a certificate of the survey of the entry by the surveyor of Berkeley, in May 1788.

2. A grant from the commonwealth to Robert Stephen (founded on Hunter's survey of May 1788) bearing date the 10th January 1810, of 2144 acres of land.

3. The defendants proved, that the land in the declaration mentioned was included in the grant to Robert Stephen of January 1810.

4. They proved, that Denny Martin Fairfax, the devisee of lord Fairfax, was born in G. Britain, always resided there, and died there in 1798, and never was a citizen of Virginia, or of the U. States.

And 5. They gave in evidence a letter of attorney from Denny Martin Fairfax, the devisee of Thomas lord Fairfax, to his brother Thomas Bryan Martin and Gabriel Jones of Virginia, dated the 7th November 1783, which was recorded in the late district court of Winchester; whereby he constituted them his general agents for the management of his estates in Virginia; with power, among other things, to collect all rents due or to become due to him within The Northern Neck of Virginia; to demand and receive from Robert now lord Fairfax, or his agents, all moneys, rents and revenues, due or to become due to him, in respect of "the one sixth part or share of The Northern Neck of Virginia, and all other estate or estates in Virginia, to him devised by the will of Thomas lord Fairfax;" to grant, or unite with the agents of the said Robert lord Fairfax in granting, all or any part, not 411 already granted, of the said estate \*or estates; to concur with them, if necessary and expedient, in any other lawful acts, which should appear to his said attorneys proper, legal, and conducive to his interest in the same estate or estates; and to execute any deeds or grants which should be necessary or deemed expedient for that purpose.

Upon this demurrer to evidence, the circuit court held, that the law was for the plaintiff, and gave him judgment according to the verdict: from which the defendant appealed to this court.

The cause was argued here, by J. Robertson and Stanard for the appellants, and Johnson for the appellee. The argument (as the reporter was informed, for he was not present) was very elaborate, on all the points arising in the cause, and all the au-

thorities, english and american, touching the case, were cited and examined.

PARKER, J. This case was very ably and elaborately argued by counsel, and has stood over since November last, for the consideration and judgment of the court. I have bestowed upon it the attention due to the importance of the principles discussed at the bar, and have attentively examined the various authorities and acts of assembly referred to in the argument; but I do not think it necessary to encumber this opinion by reviewing them in detail, and shall content myself with a brief statement of the conclusions to which my mind has been brought.

The action is ejectment, brought in the year 1813 by Thomas Swann, who claims to derive his title under Thomas lord Fairfax (through James Marshall and Denny Martin Fairfax) against Adam Stephen, the son of Robert Stephen, who was a lessee of the land in controversy under lord Fairfax. The appellants are the heirs of Adam Stephen, who died pending the suit; and at the trial they demurred to the plaintiff's

412 evidence. The \*jury found a verdict for the plaintiff (subject to that demurrer) for the lands in the declaration mentioned, containing 674 acres and three quarters of an acre, designated by metes and bounds; it being the same tract leased in the year 1781 by lord Fairfax to Robert Stephen: and the court gave the judgment which is now sought to be reversed. To sustain the judgment, the plaintiff must shew a possessory right, or a strict legal title properly deduced; but in doing so, he has the benefit of every inference of fact which the jury might fairly and reasonably have drawn from his evidence, disregarding that offered on the other side, so far as it conflicts with his own.

As twenty years peaceable and uninterrupted possession not only bars, but gives, a right of entry, and is a good title in ejectment, if lord Fairfax were the plaintiff here, I am inclined to think he would not be required to shew any other title. The deed of lease to Robert Stephen in May 1781, Stephen's signature to that lease, his recognition of the Fairfax title (at least by a strong implication) in his answer to Bedinger's bill as late as the year 1797, his continuing in possession of the land until his death, and his never setting up any claim to it for himself, so far as we know, unless his procuring a patent for it in the year 1810, by virtue of entries and surveys which in the year 1787 he had agreed with Hunter and Pendleton to take an assignment of, for the benefit of the Fairfax claimants, be considered an adverse claim; all these, I say, are circumstances from which the jury might fairly have inferred a holding under lord Fairfax, and for him, of near 30 years; so as to dispense with any further proof of his title. Indeed, taking Robert Stephen's answer to that bill to be a recognition of Denny Martin Fairfax's title (as his communications with his accredited agent in 1787, his endeavour to secure the land to such agent from the attempts of

sequently actually agreeing with them to assign their rights to him for such agent, would seem to indicate) a jury might have been justified in considering the possession of Robert Stephen from the death of lord Fairfax in 1781 until he obtained a patent to himself in 1810, as the possession of Denny Martin Fairfax and those claiming under him. He was acting in the year 1787 as a collector of the rents and quit rents due the estate of lord Fairfax, and no doubt accounted for his own rent with Thomas Bryan Martin and Gabriel Jones, the agents of Denny Martin Fairfax, with whom he seems to have been in communication; and he was perfectly cognizant of the claim of Denny Martin Fairfax to the leased lands, which some persons were then endeavouring to enter and survey, under land office treasury warrants. It would, under these circumstances, be scarcely considered a violent presumption, to hold that Robert Stephen's possession was the possession of Denny Martin Fairfax and of those claiming title under him, which, having continued without interruption for more than 20 years, would enable Swann to recover in this action, without enquiring into the title of Denny Martin Fairfax.

But waiving these views of the subject, I shall consider the title of the lessor of the plaintiff as one deriving no strength from the possession of Robert Stephen, but depending on its own intrinsic validity. He is then to shew, first, that lord Fairfax's title is a good one. This is, I think, fully made out by the proofs in the cause. The act of 1736, given in evidence by the plaintiff (1 Rev. Code, ch. 89, p. 343,) expressly recognizes lord Fairfax as the rightful proprietor of the Northern Neck, in which these lands lie, and recites the several charters and intermediate grants which establish his title. By virtue of that legislative recognition, equivalent, I think, to an express patent or grant, he has ever since been considered  
414 in our courts as tenant in fee of \*the lands within the Northern Neck, having a property in the soil, and a complete seisin and possession thereof, independent of his seigniorial rights; and it is now too late to question that title. The cases of Hite v. Fairfax, 4 Call 42; Picket v. Dowdall, 2 Wash. 106; Johnson v. Buffington, Id. 116; Curry v. Burns, Id. 121; Marshall v. Conrad, 5 Call 364, and Fairfax's devisee v. Hunter's lessee, 7 Cranch 603, fully sustain these positions; nor are they at all controverted by judge Roane in his opinions in the cases of Marshall v. Conrad, and Hunter v. Fairfax's devisee, 1 Munf. 218, but on the contrary, his arguments proceed upon the validity of that title as a concessum, and would otherwise have been wholly supererogatory.

Taking, then, lord Fairfax's title to be unquestionable, the next enquiry is, whether it passed to his devisee Denny Martin Fairfax; and here, two objections are raised to that conclusion. First, it is said, that Denny Martin Fairfax being an alien enemy at the time of lord Fairfax's death, he was incapable of taking, even for the benefit of the commonwealth, and subject to escheat. It is scarcely denied that an alien friend could

413 under \*the commonwealth, and his sub-

take by devise; but it is urged that an alien enemy cannot take. No authority has been cited in support of that distinction, unless it be a dictum of Swinburne, wholly unsupported by the case he refers to, of *Collingwood v. Pace*, 1 Vent. 413. That case simply decides that a devise to the heir of an alien, living the ancestor, was void, for *nemo est hæres viventis*, and that an alien could not by the law of England have an heir. On the contrary, the two cases of *The Attorney General v. Duplessis*, Parker's Rep. 144, and *The Attorney General v. Weedon*, Id. 267, are strong to shew, that an alien may, *flagrante bello*, acquire rights under a will, escheatable to the crown by an inquisition of forfeiture. The very question, however, arising on this will, came before the court of appeals in *Marshall v. Conrad*, and before the federal court in *Fairfax's devisee v.*

415 *Hunter's lessee*, and was in each \*case fully considered, and deliberately decided in favour of Denny Martin Fairfax's right. In the last case, judge Johnson, who dissented from the majority of the court on one of the points involved, agreed with them in this. I think both courts were fully sustained by the authorities they relied on, and by the principles upon which rests the doctrine of the incapacity of an alien to hold lands without the assent of the state. There can, indeed, be no sound distinction between a devise to an alien friend, and a devise to an alien enemy. The right of the commonwealth to the land devised does not arise out of a state of war, but results from mere municipal legislation. It accrues, as judge Roane has well expressed it (in *Read v. Read*, 5 Call 207,) "not because the person purchasing is an enemy, but because he is an alien. It is not a right pointed against the subjects of a particular power with whom we may chance to be at war, but against the subjects of all foreign nations whatsoever." It involves no improper intercourse with the enemy, and gives no aid or strength, but simply divests the heirs of the grantor or devisor of the land, and enables the grantee or devisee to take for the benefit of the state, whenever she chooses to assert her right; and if she does not assert it, but at the return of peace confirms the inchoate title of the devisee by treaty, such as that of 1794, it is only a reasonable mitigation of the evils of war, which humanity and civilization sanction and approve; and the more emphatically where the contest is a civil one, between subjects of the same empire.

It is next objected, that only one sixth of the land in question passed to Denny Martin Fairfax under the will of lord Fairfax, and that the judgment on the demurrer to evidence, for the whole tract, cannot be sustained. The language of the will gives countenance to this objection, and I have always thought it the most doubtful, if not the only doubtful part of the case. It gives

416 "all that undivided sixth part or share of my lands or plantations \*in the colony of Virginia, commonly called or known by the name of The Northern Neck of Virginia, with the several advowsons and rights of presentation thereunto belonging

or appertaining, I have therein, with the messuages and tenements, buildings, hereditaments and all other the appurtenances thereunto belonging, all or any part thereof, being formerly the estate of the late Alexander Culpeper esquire deceased; together with all my other lands and tenements I have, or am possessed of, or have a right to, in the said colony of Virginia." In a subsequent part of the will, after various devises, the testator gives all the rest and residue of his estate, both real and personal, not therein before disposed of, to the same Denny Martin, his heirs and assigns forever.

It is certainly very difficult, at this distance of time, and without a precise knowledge of the family of lord Fairfax, and how he succeeded to the rights of Thomas lord Culpeper as his heir at law (as recited in the act of 1736) or what estate Alexander Culpeper held in the Northern Neck, to understand the meaning and bearing of this clause. It is shewn by historical documents, that lord Fairfax claimed the proprietorship of the Northern Neck, at least as early as the year 1733, and came to Virginia in 1736. Sometime after, he established a land office, and was in the habit of granting lands to others, reserving a quit rent, and of appropriating tracts of land to himself by deed of conveyance and reconveyance, or by demise to tenants for life or years, reserving an actual substantial rent. These deeds and leases were entered in his office, and were made, not for the purpose of perfecting his title (for, according to the opinion of the judges in *Marshall v. Conrad*, the fee simple of all the lands ungranted remained in him) but to shew to others what he had appropriated to his individual use, and what, therefore, he no longer considered vacant lands, subject to the warrants of others. In this mode

417 he must have acquired \*much land, which he never could have considered as a part of the estate of Alexander Culpeper; and keeping this distinction in his mind, he may have referred in the first part of the above recited clause in his will, to his proprietary and seigniorial rights, one sixth of which he may have inherited from Alexander Culpeper, whilst five sixths belonged in equity to other persons, under some settlement or arrangement of which we are now ignorant. The one undivided sixth part of which he speaks, formerly belonged, he tells us, to Alexander Culpeper, and there were advowsons and rights of presentation belonging thereto; which could not have been predicable of the lands acquired after he came into the country and appropriated to his own use by conveyance and reconveyance, or by leases reserving more than nominal rents to himself. These latter he intended to pass by the other words of the clause, or by the residuary clause before recited; and if he was entitled to the whole, but intended to pass but one sixth, yet this residuary clause passed all his interest, and vested it in his devisee, according to the cases I had occasion to cite in the late case of *Miars v. Bedgood ex'or.*\*

This conjecture (for it is little more) about the meaning of lord Fairfax in relation to the undivided sixth part, is somewhat confirmed by the terms of the power of attorney given by Denny Martin Fairfax on the 7th of November 1783, to Thomas B. Martin and Gabriel Jones; for that power authorizes them to demand and receive from Robert then lord Fairfax, or his agents, all money rents or revenues due or to become due to him in respect of the one sixth part or share of the Northern Neck; and to grant, or unite with the agents of the said Robert lord Fairfax in granting, the ungranted lands of the Northern Neck, with the usual reservations. These money rents or revenues were doubtless the quit rents due to the lord proprietor as such, which Robert lord Fairfax, as then lord proprietor, might demand; and the lands were the ungranted, not the appropriated lands. And as to the rents, it is observable that they were expressly reserved by Denny Martin Fairfax, when he conveyed his other interests to James Marshall; possibly because he knew that he had but an equitable right to one sixth. I say an equitable right, because I am satisfied that lord Fairfax had the legal right, as lord proprietor, to the whole Northern Neck; for it is impossible otherwise to account for the long acquiescence in such right, and for the silence of those who must have known the true state of the title, and whose interest it was, in many instances, to assail it. I should conclude, that whilst lord Fairfax, as heirs at law to lord Culpeper, was the proprietor and owner of the legal fee tail, there were family settlements which gave equitable rights to others, one of whom was Alexander Culpeper, and that his right passed to lord Fairfax, and was intended to be embraced by him in the first part of the clause aforesaid. In any event, I should say that there is no legal title to five sixths of the tract of land in question, shewn to be outstanding in any other person or persons, of which, on this demurrer to evidence, the defendants can avail themselves to avoid a recovery. The land being held for so long a period by the tenant of lord Fairfax, and no claim having ever been set up by others, the jury would have presumed, if necessary, a surrender of such rights, if they ever existed; and if lord Fairfax held the legal title to the whole in 1736, in tail or in fee, it passed in 1781, by his will, to Denny Martin Fairfax: all estates tail being at that date converted into fees.

In this point of view it is unnecessary to decide what influence the case of *Humphrey's adm'r v. West's adm'rs*, 3 Rand. 516, should have upon this cause. If it be true, that, on a demurrer to evidence, the only question the court can consider is whether the evidence supports the issue or not, and that the amount of the damages, \*or extent of the finding, is not a question for the court, but for the jury, to be controuled only by granting a new trial, it would seem to have a very powerful influence; for here the whole tract is found for the plaintiff, subject to the question whether the law be for the one party or the other;

and if it be for the plaintiff, I doubt whether the court could, on this verdict, give one sixth, and whether it must not enter an absolute judgment for him, or a judgment for the defendants.

The next objection to the plaintiff's recovery is, that if Denny Martin Fairfax had title at all, it was a defeasible one, a mere *scintilla juris*, of which he was divested before 1794, by certain acts of assembly, operating in the nature of inquisitions of office. I cannot subscribe to this opinion. No acts of assembly have any bearing upon this question, which were passed before the death of lord Fairfax; for he was a citizen, and his title was uniformly recognized. His seigniorial rights were no doubt suspended, and ultimately destroyed, by the revolution; but his interest in the soil remained unimpaired. The act of 1781 applied to quit rents only, and could not be extended farther than to sequester or to escheat lands subject to quit rents. The acts of 1782 and 1785 refer, in terms, to waste and unappropriated lands; and it was under the 5th section of the latter act that judge Johnson, in the case of *Fairfax's devisee v. Hunter's lessee*, decided, in opposition to the rest of the court, that the grant of the commonwealth in 1788, for a tract of vacant land, divested the interest of Denny Martin Fairfax. Nor did judge Roane ever go farther than to contend, that these several acts of assembly sequestered and took possession of quit rents, of lands granted subject to quit rents, and of waste and unappropriated lands. But the land leased by lord Fairfax was in no one of these predicaments. It was not vacant land, nor was the rent reserved a quit rent. It had less of that character than the rent reserved in

\*the case of *Marshall v. Conrad*; for it was a rent of £12. 10. sterling per annum, on a tract of 671 acres, which at the time was probably a fair and full one. It is, however, unnecessary to insist on these distinctions; for I am well satisfied that none of the acts referred to, subsequent to the death of lord Fairfax, were intended by the legislature to have the effect of inquisitions of office. For the reasons of this opinion, it is only necessary to refer to judge Fleming's opinion in the case of *Hunter v. Fairfax's devisee*, 1 Munf. 218, and to that of the supreme court in the same case, reported in 7th Cranch 603.

If the title remained in Denny Martin Fairfax at the date of his conveyance to James Marshall, it passed to him by the deed of the 30th August 1797, and to the lessor of the plaintiff by Marshall's deed to Swann of the 19th of April 1806; and it is entirely unaffected by the patent obtained by Robert Stephen in 1810, which the commonwealth had then no authority to grant, or by the possession of Adam Stephen from the death of his father in 1811 to the time of bringing this action in 1813.

But some reliance has been placed upon supposed interferred grants to Strode and Mitchell. As to Strode's claim, it was decided (as I think, on the merits) against his assignee Bedinger, many years before the institution of this suit, and in the lifetime of

Robert Stephen. The warrant under which he claimed was dated in 1763; he failed to comply with the rules of the office, which required him, within six months, to return his survey and perfect his grant (see *Picket v. Dowdall*, 2 Wash. 106); and he never asserted his claim before any legal forum until 1795, nor made his survey until 1791. Bedinger's bill was dismissed in 1805, and his claim cannot be permitted now to interfere with the rights of the plaintiff.

421 \*As to Mitchell's 116 acres—there is no evidence in this record that it was a good claim, unless we rely on the answer of Pendleton alone, which I apprehend we ought not to do. Nor is it any where shewn (except by the deposition of Bedinger, which is no part of the demurrer to evidence) that it is included in the tract of land which is the subject of this suit. Bedinger asserts in his bill, that Robert Stephen had leased from lord Fairfax a tract of land, about three hundred acres of which was a part of the 400 acres he claimed as assignee of Strode; and Pendleton, in his answer to that bill, says that Strode's 400 acres included about 116 acres belonging to Mitchell. This may be true, and yet it may be no part of the 300 acres leased by Robert Stephen; for it might be included in the balance claimed by Strode, without the boundaries of lord Fairfax lease.

For these reasons, I am for affirming the judgment.

BROOKE and CABELL, J., concurred.  
Judgment affirmed.

422 \*M'Million v. Dobbins.

July, 1838, Richmond.

(Absent BROOKE and CABELL, J.)

**Pleading and Practice—Office Judgment\*—Trial without Issue—Effect.**—In an action on the case, if there be an office judgment against the defendant, with a writ of enquiry, and afterwards, without any plea in the cause, the jury be sworn as if there were an issue, and a verdict be found for the defendant, the verdict will be set aside, and a new trial directed.

Action on the case by James M'Million against William Dobbins, in the circuit court of Braxton county, for a deceit in the sale of a horse. The defendant being arrested and not appearing, judgment was entered in the office against him, for such damages as the

\***Pleading and Practice—Office Judgment—Enquiry of Damages.**—Where there has been an office judgment and an order for enquiry of damages, the only question to be ascertained, in the absence of any plea or issue in the case, is the quantum of damages. *Petty v. Frick Co.*, 86 Va. 504, 10 S. E. Rep. 886; *Briggs v. Cook*, 99 Va. 278, 38 S. E. Rep. 148, both citing the principal case.

†**Same—Nonjoinder of Issue—Effect.**—It is well settled that, if a verdict has been rendered without any issue being joined, it is a mere nullity, and no judgment can properly be rendered upon it, whether it be a civil or criminal action. And the cases are numerous, both in Virginia and West Virginia, where verdicts and judgments have been set aside by the appellate court merely because the verdict was rendered when no issue had been joined.

plaintiff had sustained, which damages were to be ascertained by a jury. At the next term, the cause was continued for the defendant; and the term after, a jury was impannelled. Although it did not appear by the record that the defendant had pleaded at all, the jury were nevertheless "elected, tried and sworn the truth to speak upon the issue joined." At the trial, the court was of opinion that in order to sustain the first count in the declaration, it was necessary for the plaintiff to prove, substantially, that the defendant warranted the horse to be sound; and that in order to sustain the second count, it was necessary to prove, in substance, that the defendant undertook and faithfully promised the plaintiff that the horse was sound. The court was of opinion that the evidence was not sufficient to sustain the action on either count, and so instructed the jury. Verdict for defendant, and judgment thereupon; to which judgment a supersedeas was allowed.

S. Price for plaintiff in error.

423 \*PARKER, J. The record in this case states that the jury were sworn to try the issue joined; yet there was no plea entered, nor issue made up, in the cause. The judgment must be reversed for this error, and the cause remanded for a new trial. *Sydnor v. Burk & ux.*, 4 Rand. 161.

As, if a plea is entered hereafter by the defendant, the plaintiff may amend his declaration, and rely alone on the deceit in the sale, without stating what the court below considered to be the substantial averment of a warranty which he was bound to prove, it is unnecessary to decide whether, under his declaration in its present form, he was bound to do more than prove the sale of the horse for a sound price, with a knowledge on the part of the vendor that he was unsounded.

TUCKER, P. The question raised by the bill of exceptions in this case is rendered unimportant, by a fatal error in the proceedings anterior to the motion to instruct the jury. The office judgment which had been rendered at the rules was never set aside, and the cause stood upon a writ of enquiry of damages. Yet the jury were sworn to try the issue joined, when in truth there was no

*Rowans v. Glivens*, 10 Gratt. 250, 251, and *foot-note* (see collection of authorities in this note): *State v. Douglass*, 20 W. Va. 770; *Preston v. Salem Imp. Co.*, 91 Va. 585, 23 S. E. Rep. 486; *Ruffner v. Hill*, 21 W. Va. 158; *Hickman v. Railroad Co.*, 30 W. Va. 315, 7 S. E. Rep. 461 (dissenting opinion of Woods, J.); *High v. Pearce*, 9 W. Va. 294; *Shrewsbury v. Miller*, 10 W. Va. 122; *Brown v. Cunningham*, 23 W. Va. 111; *B. & O. R. Co. v. Gettle*, 8 W. Va. 384; *B. & O. R. Co. v. Christie*, 5 W. Va. 328, all citing the principal case. See the principal case distinguished in *Briggs v. Cook*, 99 Va. 277, 38 S. E. Rep. 148.

Although the record states that the jury was sworn to try the issue joined, yet if it does not show that any plea was filed by the defendant, or that any issue was, in fact, made up, the judgment will be reversed. *Sydnor v. Burke*, 4 Rand. 161, and *M'Million v. Dobbins*, 9 Leigh 422, are cited as so holding in *Petty v. Frick Co.*, 86 Va. 505, 10 S. E. Rep. 886. See further monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

issue. This was erroneous. *Sydnor v. Burke & ux.*, 4 Rand. 161. The defendant, by failing to plead, admitted the plaintiff's right of action. It could no longer be questioned. The only matter remaining to be ascertained was the quantum of damages; and had the jury been sworn to enquire of damages only, the court must at once have perceived that no question could be raised as to the plaintiff's right of action. He had a right to some damages, however small, and to his costs also. But by the irregular course of the cause, the defendant, upon the trial of a supposed issue which never existed, is let into a defence which he had waived, and that defence being sustained by the court, judgment is rendered against the plaintiff for his false clamour \*and for costs, while there is in the record a judgment in the office in his favour against the defendant, which has never been set aside and is now in full force. The judgment must be reversed, and the cause sent back for the purpose of having the writ of enquiry properly executed. The defendant may then, if he desires, set aside the office judgment; and upon his motion to do so, the plaintiff, if he wishes it, will be entitled to leave to amend his declaration, by adding a count, or otherwise.

BROCKENBROUGH, J., concurred. Judgment reversed.

### Weaver v. Tapscott.

July, 1838, Lewisburg.

**Partnership—What Constitutes—For What Contracts, Firm Liable.**—What constitutes a partnership, and for what contracts made by a partner the firm is liable.

**Same—Bond of One Partner for Partnership Debt—Rights of Surety against Other Partners.**—A member of a firm hires slaves, and the nature of the partnership and circumstances of the hiring are such, that all the partners would be held at law bound for the hire, if the contract of hiring rested

in parol; but a specialty is executed for the hire, by one of the firm in his individual character, with another person as surety; and judgment is obtained on the bond against the surety, who satisfies the same. On a bill in equity by the surety against all the partners, it appears that the one who executed the bond is a nonresident of the commonwealth, and insolvent. HELD, the complainant is entitled to a decree against the other partners, for the amount paid by him.

James Tapscott, on the 23d of November 1830, commenced a suit in equity, in the circuit court of Augusta, against William Weaver and Elihu Trimble.

The bill alleged, that in 1825 the defendants were associated together as copartners in the boating business \*upon James River, between Rockbridge and Richmond; that some time after the copartnership was formed, Trimble was deputed to the county of Buckingham, to hire slaves to aid in the navigation of the boats; that he hired slaves from three several persons of the name of Bondurant, for the year 1826, and being unable to procure the slaves without securing the hire, applied to the complainant to become surety for the same; that at the time of so applying, he stated the fact of Weaver being a partner with him, and that the slaves were to be employed by the concern in the boating business; and that the complainant, confiding in these representations, and others made at the time, became surety in the bonds given to secure the hires. Copies of the obligations were exhibited with the bill. They were all under the hands and seals of Elihu Trimble and James Tapscott. One dated the 16th of December 1825, for 120 dollars, was payable

money of land; and that is a distinction without a difference, at least in principle."

In *Niday v. Harvey*, 9 Gratt. 454, it was held that, whether a bond and deed of trust to secure it, given by a partner after the dissolution of the partnership, for a simple contract debt of the partnership, releases the other partner in equity, depends upon the intention of the parties in giving and taking them; and that this intention may be ascertained from the attendant circumstances. In this case, it was held that there had been such a dealing on the part of the creditor with the partner executing the bond, etc., and such a relying on the individual liability of that partner as showed that his obligation and the means provided for its payment were alone looked to for the satisfaction of the debt, and that, therefore, the other partner was released in equity as well as at law, according to the real intention and understanding of the parties concerned. The court, citing the principal case, *Williams v. Donaghe*, 1 Rand. 300, *Sale v. Dishman*, 3 Leigh 548, and *Galt v. Calland*, 7 Leigh 594, said that, though in each of these cases it was held that the giving by one of the partners of his individual promise or obligation for a debt of his firm, and its acceptance by the creditor, did not, under the circumstances, release the other party in equity, yet, in neither of these cases, were the circumstances attending the transaction similar to those found in the case under consideration; and there was nothing in either of them which militated at all with the conclusion to which the court had arrived in the case at bar.

**\*Partnership—Specialty of One Partner for Partnership Debt—Effect.**—Where one partner executes a specialty for a partnership debt, such specialty merges the partnership debt at law, and discharges the other partners from liability therefor; but, in equity, the liability of the other partners is not thus extinguished unless there is a clear intention of the creditor to take the specialty in entire discharge of the partnership debt. As upholding this proposition, the principal case was cited in *Ward v. Motter*, 2 Rob. 552, 567; *Brooke v. Washington*, 8 Gratt. 252, 255, 257; *Niday v. Harvey*, 9 Gratt. 470; *Baylor v. DeJarnette*, 18 Gratt. 172; *McArthur v. Chase*, 18 Gratt. 704; *Jordan v. Miller*, 75 Va. 458; *Black v. Campbell*, 6 W. Va. 64. See also, *Sale v. Dishman*, 3 Leigh 548; *Galt v. Calland*, 7 Leigh 594; *Parker v. Cousins*, 2 Gratt. 389, 390; *Morris v. Morris*, 4 Gratt. 327.

In *Brooke v. Washington*, 8 Gratt. 255, JUDGE MONCURE, after quoting at some length from the opinions in the principal case, said: "These copious extracts are made from the opinions of the judges in *Weaver v. Tapscott*, because, *nomine mutato*, they are as applicable to this case as they were to that, and because they leave little or nothing more to be said in this case. It seems to be difficult to find a distinction between that case and this, unless it be in the fact that in that case the bonds were given for negro hire, and in this they were given for the purchase



nine months after date, to Samuel Bondurant. Another of the same date, for 149 dollars, was payable at the same time, to Thomas Bondurant. And a third, dated the 13th of December 1825, for 160 dollars, was payable on the 1st of January 1827, to Darby Bondurant.

The bill, after describing the obligations that were given, set forth, that the same not being punctually paid, suits were brought thereupon by the assignees, and judgments obtained against the complainant for the amount of the bonds, which he had been compelled to discharge. It stated that Trimble had become embarrassed in his circumstances, and had removed from the state; and prayed that Weaver might be decreed to pay the complainant the amount which he had been compelled to pay as surety.

Weaver answered, that in 1825 he employed Trimble in the boating business, on the following terms: He furnished the boats and the loading; Trimble furnished the hands, and superintended the business; and  
426 the profits \*were divided. The respondent denied that Trimble was, in December 1825, or at any other time, deputed to Buckingham to hire hands for 1826. He stated that he discharged Trimble from his employment in the latter part of 1825, or the beginning of 1826, and that Trimble afterwards continued the boating business on his own account.

By the exhibits it appeared, that the judgments on the first two mentioned bonds were satisfied by the complainant on the 24th of July 1828; and that the judgment on the other bond was satisfied by him on the 2nd of February 1829. Depositions were taken by parties: the purport of which, so far as material, appears in the opinions of the judges.

The cause was removed to the circuit court of Rockbridge, and after being proceeded in as to Trimble by publication, came on there to be heard, when the circuit court declared, that it was satisfied a partnership existed, as charged in the bill, and that Trimble being nonresident and insolvent, the defendant Weaver was responsible to the complainant for the amount paid by him. A decree was entered in conformity with this opinion; and upon the petition of Weaver, an appeal was allowed him.

The attorney general for the appellant. Peyton for the appellee.

PARKER, J. Tapscott, the complainant in the court below, had a clear right to be substituted to all the remedies of the Bondurants, the obligees in the bonds, and for this reason, as well as because the remedies against the partners on the original contract of hiring had been extinguished at law by Trimble's having given a higher security (Williams v. Donaghe's ex'or, 1 Rand. 300; Sale v. Dishman's ex'ors, 3 Leigh 548,) he is entitled to come into a court of equity.

This has scarcely been questioned,  
427 \*and the only serious point raised is whether Weaver was liable to the Bondurants, who hired the slaves to Trimble, or to Tapscott, his surety in the bonds.

I think that a partnership in the boating business between Weaver and Trimble is clearly established by the evidence, and indeed admitted in the answer of Weaver; and that this partnership existed when the slaves were hired, and for some time after. The slaves were hired by Trimble to be employed in the boating business, and were actually so employed during a portion of the time that the partnership continued. Weaver says, the partnership was dissolved about the last of the year 1825, or early in 1826; but there are several circumstances inducing me to fix the period of dissolution as late, at least, as April 1826. According to him, by the terms of the partnership, he was to furnish the boats and loading, and Trimble to superintend the business and furnish the hands; whilst the profits were to be equally divided. Taking his own statement, it is enough to fix his responsibility to third persons. A participation in the profits and losses made them general partners in that concern, and subjected each one to all the liabilities of such general partnership, whatever may have been the stipulations and arrangements inter se.

The reason why the partner taking a part of the profits is liable to creditors, is this, that he takes part of the fund on which they rely for payment. A dormant partner, to whom a vendor gives no credit, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement, in matters which, according to the usual course of dealing, have reference to the business transacted by the firm. Robinson v. Wilkinson, 3 Price 538; Saville v. Robertson, 4 T. R. 720.

There can be no doubt, that the hiring of hands to be employed in the boating  
428 business had immediate reference \*to the nature of the dealings between Trimble and Weaver. The trade in which they were engaged could not be carried on without hands, any more than without boats.

It made no difference, that Weaver gave no express authority to Trimble to hire. If he had been dealing in matters without the scope of the partnership, that circumstance would have been material; but not in contracts relating to the partnership. Gow on Partnership 67.

Nor was it more material, if Trimble hired on his own account, without expressly naming the partnerships; or that Tapscott became his surety in ignorance of its existence. How these facts were, does not clearly appear. The probability is, that as the partnership was one of some notoriety, Trimble, when he went to Buckingham to hire hands, and asked strangers to become his sureties, would speak of the business in which he was concerned, and refer the persons with whom he was dealing to the ultimate responsibility of the firm. But it is not necessary to establish that fact. If Tapscott was ignorant of Weaver's being a partner, it brings this case within the influence of those upon secret partnerships. Gow 176. If he knew it, but dealt with Trimble alone, without intending to release the partnership, it must be governed by the cases of Bond v. Gibson &

Jephson, 1 Camp. 185, and Gouthwaite v. Duckworth, 12 East 421.

It is only, I think, in cases where a separate credit is clearly given to one of the partners, to the exclusion of the rest, that the latter are absolved. This observation will explain the cases of *Emly v. Lye*, 15 East 7, and *Bevan v. Lewis*, 1 Simons 376, 2 Cond. Eng. Ch. Rep. 189, cited by appellant's counsel. In both of them, the partnership was known to the creditors, and the circumstances shew that they looked only to the individual partner with whom they dealt, and not at all to the others. These cases,

429 properly understood, do not \*controve the principle, that in purchases or bargains relating to the partnership, the act of one is considered the act of all, and that each may contract as if he were the authorized agent of the rest, and bind all by dealings within the scope and nature of their business. *Gow* 71; *Willet v. Chambers*, Cowp. 814; *Walden v. Sherburne*, 15 Johns. 422.

When one deals with a partner in matters relating to the partnership business, it ought to be inferred that he deals on the credit of the partnership, unless the circumstances prove, that though apprized of the partnership, he meant to give individual credit. It would be hard to hold him bound to prove, that he knew of the partnership, and dealt on its credit. One of a firm dealing in produce goes into the country, and purchases from the farmer, without naming his partners; or he gets another to become his surety for the purchase money. Is the vendor or surety bound to prove that he knew of the partnership, and dealt on its credit? The presumption is in the affirmative; and to discharge the firm, it ought to appear clearly that he gave credit to the individual alone, and intended to absolve the other partners. See the observation of chief baron Macdonald, in *Barton v. Hanson*, 2 Camp. 99.

So far from this appearing in the case under consideration, I am persuaded that Tapscott never intended to become the surety of Trimble alone, in exclusion of his partner, and that his delay in applying to the latter proceeded only from his doubts about his legal rights, or the difficulty of procuring evidence to prove the partnership, now so clearly established.

I am therefore for affirming the decree.

CABELL, J. It is sufficiently manifest, even from the answer of Weaver, that a partnership existed between him and Trimble, in the boating business, at the time when the slaves in the bill mentioned 430 were hired by \*Trimble, and that the profits of the business were to be equally shared by the parties. It is also manifest from the testimony, that the slaves were hired for the partnership, and were applied to the uses thereof. Under these circumstances, it is perfectly clear that Weaver was equally liable with Trimble, even if Tapscott, at the time of the contract, were ignorant of the fact that Weaver was a partner. And if the fact of the partnership were known to Tapscott, Weaver is a fortiori liable; unless, indeed, it can be

shewn that Tapscott, with this knowledge, contracted on the individual credit of Trimble, in exclusion of that of Weaver. Nothing of the kind is attempted to be proved, and it cannot be presumed without proof. Weaver, therefore, was clearly liable on the hiring; and the cases of *Sale v. Dishman's ex'ors*, 3 Leigh 548, and *M'Cullough et al. v. Sommerville*, not yet reported,\* shew that this obligation was not extinguished by the execution of a bond by his partner.

I am therefore of opinion to affirm the decree.

BROCKENBROUGH, J., concurred in the opinion of judge Cabell.

TUCKER, P. In this case I think it sufficiently appears, without a resort to the answer of Weaver, that there was a partnership in the boating business, commencing in 1825 and running into the year 1826. During that year, it was dissolved. In preparation for the business of that year, the slaves in question were hired by Trimble the partner of Weaver. It matters not, therefore, whether there was a subsequent dissolution or not. The transaction was during the partnership, and for its purposes. If it had been made in the name of the partners, and not under seal, it could not have been questioned that

Weaver was responsible. He alleges, in 431 deed, \*that the partnership was a limited one; that he was to find the boats, and Trimble the hands. But this is not proved, and the imperfect character of Weaver's recollections (proceeding from the circumstance that the transactions of this concern were entrusted to his clerks and agents, or from some other cause) forbids implicit confidence in the answer. I rely rather upon the testimony of the witnesses, which goes to establish a general partnership. Yet it is perhaps of little moment how this fact may be. For even if the alleged arrangement was made between the partners, that Weaver should find the boats and Trimble the hands, yet the public had nothing to do with that arrangement, and as Weaver was to get half the profits, he was responsible for the hires, since that interest in the profits, ipso facto, constituted him a partner. In *Dry v. Boswell*, 1 Camp. 329, where in a boating partnership, one party was to furnish boats, the other nevertheless was held responsible for the repairs, upon the general principles of partnership. So here, though Trimble was to furnish hands, yet Weaver, as a partner who was to receive one half of their profits, was responsible for their hires.

Conceiving it then to be clear, that if the hiring had been by contract not under seal, and expressly upon the credit of the firm, Weaver's responsibility would have been undoubted. I will next remark, that as I interpret the testimony, Tapscott did understand from Trimble that there was a partnership between himself and Weaver, and accordingly contracted upon the faith of Weaver's liability. But if I am mistaken in this construction, then the ordinary case is presented, of a contract for a firm by the ostensible partner, there being a secret part-

\*This case has been since reported in 8 Leigh. p. 415.

ner unknown at the time, who receives the benefit of the contract. If, as it appears to me, there was a partnership throughout the year 1825, and running into the year 1826 till the boating season was over or far advanced, and these slaves were employed in 432 boating, then they \*clearly came into the use of the concern, and contributed in no small degree to the handsome profits admitted to have been received: and if so, upon the general principles of partnership, those who were to share the profits were bound for their hires.

If, then, Weaver would have been clearly responsible had these contracts been without seal, it only remains to enquire whether that will make a difference here. And I think it will not. At law, indeed, the partner who does not join in a bond is not bound by the sealing of his copartner. But equity looks into the character of the transaction. It looks not to the form of the thing, but to the substance. The seal cannot hide from its searching eye the real nature of the case, or the consideration or intention of the contract. It respects, indeed, that intention, if fair and upright, as much as a court of law. If, therefore, it appears that the bond of an individual partner is taken with a view to his distinct responsibility, a court of equity would not thwart that intention by disregarding his individuality. But if, on the other hand, it appears, that though the contract is under seal, it is for the firm; if the firm is looked to on the one part, and intended to be contracted for on the other; or if the contract is for matters germane to the business of the concern, and the benefit of it goes to the copartnership; then the partners are bound, notwithstanding the form of the transaction. The case of *Sale v. Dishman's ex'ors* was decided on these principles.

Looking, then, to the real character of the transaction, let us see whether there is any thing from which it can be inferred that the individual responsibility of Trimble, a poor boatman, was looked to. The bond is the only ground of inference, and that loses all force, when we consider that it was most probably adopted in conformity with general usage in the hire of slaves, and in compliance with the notions and requisitions of the owner. On the other hand, if

433 Tapscott was informed of \*the partnership, as he alleges, every presumption of law is in favour of the intention to look to the firm rather than the individual partner. "It is possible," says chief baron Macdonald, (2 Camp. 99,) "that separate credit may be given to one of two partners individually, but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence." And this is reasonable; for why should the partner desire to bind himself and absolve the concern? or why should the dealer with him prefer to bind him individually, when, if bound as a partner, he is personally not less bound, and there is the additional security of his partner? In this case, it is absurd to suppose that Tapscott took Trimble's individual responsibility, if he knew of Weaver's connexion with him; and if he did not know

of it, then the execution of a sealed instrument could not have been with a view to indicate his individual responsibility, in contradistinction to that of the concern. In every view of the case, then, I am for affirming the decree.

I have said nothing of the cases from East and from Simons, because they have been already commented on by one of my brethren. I do not think they can have any influence upon this case.

BROOKE, J., concurred in opinion to affirm the decree.

Decree affirmed.

#### 434 \*Wayt and Others, at the Relation of Hall v. Peck and Others.

July, 1838. Lewisburg.

**Partnership—Liability of Deceased Partner's Administrator to Separate Creditor—Case at Bar.**—A creditor of a decedent, who has obtained judgment against the administrators, brings an action of debt upon the administration bond, and shews at the trial, that one of the administrators, under an agreement with a surviving partner of the decedent, had sold partnership effects to the amount of 408 dollars 76 cents. There is no evidence that the amount of debts due from the partnership was ever ascertained, or that any settlement of the partnership transactions had ever been made. But it is proved that the administrator exhibited to a witness a statement of partnership debts which he had paid, amounting to about 200 dollars, thus leaving a balance of 200 dollars unaccounted for by him, one half of which balance exceeds the amount of the judgment. Upon this evidence, the jury find a verdict for the plaintiffs. **Held**, the verdict ought not to be set aside.

On the 24th of August 1824, Philip Dull and John H. Peck qualified in the county court of Augusta as administrators of George Dull junior deceased, and executed an administration bond, with Robert Grass as their surety, to John Wayt and others, justices of the county court, in the sum of 400 dollars.

There having been, at the time of the intestate's death, a copartnership between him and Jacob Dull, it was agreed between the surviving partner and the administrator Peck, that Peck should make sale of the partnership effects, and out of the proceeds of such sale pay all the partnership debts, and then retain one moiety of the residue as administrator of George Dull, and pay over the other moiety to Jacob Dull. In accordance with this agreement, the partnership effects were sold at public auction on the 16th of September 1824, and the sale amounted to 408 dollars 76 cents.

435 \*In 1826, Moses M'Cue obtained a judgment against Philip Dull and John H. Peck as administrators of George Dull, for a debt of 22 dollars 56 cents, with interest from the 6th of October 1823 till paid, and 8 dollars for his costs. An execution was sued out, on which the sheriff made return, that he had levied it on an old black horse, the property of George Dull, which he sold, and the proceeds of sale, after deducting expenses and commissions, amounted to 3 dollars 99 cents; and that no property or assets were found to make the balance.

After this, M'Cue assigned the judgment to Alexander S. Hall; and at the relation of Hall, an action was brought under the statute, upon the administration bond, in the names of the justices to whom it was payable, against the obligors. The writ being served upon Peck and Grass, they pleaded conditions performed.

At the trial of the issue joined on this plea, there was no evidence that the amount of debts due from the partnership was ever ascertained, or that any settlement of the partnership transactions had ever been made. On the contrary, it appeared that the administrator Peck had failed to make any settlement with the surviving partner, and the surviving partner had brought a suit against him, to have a settlement of the partnership transactions, and obtain payment of his share of the surplus; which suit was still pending. The defendants failed to produce any evidence, to prove any payment of partnership debts by Peck, out of the fund of 408 dollars 76 cents; but it was proved that Peck exhibited to a witness a statement of partnership debts which he had paid, amounting to about 200 dollars; thus leaving a balance of 200 dollars of the fund unaccounted for by him. Upon this evidence, the jury found a verdict for the plaintiffs. The counsel for the defendants moved the court for a new trial, upon the ground that the verdict was contrary to evidence; but the court overruled the motion,

and rendered judgment against the defendants. \*Upon a supersedeas from the circuit court, the judgment was reversed with costs. And then a supersedeas was awarded by this court, to the judgment of the circuit court.

Baldwin, for plaintiffs in error, submitted the case without argument.

PARKER, J. I am aware that Jacob Dull, the surviving partner of the intestate, had a right to the custody of the partnership effects, for the purpose of paying the debts and settling the concern; and if he had exercised the right, and none of these effects had actually come to the hands of the administrator of the deceased partner, he could not have been charged, without gross negligence in having the partnership affairs adjusted, and the balance ascertained and paid over to him. But here, by an agreement with surviving partner, he took possession of the partnership effects and sold them, and was to pay the partnership debts and divide the balance. This sale was made in September 1824, and the present suit was instituted in 1829, after he had had ample time allowed him to pay the debts, if any, and to administer the moiety coming to him, according to the tenor of his official bond. These effects were, in fact, legal assets in his hands, subject only to a charge which it was incumbent on him to establish. He was not merely Jacob Dull's agent in this arrangement; for he was a tenant in common with him, having a community of interest, and, as such, entitled to hold the partnership effects, if he happened to be in possession of them, until required for payment of debts, or for distribution by a court of equity. They might

have been taken under execution by a creditor of his intestate, and the court of law would not have taken notice of the equitable rights arising out of the partnership, but have left them to a court of equity. Ram

437 on Assets 317; \*Law Library, vol. 8, p. 209, 210; 2 Wms. on Executors 1022.

That is to say, Jacob Dull could only in equity have recovered a moiety after the partnership debts were paid; and in the mean time they would have been treated as legal assets. That this moiety should have been accounted for in 1835, when this suit was tried, appears to me to be reasonable, from other considerations. The administrator having undertaken to sell the partnership effects and pay the debts, it was his duty to use reasonable diligence in the execution of that trust. If they had remained in the hands of the surviving partner from 1824 to 1835, the administrator having unduly delayed to bring him to a settlement and to collect his intestate's share, he would be liable to creditors for any amount they could establish by probable evidence. A fortiori he is liable, when he has the assets in his own possession, and has taken no steps to ascertain his intestate's share. His conduct was a breach of his official bond, and the only question before the jury would be as to the amount of the damages. They had the materials before them for settling the account, furnished by the administrator himself, who by his own statement had paid but 200 dollars of partnership debts, whereas the sale amounted to 408 dollars 76 cents, which, after paying Jacob Dull one moiety, left more than enough to pay the debt for which suit was brought. After the lapse of 11 years, the jury had a right to presume there were no other partnership debts; and if the result of Jacob Dull's suit against the defendant, brought in 1831, seven years after the trust commenced, should shew the contrary, and charge him farther, it would be a loss brought about by his own gross negligence, which ought not to affect the creditors of his intestate. If, after eleven years laches, they are not entitled to have his account settled by a jury, and the balance considered as assets in his hands, how long must they wait? Must it be until the suit is decided between

him and the surviving partner, which 438 \*may, for any thing that we know, be depending many years, and which we have a right to presume was rendered necessary by his own laches in not rendering an account to Jacob Dull from 1824 to 1831? I think not. I am therefore of opinion that the judgment of the circuit court should be reversed, and that of the county court affirmed. But I submit these impressions with much diffidence, since they differ from those of my brethren, who think the judgment of the circuit court ought to be affirmed.

TUCKER, P. The question in this case is, whether there was sufficient evidence of assets before the jury. The only assets pretended consisted of the interest in the social effects of a partnership concern between the decedent and his brother. Now, although it is true that upon the death of one partner, his administrator is tenant in common of the

property in possession with the surviving partner (Gow on Partn. 376; Montague on Partn. 136; 2 Chitty's Black. 399, in note; Co. Litt. 182a,) it is not less true that the social effects cannot be applied to the discharge of the individual debts, until all the social debts have been discharged. Montague 99; Gow 157; Id. 223-228; Ex parte Ruffer, 6 Ves. 126; Ex parte Williams, 11 Ves. 5. And though an execution against an individual partner may be levied on his interest in the tangible property of the firm, yet I have no doubt that Gow has truly stated the law to be, that an injunction would, on a proper case, be allowed in equity to stay proceedings under the execution, until the proper accounts are taken, and it is ascertained what interest the debtor has in the partnership stock; and if he has none, the injunction will be made perpetual. For, "in case of dissolution," says lord Eldon (in *Crawshay v. Maule*, 1 Swanst. 506,) "no person in possession of the property can make any use of it inconsistent with the purpose of winding up the affairs of the concern."

439 \*In this case, then, until it is shewn by a settlement of the partnership accounts, that there is a surplus after winding up the concern, and what that surplus is, it cannot appear that any part of the social effects is assets of the deceased partner's estate. Now, if the surviving partner had taken possession of the effects, as he well might, for the purpose of winding up the concern and paying the debts, it is palpable that until the accounts were settled, and he paid over the balance to the administrator, that balance, if any, would not have been assets. And even admitting that where an executor has grossly delayed the recovery of the decedent's choses in action, he may be made responsible for them as if received, I do not think the mere lapse of time in this case would justify such a measure, when it appears that a suit is depending for the settlement of the partnership concerns, and there is no evidence that it has been unnecessarily delayed, but a presumption to the contrary, as the surviving partner, and not the administrator, is the complainant.

Nor do I think the fact of the winding up of the concern being intrusted to the administrator, makes a difference. He is bound, in faith of his agreement, as well as in law, not to misapply the funds, and to account fairly with the surviving partner. He alleges that he has paid 200 dollars, and doubtless contends that there is 200 dollars surplus; and if so, the relator will at some future time get his money. But it would seem, the surviving partner is still asserting a claim against the administrator. If he should shew that besides the 200 dollars Peck has paid, he himself has paid other 200 dollars, then he is entitled to the whole amount in Peck's hands. The jury ought not, in the dark, to have decided this matter, nor was it competent for them, or the court, to settle accounts between Peck and the surviving partner, in this suit between the justices and Peck, since their opinion of the matter would be no

440 \*protection to him against paying the

money over again to the surviving partner.

I am of opinion, therefore, that the judgment of the county court refusing a new trial was rightly reversed, and that the judgment of reversal must be affirmed.

CABELL and BROCKENBROUGH, J., concurred in the opinion of the president.

After the delivery of the foregoing opinions, Baldwin requested to be heard, and was allowed to argue the case. Upon the argument (which was before a full court) the opinions were as follows—

BROCKENBROUGH, J. It is a well established principle, that if a partnership be dissolved by the death of one of the partners, the executor or administrator of the deceased partner becomes tenant in common with the surviving partner, of the partnership effects in possession. Gow on Partn. 337. It is also a well established principle, that an individual creditor of a partner, having obtained a judgment separately against him for his own separate debt, may issue his fieri facias and cause it to be levied on the social effects, and the sheriff must seize the whole of them, though he may not sell the moiety, but an undivided moiety of the whole; and a vendee of the undivided moiety becomes tenant in common with the other partner. Gow 224; Shaver v. White & Dougherty, 6 Munf. 110. It would seem to follow, that if a judgment be rendered against the administrator of a deceased partner, for the said partner's individual debt, a fieri facias against the goods of the intestate in the hands of the administrator may be levied on the tangible goods of the partnership, and an undivided moiety of the whole may be sold to pay the debt of the deceased; for the administrator is tenant in common with the surviving partner; and it might per-

441 haps \*be contended that if Jacob Dull, the surviving partner in this case, had retained the possession of the partnership effects, a fieri facias against George Dull's administrator might yet be levied on those effects. But it is not necessary to maintain that position in this case. For here, Peck the administrator of George Dull was not only tenant in common with Jacob Dull the surviving partner, but, by agreement with the latter, he obtained actual possession of the social effects, and was bound both by agreement and by law to pay off first the partnership debts, and then to divide the surplus between himself and his cotenant in common. By thus obtaining possession of the partnership goods, he became chargeable, as administrator, with the undivided moiety of them, as legal assets in his hands. "Whatever comes to the executors' hands, or they are intrusted with as executors, shall be assets at law." 2 Fonbl. Eq. 401, 3d am. edi. 622. See also 2 Williams on Executors 1022; Bac. Abr. Executors, H. 2.

These assets were not less legal, because there was a lien on them to pay the partnership debts. Vincent v. Sharp, 2 Starkie's Cas. 507; 3 Eng. Com. Law Rep. 451.

In cases of this sort, as the social effects are first liable to pay the social debts (ac-

ording to the maxim, *qui sentit commodum, sentire debet et onus*) the separate creditor has no right to more of the partnership property than the separate interest of that partner, which is, in fact, a moiety of the surplus after paying the partnership debts. If, then, the *fieri facias* be issued against the partnership effects, a bill in equity may be filed by the solvent or surviving partner, to take an account of what is due to such partner, and for an injunction in the mean time. *Gow 227; 1 Madd. Ch. 136.* And I presume, that on the case being brought into equity,

that court will distribute the surplus funds between the solvent or surviving partner, and the creditor of the insolvent or deceased partner, according to their several rights. Although the surviving partner may go into equity, yet why should it be required, in this case, that the creditor of the deceased partner should become plaintiff in equity? Jacob Dull had surrendered the possession to Peck, who agreed to sell the goods, pay off the partnership debts, and divide the surplus. Peck, therefore, had the game in his own hands. He did sell the goods. It was just as easy for him to prove at law, as in equity, how much of the proceeds he had paid towards the partnership debts, and of course how much surplus remained in his hands.

When Peck was sued as administrator in the first instance by Hall, he might, on the plea of fully administered, have given in evidence to the jury the payment of partnership debts to the full extent of the social effects in his hands, and if he had done so, his plea would have been supported: or if he had proved debts paid to a smaller extent, the jury might have ascertained the surplus in his hands, and found against him the moiety of that surplus. To that extent, he would have been found guilty of a misapplication of his intestate's funds. It would seem, however, that in the first action Peck made no such defence; but still it was competent for him and his sureties to make the same defence in the present action on the administration bond, and the jury did in fact make the enquiry, and found a surplus of assets more than sufficient to pay the debt. In this I see no error, and no prejudice to the rights of the deceased partner.

I am therefore for reversing the judgment of the circuit court, and affirming that of the county court.

BROOKE, CABELL and PARKER, J., concurred in opinion to reverse the judgment of the circuit court, and affirm that of the county court.

443 \*TUCKER, P., adhering to his opinion already delivered in the cause, made the following additional remarks:

The action in this case being for a devastavit, it was incumbent on the plaintiff to prove that the assets in question actually came to the administrator's hands, or have been lost by his negligence, or that, from the delay to reduce them into possession, he ought to be charged with them as if collected.

As to the first—They were not in his hands as administrator. They were placed there upon the faith of their being first applied to

the payment of partnership debts. They were moreover in his hands liable to those debts in the first instance, since "no person in possession of partnership funds can make any use of them inconsistent with the social purposes." They were thus impounded in his hands. They were there in double trust, bound both by contract and by equity.

As to the second—It is not pretended that the assets have been lost.

As to the third—Though I am not aware that there is any case at law, impugning the general principle that choses in action are never assets until reduced into possession, (*Bac. Abr. Executors, H. 2, 1 Salk. 207, 314; Shep. Touch. 497; Wentworth's Office of Executor, ch. 6, p. 65.*) or deciding that an executor shall be charged with a debt by unreasonable delay in collecting it, yet as equity will so charge him (*2 Bro. C. C. 156; 1 Madd. Ch. Cas. 162.*) I will concede, for the sake of the argument, that such would be the case in a court of law. But then the unreasonable delay must be proved. Now, although a long time has elapsed, yet the record of the suit between the administrator and the surviving partner not being before us, it is impossible to say that the delay has proceeded from the fault of the administrator. Every presumption is against it, as the surviving partner, and not the admin-

444 istrator, is plaintiff. It would therefore be grossly unreasonable to compel him to pay away to the relator, funds which are at this moment demanded by another. The true controversy, in fact, is between the creditor and the surviving partner: the administrator is but a stakeholder. To make the stakeholder pay while the court of equity is proceeding against him, would be unjust and unprecedented. If the creditor desires to hasten the proceedings, and contest the surviving partner's claim, he may intervene. If he does not, he should await the result.

I remain of opinion to affirm the judgment.

Judgment of the circuit court reversed, and that of county court affirmed.

#### Linton and Others v. Bartly and Others.

July, 1888, Lewisburg.

**Writ of Right—Nonjoinder of Heir—How Advantage Taken.**—Where a writ of right is brought by demandants who claim as heirs, and the mise is joined on the mere right, evidence at the trial that there is another heir besides those named in the writ and count, will not entitle the tenants to a verdict. The tenants, to avail themselves of such matter, should plead it in abatement.

Writ of right, in the circuit court of Grayson county, by Isaac Bartly, Reuel Bartly, Eleanor M'Knight, Peggy Bartly, John Webb, Daniel Coleman and Sally his wife, Caleb Davis, and Lydia his wife, and Jesse

\*Writ of Right—Nonjoinder of Heir—How Advantage Taken.—In a writ of right, the nonjoinder of an heir as plaintiff is a matter in abatement, and is not therefore available on the mise joined. *Walkers v. Boaz, 2 Rob. 485, 491, and foot-note; Bell v. Snyder, 10 Gratt. 355, both cases citing the principal case.*

Hodge and Peggy his wife, heirs and legal representatives of William Bartly deceased, against Mary Linton, Mary Ann Linton and Peggy Linton. The demandants filed their count, and the tenants filed their plea, to which the demandants filed their replication; and thereupon the mise was joined between the parties.

445 \*At the trial, the demandants, to prove that they were the heirs of William Bartly deceased, introduced a witness, who stated upon his cross examination, that one of the heirs of William Bartly was not a demandant, either in the writ or count, but was omitted in both. Whereupon the counsel for the tenants moved the court to instruct the jury, that unless they were satisfied, from the evidence, that all the heirs of William Bartly deceased were made demandants, they should find a verdict for the tenants. But the court, being of opinion that the tenants had, by joining the mise, admitted that the demandants were the heirs of William Bartly deceased, and could not prove the existence of other heirs than those named, in order to defeat the demandants, except on a plea in abatement, refused to give the instruction asked. To which opinion the tenants excepted. Verdict and judgment were rendered for the demandants; and the tenants obtained a supersedeas.

B. R. Johnston, for the plaintiffs in error, argued, that the matter to which the evidence applied, respected the title of the demandants and the extent of their interests in the land. If those before the court shewed title only to a part, they could recover only to that extent. In this case, no title was shewn to the interest of the heir who was not named; and the judgment, to the extent of that interest, was therefore erroneous.

David M'Comas, for the defendants in error, insisted, that the authorities fully sustained the proposition, that if one of the heirs were not named, it was matter in abatement only, and could not be taken advantage of at the trial. He referred to Cro. Eliz. 554, pl.; 7 Com. Dig.; Abatement, E. p. 43; 1 Dodd's Bac. Abr. p. 18; 9 Vin. Abr. 457, pl.; 2 Bro. Abr. Entre Congeable, pl. 59; 1 Chit. Plead. 75; Garrard v. Henry, 6 Rand. 110.

PER CURIAM. The judgment is to be affirmed.

446

**\*Black v. Gilmore.**

July, 1838, Lewisburg.

**Conveyance of Freehold—Words of Lease—Effect.—**

Where a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment.

**Same—Same—Same—Case at Bar.**—A declaration in covenant sets forth, that the defendant, by an indenture, did rent and lease to the plaintiff a tract of land, to have and to hold the same so long as he the plaintiff should live: and it avers, as a breach of the covenant, that the defendant entered upon the possession of the plaintiff, and expelled and removed him. HELD, on general demurrer, that no covenant for quiet enjoyment is to be implied from the words set forth, and that the action cannot be maintained.

In an action of covenant brought by Isaac

Black against Henry Gilmore in the county court of Rockingham, the declaration set forth, that by an indenture made the 27th of March 1832, the said Gilmore did rent and lease to the said Black a tract of land, to have and to hold the said tract so long as he the said Black should live, but upon certain conditions, to wit, that Black and his family should conduct themselves to Gilmore and the neighbours around him, in a peaceable manner, and that Black should not waste the timber on the place, but should have the liberty of taking fire wood, and timber for the use of the said place. It then averred, that after the said 27th of March 1832, Black entered into the said tract of land, and was possessed thereof, and farmed and cultivated the same, by virtue of the said lease, and continued in possession until the — day of — in the year 1834, having, during the whole time, wasted none of the timber on the said place, and having, both he and his family, conducted themselves to Gilmore and the neighbours around him, in a peaceable manner. And it alleged that nevertheless, Gilmore, not regarding his covenant aforesaid, on the said — day of — in the year 1834, illegally and improperly entered upon the possession of Black, and thence

447 totally \*expelled and removed him, and hitherto hath been and still is possessed thereof, and appropriated to his own use the plaintiff's crop of grain which was then growing upon the said tract of land; by which act and doing of Gilmore, the said Black the said tract of land, from the said — day of — in the year 1834 for as long as he the said Black should live, according to the form and effect of the indenture aforesaid, could not have and hold. And so the said Gilmore the covenant aforesaid hath not kept, but hath broken the same.

The defendant filed a general demurrer to the plaintiff's declaration, in which the plaintiff joined; and the court held the declaration to be sufficient. Issues in fact were joined on three pleas, and the jury found a verdict upon the issues for the plaintiff; on which verdict the county court rendered judgment.

A writ of supersedeas being obtained from the circuit court, that court was of opinion that the demurrer to the declaration ought to have been sustained; and for this cause reversed the judgment with costs, and gave final judgment in favour of the defendant. Whereupon Black obtained from this court a supersedeas to the judgment of the circuit court.

Michie for plaintiff in error.

Baldwin for defendant in error.

TUCKER, P. This is an action of covenant, brought by a lessee for life against his lessor, for evicting him from the possession. There is a demurrer to the declaration, and the covenant itself being no part of the record, the simple question is, whether the declaration sufficiently sets forth an express or implied covenant for quiet enjoyment.

To maintain the affirmative, the counsel for the plaintiff in error has contended that a covenant for quiet enjoyment is implied

448 from the very words of the lease, \*that the said Gilmore did lease and rent to



the said Black a certain tract of land, to have and to hold &c." And if this were a lease for years, it would be very certain that these words would import an agreement that Black should possess, and that an eviction would be a breach of that agreement. For a lease for years is looked upon in the law, less as a conveyance of an estate, than as a contract for the possession; 2 Black. Com. 141-444. And hence it is obvious, that in leases for years, the words lease and demise are used as words of contract rather than as words of transfer, and, as such, import a covenant that the lessee should possess and enjoy. But in a lease for life, it is otherwise. That is the creation of an estate of freehold, not a mere contract for the possession. The words of lease and demise are therefore used as words of conveyance, and not of covenant; and although, if accompanied by the word *dedi*, or if rent be reserved in the lease, a warranty is implied, a covenant never was. Hence it is, that as long ago as the reign of Henry 6, it was decided that "if a man lease lands for life by deed, and afterwards put his lessee out of possession, the lessee shall not have a writ of covenant against him, but an assize." Fitzh. Nat. Br. 145. "Sed aliter of a lease for years." Ibid. in note. And it has been held in England, for centuries, that upon the eviction of a freehold, no action of covenant will lie upon a warranty in deed or in law; but in case of a lease for years, upon eviction, there can be no other remedy. Bac. Abr. Covenant, C. ad finem; Pincombe v. Rudge, Yelv. 139; S. C. Hob. 4. Accordingly it has become the course of conveyancing, always to insert a covenant for quiet enjoyment where that is contracted for. Bac. Abr. ubi supra. Now, it would be a fraud upon any party, at this day, to give to the words of his contract an interpretation and extension, of which for centuries they were declared not to be susceptible. The principle stare  
449 decisis is in these \*matters not merely proper, but it is vital; since counsel advise, and conveyancers proceed, and parties contract, with reference to the declared construction of the language of an instrument. It is sufficient therefore to say, that according to the established course of decisions, no covenant for quiet enjoyment is implied by words of lease and demise in the conveyance of an estate of freehold. Modern decisions, indeed, have wisely leaned to the narrowing, rather than to the extension, of implications; and notwithstanding some loose expressions of lord Eldon and justice Buller in 2 Bos. & Pull. 21, 26, and of lord Ellenborough in Barton v. Fitzgerald, 15 East 528, (which are justly questioned by Kent, C. J., in 2 Caines's Cas. 188, and by Platt in his work on covenants, p. 22,) the general principle is now well understood, that the vendee who does not take proper covenants for his security, must lie down under the consequences of his own negligence or want of forecast.

It is said, however, that in every lease for life reserving rent, a warranty is implied; and upon this foundation the counsel has endeavoured to rest his case. It cannot, however, serve his purpose. We are all clearly of opinion that the case, as set forth

in the declaration, does not, with needful precision, shew a lease reserving rent. The reservation of rent is attempted to be implied from the use of the expression "rented." But in this connexion, the reservation of rent is not necessarily implied from the use of the term. It is merely used in the looser sense of "leased or demised." If the pleader had designed to bring himself within the principle now relied upon, he ought to have set out the reservation distinctly, that the court might as distinctly have seen that the lease was one from which a warranty was implied. He has not done so, and the principle therefore cannot apply.

If, however, the declaration were not defective in this regard, still the action would not lie. Admit the implied  
450 \*warranty, yet, as we have already seen, covenant does not lie upon it. Fitzh. 145; Yelv. 139. Nor, indeed, would the warranty itself afford a protection to the lessee against his wrong. His remedy for an eviction by his landlord is trespass or ejectment. He is at this moment at liberty to recover back his estate for life from Gilmore, if he has not broken its conditions. And what is more, if the judgment in his favour were affirmed, it would be no bar to his recovery (Yelv. 139); so that he would get a double recompense. His remedy, then, is complete; but it is not a remedy upon the warranty. The remedy upon the warranty is a remedy given against the lessor, when the lessee is evicted by better title and by right. It does not exist where the eviction is by wrong and without title. It cannot, then, be appropriate to the eviction by the lessor himself, which is by wrong and without title. As, therefore, the remedy upon the warranty is inappropriate to the case, the action of covenant would not lie, even if we admit that in Virginia the remedy by covenant has taken the place of the warrantia chartæ: for it certainly could not be extended farther than the remedy for which it is the substitute.

Upon the whole, I am of opinion to affirm the judgment.

The other judges concurred. Judgment affirmed.

451

## \*Lightfoot v. Strother.

July, 1838. Lewisburg.

(Absent BROOKE, J.)

**Parol Loan of Personalty—When Fraudulent as to Loanee's Creditors and Purchasers.\***—Under the act to prevent frauds and perjuries, a loan of goods and chattels made by parol, to a person with whom, or those claiming under him, possession remains five years, without demand made and pursued by due process of law on the part of the lender, is taken to be fraudulent as to the creditors and purchasers of the persons so remaining in possession.

**Same—When Not Fraudulent as to Loanee's Purchaser.\***

—If the property be sold before possession shall have remained five years with the loanee or those

\*See monographic note on "Fraudulent and Voluntary Conveyances" appended to Cochran v. Paris, 11 Gratt. 348; monographic note on "Frauds, Statute of" appended to Beale v. Digges, 6 Gratt. 582.



claiming under him, the loan is not, under the statute, taken to be fraudulent as to the purchaser.

**Same—Tacking Loanee's Possession to That of Loanee's Purchaser.**—Where possession has not, at the time of a sale, remained five years with the loanee and those claiming under him, the purchaser can have no benefit of the statute of frauds, by reason of his own possession after the purchase. The circumstance that the possession by the loanee before the sale, and the possession by the purchaser after the sale, will together make five years cannot avail to give a title to the purchaser.

Sarah Chalmers of the county of Prince William died in 1813, having made her will, which contained the following bequest: "Item, I give and bequeath to Jane Ewell during her natural life, the following negroes, Cæsar, Johnston, Lacy, Jacob and Sucky and her increase, and then to revert to the heirs of her body forever. It is my will and desire that the said Jane Ewell shall have the above mentioned negroes free from any control of her husband Alfred Ewell in any wise whatsoever. And for this purpose do I appoint James E. Heath, attorney at law, as a trustee for the management of the said property for the benefit of the said Jane Ewell and her heirs." The will was duly recorded, and Heath acted as trustee under it, until James P. Strother was substituted for him. This substitution was by virtue of a

452 \*decree of the superiour court of chancery holden at Fredericksburg. The terms of the decree were complied with by Strother, and he received possession of the negroes and their increase from Heath. On the 28th of September 1828, Strother (who then resided in Russell county, and who had the slaves in his possession in that county) with the consent and approbation of Jane Ewell, permitted Benjamin Plummer, who had intermarried with Maria Antoinette, a daughter of the said Jane Ewell, and who resided in the county of Prince William, to take Eliza, a daughter of the slave Sucky mentioned in the will, upon condition that Plummer should, at his own expense, return her to Strother, with her children, if she should have any, whenever demanded. Eliza, at this time, had no children. Plummer, upon taking her on the day mentioned, carried her to his residence in the county of Prince William, where he kept her until the 5th of August 1833, on which day he sold her and two children of hers, born after the said 28th of September 1828, to a negro trader by the name of Daniel. The negro trader immediately removed Eliza and her children out of the state of Virginia, to Alexandria in the district of Columbia, a distance from Plummer's residence of 12 or 15 miles, and placed them in the hands of his agent James M'Daniel, who took them to Richmond in Virginia, and there sold them and another slave to John L. Lightfoot on the 7th of September 1833, for the sum of 625 dollars. Lightfoot had possession of Eliza and her children from the time of his purchase until the 15th of November 1833, when Strother took possession of them in the county of Smyth, while Lightfoot was in the act of

removing them out of the state through that county.

On the 17th of November 1835, an action of detinue was commenced in the circuit court of Smyth county, by Lightfoot against Strother, to recover Eliza and her children.

The general issue was pleaded. And 453 at the trial, the jury returned a special verdict, finding the facts before mentioned. It found also the following additional facts: That about the first of August 1833, Strother, having heard that Plummer was not doing well, and was not likely to continue to be a safe person to trust with the possession of Eliza and her children, wrote to Jesse Weems, in the county of Prince William, authorizing and requesting him, as his agent, to take possession of Eliza and her children: that the said authority and request were not received by Weems till the — day of August 1833, some days after Eliza and her children had been sold to Daniel, and conveyed out of the state by him: and that on Weems's receiving the request and authority aforesaid, he would forthwith, as the agent of Strother, have demanded Eliza and her children, or taken legal means to recover the possession of them, but for their previous sale to and immediate removal by Daniel.

The circuit court adjudged the law upon the special verdict to be for the defendant; and a supersedeas was allowed to the judgment.

Watson for plaintiff in error.

The attorney general and M'Comas for defendant in error.

PARKER, J. It appears by the special verdict in the case, that when Lightfoot purchased from Daniel, neither he nor Plummer the loanee of Strother had been in possession of the slaves in controversy "by the space of five years." Our act to prevent frauds and perjuries declares, that loans of goods and chattels made or pretended to be made to any person with whom, or those claiming under him, possession shall have remained by the space of five years, without demand made and pursued by due process of law on the part of the pretended lender, shall be taken to be fraudulent as to the creditors

454 \*and purchasers of the persons so remaining in possession; that is, for five years. But when Lightfoot purchased, the five years had not expired; and so he is not within the words of the act. If he had been a creditor of Daniel at the date of his purchase, instead of purchasing from him, the possession then existing would not have rendered the loan fraudulent; and by the act, creditors and purchasers are placed upon the same footing. Daniel, the purchaser from the loanee, could never have acquired a title, short of five years adverse possession; although his creditors, or purchasers under him thereafter, might connect his adverse with Plummer's fiduciary possession, for their own protection. The mischief which the act intended to remedy was this, that lenders or pretended lenders could, at common law, set up secret trusts against those who, at the time they purchased, did so upon the strength of a possession which usually gives title to personal property, without any notice

to them of its fiduciary character. But if they purchased before the five years expired, there could be no good reason for protecting them, farther than they were already protected by the act of limitations. If, at the time of the purchase, the loan is not considered as fraudulent, it would seem that it ought not to become so by the possession of the person who ought to have enquired into the title, and as to whom it was not fraudulent at the time.

This view of the question is fully sustained by the case of *Auld v. Norwood*. 5 Cranch 361. In that case, the title of Auld, who was a trustee for creditors, was held under persons who had been in possession (connecting the loanee's possession with that of Jamesson the debtor) for eight years; and yet the supreme court held, that the four years adverse possession of the latter could not be connected with the possession of the loanee for the same period, so as to make the case a fraudulent loan within the Virginia

455 statute. Whether this case may not, indeed, have gone too far, will remain a question for decision, if ever the point comes before this court. It may be distinguished from the case at bar, in going probably somewhat farther in protecting the rights of an innocent lender, than it is necessary to go here.

I am for affirming the judgment.

BROCKENBROUGH, J. I have struggled hard in this case to maintain the right of the plaintiff in error to the slaves in controversy, because the loanee in this case, and those claiming under him (including Lightfoot) up to the 29th September 1833, and indeed up to the — day of November 1833, have had more than five years possession, without any demand made and pursued by due process of law on the part of Strother the lender, within the five years, and because no declaration of the loan, by deed or will in writing properly recorded, has been made by the said lender.

But the language of the statute is too strong to be resisted. The loan of goods and chattels, of which possession shall have remained by the space of five years in the loanee and claimants under him, without demand and suit by the lender within the five years, is fraudulent, not in all cases and as to all persons, but as to certain persons only. It is not fraudulent as to the loanee himself, nor as to volunteers under him even though he or they may have had possession for ten years without the demand of the lender. It is only fraudulent as to "creditors and purchasers of the persons aforesaid so remaining in possession." These words "so remaining in possession" are especially to be noted, as they refer to the length of the possession of the loanee and claimants under him, from whom the holder has purchased, or of whom he is the creditor. The loanee, or persons claiming under him, must have had possession for five years, to render the loan fraudulent as to their creditors or purchasers.

456 \*Now, Lightfoot was not such a purchaser as is herein set forth, as to whom the loan shall be deemed fraudulent.

He purchased from Daniel, who had purchased from the loanee, at a time when the loanee and Daniel had not had possession by the space of five years. He was not, therefore, a purchaser from one who came within the description just mentioned. Those from whom he purchased had not had the five years possession; and though he himself is a claimant under the loanee, and a purchaser from one claiming under the loanee, yet he cannot add his possession to theirs, because that would not make the possession of those from whom he purchased, a possession of five years.

It is a hard case on Lightfoot, because he has paid his money without knowing of the loan, and in a case where possession had remained for a long time with the loanee and a claimant under him. It seems still more hard, from the circumstance, that if he had made his purchase only three weeks later, that purchase could not have been disturbed, unless in the mean time the lender had made his demand, and pursued it by due course of law. Yet although it is hard, we may say that it is not the court, but the law, which has produced the hardship. It is only the legislature that can give redress in future cases. It might be well for them to say, that such loans shall be taken to be fraudulent as to all persons except the loanee and volunteers under him; or perhaps still better to say, that all loans of chattels, especially of slaves, shall be void, unless evidenced by deed, duly recorded in a certain time, or by will.

But as the matter now stands, I am for affirming the judgment.

CABELL, J. I was at first inclined to think that the law was in favour of the plaintiff in error. But a more attentive examination of the act of assembly has perfectly convinced me that the law is otherwise.

457 \*This is the case of a contest between the lender of property, and a purchaser under the loanee. The remarks which I may make as to the construction of the act of assembly, will therefore be regarded as applicable to the case of a purchaser, without considering whether they are or are not applicable to the case of a creditor.

Five years had not elapsed after the loan and before the purchase by the plaintiff in error, although they had elapsed before the commencement of the suit.

At common law, no length of possession by the loanee would protect a purchaser from him. This was productive of much mischief; for third persons who had been induced to become purchasers, relying on the possession of the loanee as the indicium of the right of property, were often surprised and defeated by the exhibition of loans, of the previous existence of which they had no knowledge, and no means of obtaining knowledge. It was the object of the statute to remedy this evil. But how does it propose to remedy it? Not by protecting every fair purchaser from a loanee, but those purchasers only who had become such on the faith of five years previous possession by their vendors or those under whom they

claimed. The words of the act of assembly are too plain to admit of doubt as to their meaning. After having spoken of a loan made to "any person with whom, or those claiming under him, possession shall have remained by the space of five years," the act goes on to declare, that the loan "shall be taken, as to the creditors and purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act." It is manifest, therefore, that the possession which this act interposes as a shield to the purchaser, is a possession previous to his purchase. If he relies on his possession subsequent to his purchase, it will be unavailing, unless it be for such a time as will present a bar under the act of limitations.

I am for affirming the judgment.

458 \*TUCKER, P. By the statute of frauds it is provided, that where a loan is made to any person, with whom, or those claiming under him, possession shall have remained for five years without suit, the same shall be taken, "as to the purchasers from the person aforesaid so remaining in possession, to be fraudulent, and that the absolute property is with the possession, unless &c." The purchaser, therefore, who would protect himself by this act, must shew that he has purchased from a person with whom, or those claiming under him, five years possession under a loan has remained. Lightfoot cannot do this. The possession of Plummer together with that of Daniel, from whom Lightfoot purchased, falls short of five years by about three weeks. It cannot be pretended that on the day after his purchase, he had title; for on that day, those under whom he claimed had not had five years possession. To make up the five years, he must add three weeks of his own possession. But his own possession cannot give him title under this act. His title under it can only arise from five years possession (antérieur to his purchase) of those under whom he claims. If there has been no such possession, he has no title. Were it otherwise, it would follow that if a slave be lent to A. who holds him under the loan only a month, and sells him to B. who holds him for four years and eleven months, his title will become good by wrong,—by his own continued possession to the prejudice and adversary to the rights of the lender; and this too, although his title was good for nothing the day after his purchase. This cannot be. He may, indeed, acquire title under the statute of limitations, if the possession continues adversely for five years in himself or in those under whom he claims. But under the statute of frauds he can acquire no title, unless those under whom he claims have had full five years possession antérieur to his purchase. He cannot weld the two statutes together, or eke out, with his own adversary possession, \*the possession of those under whom he claims. In this case, Lightfoot having purchased within the five years, his title is not good, and judgment was properly rendered against him. I am of opinion that it be affirmed.

Judgment affirmed.

## Wilson and Others v. Alexander, Sheriff.

July, 1838, Lewisburg.

**Indemnifying Bond—Action on—Witness—Deputy Sheriff.**—The decision in *Carrington v. Anderson*, 5 Munf. 32, approved, and the law now settled, that in an action upon an indemnifying bond, brought by a person claiming the property sold, the deputy sheriff who sold the property under the execution, and took the bonds, is not a competent witness for the defendants, to prove that the property belonged to the person against whom the execution issued.

Writs of fieri facias were sued out of the circuit court of Botetourt against the goods and chattels of William D. Tinsley, upon two judgments obtained in that court, one by John S. Wilson & Co. and the other by Robert Snoddy. The executions being put in the hands of the sheriff of Rockbridge county, were levied by him on a slave, and a doubt arising whether the right of the property was in Tinsley or not, the sheriff required of Wilson & Co. and Snoddy, an indemnifying bond according to the statute. An indemnifying bond was thereupon executed by Wilson, Snoddy, and Bertrand E. Trennis as surety.

Upon this bond an action was brought in the circuit court of Botetourt against the obligors, by John Alexander, sheriff of Rockbridge county, for the benefit of 460 Willis \*Tinsley, alleging the slave to be Willis Tinsley's property. The defendants filed three pleas; 1. that the slave was the property of William D. Tinsley, and not the property of the relator; 2. that the relator had not been damaged by reason of any matter mentioned in the condition of the bond; and 3. conditions performed. The parties went to trial upon issues made up on these pleas. In September 1836 there was a verdict for the plaintiff, and a new trial awarded the defendants. In April 1837 the plaintiff again succeeded in getting a verdict, and the defendants succeeded also in getting a new trial. In September 1837, there was a third trial.

At this trial, the plaintiff introduced evidence tending to prove that the slave had been sold by the sheriff of Botetourt under an execution, and had been purchased at such sale by William D. Tinsley, and that William D. Tinsley subsequently sold the slave to the relator Willis Tinsley. The plaintiff then offered as evidence a receipt given by the sheriff of Botetourt to William D. Tinsley for the purchase money of the slave, and proved the execution of the same; but the defendants objected to the paper being read in evidence, upon the ground that the sheriff who made the sale should be examined himself. The court permitted the paper to be read as evidence, and the defendants excepted.

The defendants offered to introduce the deputy sheriff who levied the executions against William D. Tinsley and took the indemnifying bond mentioned in the declaration, and to examine him to disprove the claim of the relator to the slave; but the

\*See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

plaintiff objected to his introduction and examination as a witness, and the court rejected him as incompetent; to which opinion the defendants also excepted.

A third verdict was found for the plaintiff. Upon this verdict the circuit court gave judgment; and then a supersedeas was obtained to the judgment.

461 \*Baldwin and Brockenbrough for plaintiffs in error.

Edward Johnson for defendant in error.

PARKER, J. With respect to the first bill of exceptions, there appears to be nothing calling for any particular observation. The execution of the receipt being proved by other evidence, it was plainly unnecessary to call upon the sheriff who gave it.

The question whether, in an action upon an indemnifying bond taken under the 25th section of the act, 1 Rev. Code, ch. 134, p. 533, the deputy sheriff who levied the execution and took the bond, can be examined by the defendant, to disprove the claim of the relator, is one not free from difficulty; and we accordingly find the judges equally divided upon it, in the case of *Stevens & al. v. Bransford &c.* 6 Leigh 246. It is remarkable that in this case no reference whatever is made to the previous decision of *Carrington v. Anderson*, 5 Munf. 32, establishing the negative of the proposition; and we are left in doubt how far it would have influenced the opinion of the judges maintaining the competency of the deputy sheriff, had it been brought to their notice. One of them (judge Brockenbrough) as it would seem from his observations in *Brent v. Green*, 6 Leigh 29, would have attached little weight to that case; but whether judge Carr recollected it, or would have considered it a binding authority, does not appear.

Under these circumstances, I cheerfully acquiesce in the judgment that will be given by a majority of this court, although my impression is, that in a case like this, of contingent liability, the evidence ought to be received, and its weight left to the jury. The courts in modern times very wisely lean against objections to the competency of a witness on the ground of interest, unless where such interest is direct, certain and vested. If the interest is merely contingent, depending entirely upon another

462 enquiry, not involved in the issue then trying, \*the objection, as it seems to me, ought to go rather to the credit than to the competency of the witness. The bare possibility of his being made liable in a subsequent action, upon the trial of a very different issue from the one in which he is called to testify, should not, if the attainment of truth be the object, be permitted to exclude him. Thus, in the case at bar, the gist of the action was whether the property seized belonged to the relator. No matter how that fact was decided, it did not make the sheriff, who levied the execution, certainly liable, or liable (as some of the authorities express it) in any event. The act of assembly protected him, unless the obligors in the bond were insolvent; and as no evidence was given of that fact, the interest was not certain, but

altogether doubtful and contingent. If the evidence of the sheriff induced a verdict against the relator, he relieved himself, it is true, from all responsibility; and this is said to be an interest which disqualifies; but that is the very point in controversy. Relief from a certain responsibility, however small, does disqualify; but relief from a possible responsibility, however great, ought not, in reason, to have that effect. The interest depends on a fact to be ascertained; namely, the solvency of the obligors in the bond. They may be the wealthiest citizens in the country; the penalty of the bond may bear a very small proportion to their known means; and then the sheriff's interest is nothing, and there is no bias on his mind to affect his testimony. So, by a change of circumstances, that bias may exert more or less influence. These are matters proper for the consideration of a jury, who can alone give them their due weight; whilst the court, if it exclude, runs the risk of excluding in a case where no interest exists.

It must be admitted that in the event of the obligors' insolvency, and in a subsequent action against the sheriff, the first verdict in favour of the plaintiff might be given

463 \*in evidence, to shew the amount of the damages sustained by the relator; and it is readily conceded, that in general, this is a proper criterion to determine the competency or incompetency of a witness thus situated. But I conceive, this criterion is not a universal one, and that it fails where the witness is not immediately answerable over, or in other words, where the verdict and judgment in the case do not fix his responsibility. These seem to be the principles recognized in *Stewart v. Kip*, 5 Johns. Rep. 256, and I have found no case in the english reports controverting them. In that case, the interest was remote, depending on the solvency of the obligors in the prison bounds bond; but if the plaintiff recovered, and they proved insolvent, the officer was liable, and the verdict in the first action would have been evidence to prove the amount of damages; yet he was admitted as a competent witness for the defendant. There is no distinction in principle between that case and the one at bar; for the mere circumstance that here the deputy sheriff levied the execution and took the bond, can make no difference, as the contingent liability of both witnesses was conceded. So, in all the cases I have met with in the english books, the excluded witness was immediately answerable over, and would certainly be exposed to gain or loss by the establishment of the facts involved in the trial of the case: the necessary legal consequence of the verdict bettered his situation, by either securing a certain advantage or repelling a certain loss, dependant upon nothing to be ascertained thereafter in another suit. But here the necessary consequence of the verdict did neither; for if the obligors in the bond were solvent, it left the sheriff precisely where it found him. The case of *Carter v. Pearce*, 1 T. R. 163, may be cited in illustration of this distinction. There it was decided, that the co-obligor in an administration bond might be a witness to prove a

tender by the administratrix. Yet if  
 464 the judgment \*had been obtained  
 against her, a suit might have been  
 brought against the surety, and the verdict  
 in the first action been given in evidence  
 against him to shew the amount of damages.  
 By establishing the tender, the surety re-  
 lieved himself from this possibility. But the  
 court held that the bare possibility of an  
 action being brought against the witness  
 was no objection to his competency; and  
 Buller, J., said, "this was not like the case of  
 bail, for they are immediately and directly  
 interested, since by a verdict against the prin-  
 cipal the bail becomes immediately answer-  
 able." He added, that "in order to shew a  
 witness interested, it is necessary to prove  
 he must derive a certain benefit from the  
 determination of the cause one way or the  
 other; but in this case, supposing there were  
 no assets, the administratrix would not be  
 liable on her bond, and it does not appear  
 how she had applied them." So in the case  
 at bar, supposing the obligors to be solvent,  
 the sheriff was not liable under the law, and  
 it does not appear how that fact was. In  
 the case cited, it was equally true that if  
 there were assets, both the administratrix  
 and her surety would have been liable on the  
 bond, at least for the costs, and that the evi-  
 dence of the witness, of a tender, secured  
 him against the chance of a future action  
 for those costs: as the evidence in this case  
 might have secured the witness against a  
 future action for the debt.

In the case of *Whitehouse v. Atkinson*, 3  
*Carr. & Payne* 344, 14 Eng. C. L. Rep. 339,  
 lord Tenterden decided, that in an action  
 against the sheriff for goods taken and sold  
 under execution, his officer, who had made  
 the levy and had given security to the sheriff,  
 was not a competent witness to prove the  
 fairness of the sale, although he was indem-  
 nified by the execution creditor; "for," said  
 he, "if the result of this action is against  
 the sheriff, the witness is liable at a certainty,  
 and he never may get repaid his indem-  
 465 nity; therefore \*it is his interest to  
 defeat the action." What would have  
 been his judgment if the officer had only been  
 liable in the event of the obligors in the in-  
 demnity bond proving insolvent, is strongly  
 to be inferred from the expressions he uses;  
 for surely, in that case, he could not have  
 said that the witness was liable to a certainty.

There are other cases where, as it seems  
 to me, the escape from a future contingent  
 liability is not that certain interest that will  
 exclude a witness; such as an executor's  
 being admitted, after he has meddled with  
 the assets, to prove the will, although the  
 effect of establishing it may be to hinder  
 him from being sued as an executor de son  
 tort. But I forbear to press them, being  
 content with thus shewing the grounds  
 which would induce me to reverse this judg-  
 ment, if the point is to be considered an  
 open one in this court. The same reasons  
 would prevent me from hereafter extending  
 the doctrine beyond this identical case.

BROCKENBROUGH, J. I am of opinion  
 that the deputy sheriff who was produced as  
 a witness in this cause, was a competent

witness, and that the judgment ought to be  
 reversed. I refer to the opinion which I ex-  
 pressed in the case of *Brent v. Green*, 6  
*Leigh* 29,—to the opinions of judge Carr  
 and myself in *Stevens & al. v. Bransford &c.*,  
 6 *Leigh* 246,—to the case of *Stewart v. Kip*,  
 5 *Johns. Rep.* 256,—and finally to the opinion  
 now delivered by judge Parker,—in support  
 of the judgment I have formed on the subject.

As the opinion of a majority of the court  
 is now decidedly otherwise, I shall in future  
 yield to the authority.

CABELL, J. In the case of *Stevens & al.*  
*v. Bransford &c.*, 6 *Leigh* 246, I gave my  
 opinion, at some length, that the officer levy-  
 ing an execution and selling the property was  
 an incompetent witness, in an action  
 466 of debt on an \*indemnifying bond, to  
 prove that the property belonged to  
 the person who was the defendant in the  
 execution. The same point is involved in  
 this case, and, in truth, presents the only  
 question which merits consideration.

After a careful review of *Stevens & al. v.*  
*Bransford &c.* and a diligent examination of  
 all the additional authorities referred to, I  
 am entirely confirmed in the correctness of  
 the opinion which I gave in that case; and  
 I have very little to add on the present oc-  
 casion. I cannot, however, forbear to advert  
 to the fact, that in the case of *Stevens &*  
*al. v. Bransford &c.* no reference was made  
 by any of the judges to the previous case of  
*Carrington v. Anderson*, 5 *Munf.* 32, in  
 which the very point arose, and was decided  
 by the unanimous opinion of the court. The  
 arguments of the counsel are not given in  
 the case of *Stevens & al. v. Bransford &c.*  
 but it is to be presumed that they, also, failed  
 to avert to it. For, had the case been men-  
 tioned by the counsel, or had it occurred to  
 any judge of the court, it cannot be believed  
 that it would have been unnoticed in the  
 opinions delivered. I can say for myself,  
 that if I had not forgotten its existence, I  
 should have relied upon it in support of my  
 opinion, rather than on the english authority  
 to which I referred. I refer to it now, as  
 concluding the question. I must also take  
 occasion to remark that a more careful ex-  
 amination of the case of *Stewart v. Kip*, 5  
*Johns. Rep.* 256, has convinced me that I  
 erred in supposing that to be a similar case.  
 A comparison of the facts of this case with  
 the facts of that, and the remark of judge  
 Spencer, who delivered the opinion of the  
 court, will shew that the cases are materially  
 and fundamentally different. In that case,  
 the gist of the action was the escape of a  
 debtor from the prison bounds, to which he  
 had been admitted on giving the bond and se-  
 curity required by the law of New York; and  
 the deputy sheriff who had fairly and legally  
 taken the bond, which he could not have  
 legally refused to take, was called upon  
 467 to testify \*as to the fact of the escape  
 from the bounds; a fact as to which he  
 had no agency, and which he could not have  
 prevented. Judge Spencer said, "the wit-  
 ness not being called on to justify any act of  
 his own or to disprove any negligence imput-  
 able to him, having no concern with the  
 gist of the action between the parties, and

his liability over being doubtful, depending on various facts not involved in the trial of this cause, his interest was too remote and contingent to exclude him from testifying." Understanding that case as I now do, I entirely approve of it. But what is the case before us? Here, the sheriff is called upon to justify his own act, the seizure and sale of property not liable to the execution, and by justifying it, to free himself from all responsibility, although the parties to the indemnifying bond taken by him may all be insolvent.

I know it has been said, that the bare possibility of an action being brought against a witness is no objection to his competency; *Carter v. Pearce*, 1 T. R. 163. But general remarks of judges must be considered in reference to the circumstances of the cases in which they were made. The liability of a deputy sheriff, on a judgment being obtained against the high sheriff, for such misconduct of the deputy as is imputed in this case, is not the bare possibility alluded to by the judges in *Carter v. Pearce*. For in that very case, justice Buller, who united in the remark, said, "this is not like the case of bail, because they are directly and immediately interested; for if a verdict be given against the principal, the bail becomes immediately answerable." Yet we know that after judgment against the principal, no action or proceeding can be immediately had against the bail; none can be had against him until a ca. sa. issues and is returned non est inventus. And even after that, his liability is not fixed, until a scire facias is returned executed. The case of a deputy sheriff, after judgment against his principal, is, in my opinion, very similar to \*that of bail. The deputy becomes immediately answerable, but that liability is not fixed, and cannot be enforced, "unless" (or until) "the obligors in the indemnifying bond shall become insolvent." 1 Rev. Code, ch. 134, § 27, p. 534.

I think the judgment should be affirmed.

TUCKER, P. On the question made by the defendants' first bill of exceptions, I am of opinion that the court properly permitted the receipt to go in evidence to the jury, and that it was not necessary to call upon the sheriff to prove it.

Upon the second question, I coincide with the opinions of judges Cabell and Brooke in the case of *Stevens & al. v. Bransford &c.*, 6 Leigh 246, and in the unanimous decision of the court in *Carrington v. Anderson*, 5 Munf. 32. By whatever principle we try the question, the deputy sheriff appears to me to be an incompetent witness. Take it upon the ground of interest, and take the rule in the strongest language in which it has been couched. Admit that the interest must be direct and immediate, or, as it is otherwise expressed, a present, certain and vested interest, and not a mere uncertain and contingent interest. Here the interest of the deputy is certain, direct and immediate. He had, at the moment of delivering his testimony, a direct interest in proving that the relator had no title to the property, because in that event he never could be made liable, even

though the obligors should prove insolvent. He had a direct interest in defeating the plaintiff's action, because he thereby discharged himself forever from every possible liability. By barring that action, he "took a bond of fate." He placed himself above contingencies. He converted his condition of possible loss into a state of certain security. He changed a state of hazard into a state of perfect safety. If the hazard itself was con-

tingent, the interest to get rid of it was  
469 not so. \*That was direct, immediate and urgent. Admit that the hazard

was remote, still he had an immediate and direct interest, to remove it altogether. Suppose the chances of the insolvency of the obligors were a hundred to one, yet as there is one chance of solvency, the liability is not certain, but contingent. But is the interest to get rid of this liability uncertain, when the chances of it are a hundred to one against him? I cannot think so. A man has an interest, and a vendible interest, in a contingent estate, although it is possible neither he nor his vendee may ever enjoy it. And so a man may have a contingent liability, against which it may be his interest to secure himself. Suppose, in this case, A. had entered into a supplemental bond to the deputy sheriff, to indemnify him in case the obligors in the principal bond should prove insolvent: could A. have been a good witness to defeat the relator's action, when he would thereby annul his own bond? And if he could not, how could the deputy be a witness, into whose shoes A. steps? A supplemental surety never can be a witness to discharge the demand for which he is bound, however remote and improbable may be the chance of his being required to pay it. So it is with every person ultimately responsible, however remotely. Take it that *Wilson & Co.* were assignees in this case, of a bond executed by *William D. Tinsley*. If, after suing with due diligence, they fail to recover from *William D. Tinsley*, the assignor is responsible to them. He is therefore interested in defeating the present action on the indemnifying bond, by proving this property to belong to the debtor. Is he nevertheless a good witness, because it is still possible that *William D. Tinsley* has other property and is solvent, so that his own ultimate liability is not certain, even though his testimony should establish that the property here does not belong to the debtor? By no means. Yet he is in the like situation with the deputy sheriff, though with somewhat

470 \*greater chances of loss. Unless the deputy can defeat the plaintiff's action, and thus make good the levy on the slave, he will be chargeable if the obligors in the bond prove insolvent. And unless the assignor can defeat the action, and thus make good the levy on the slave, he will be liable if the original obligor, the debtor, prove insolvent. The assignor is therefore directly interested in defeating the action, though his responsibility is uncertain and contingent since the debtor may be solvent. He is therefore not a good witness to defeat the action; and for the same reason, the deputy sheriff is not.

Consider the case, secondly, with reference to the other rule; that "a party has a direct interest where the necessary legal consequence of the verdict will be to better his situation, by either securing an advantage or repelling a loss." 4 Stark. 747. Then here, the necessary legal consequence of a verdict against the plaintiff is to discharge the deputy forever, and thus to secure the advantage of being exempt from a responsibility and hazard, to which, before the verdict, he was exposed, and from which, by the verdict, he is exonerated forever. The verdict, indeed, against the relator, is a verdict for the deputy sheriff. It forever determines all proceedings against him. He is not merely entitled to use it in a future action (which of itself would disqualify him) but he is as immediately benefited by it as if he had been a party in the suit, since it settles the controversy forever as to him.

It seems, however, to be supposed that the deputy is not interested, because the verdict for the plaintiff does not conclusively fix him for the debt. It is said that "it would not alone, or per se, render him liable: something else must be shewn, namely, the insolvency of the obligors." This is not according to my understanding of the meaning of the rule. It is not necessary that the verdict, per se, should determine and

471 fix the responsibility \*of the party.

If it determines and fixes, beyond question, any one point on which his responsibility depends, he is incompetent to give evidence. If it constitutes one link in the chain by which he is to be bound, he will not be permitted to destroy that link. His interest to destroy it is direct, immediate, and urgent. To testify in such a case is, emphatically, to testify in his own cause.

My brother Parker having cited several cases, in the opinion just delivered, in opposition to the views I have presented, I will observe (with lord Kenyon in *Bent v. Baker*, 3 T. R. 27,) that "an attempt to reconcile all the cases upon this litigated question would be fruitless." It is sufficient to meet them with the case of *Carrington v. Anderson*, decided long ago by this court. But, in truth, little weight is due to some of them. The case of *Carter v. Pearce*, for instance, stands altogether alone. It has been followed by no other, nor does it rest upon any other. Its argument, too, is unsound, and the report is short and unsatisfactory. Justice Buller admits that the bail above (or special bail) would not be a good witness, because he is immediately liable; whereas the surety in the administration bond is not liable, unless there are assets. But the bail is not liable, unless he fails to surrender the principal. In neither case is the party introduced as a witness, fixed for the debt by the verdict. His responsibility in both cases depends upon a supplemental matter; in the one upon the proof of assets and devastavit, in the other upon failure to prove a surrender. I cannot, then, consent to overturn the authority of a case in our own court, upon this decision.

The case in *Carrington & Payne*, I think, is for me. The deputy was there rejected, though he was indemnified. He could not

suffer unless his guarantors proved insolvent.

Yet he was incompetent. So here, as 472 he \*will suffer in his guarantors (the obligors in the bond) prove insolvent, he was properly rejected.

The case of *Stewart v. Kip* seems to be in point; but I think it was improperly decided; and at any rate it cannot overrule our own decision in *Carrington v. Anderson*.

I am of opinion to affirm the judgment.

BROOKE, J., concurred in opinion to affirm the judgment.

Judgment affirmed.

#### 473 \*Scates v. Wilson and Edmunds.

July, 1838. Lewisburg.

**Assignments—Award and Judgment for Obligor against Assignee—Effect as to Assignor.**—A suit by assignee of a bond against the obligor being referred to arbitration, the arbitrators find the debt to have been discharged by payments to and set-offs against the assignor, and make an award in favour of the obligor, upon which judgment is entered. Whereupon an action is brought by the assignee against the assignor. **Held**, that though the assignor is at liberty to controvert the facts found by the award, and shew that the judgment is erroneous, yet, until the contrary be shewn, the judgment is to be presumed to be right, and is therefore sufficient to establish the liability of the assignor, and support an assumpsit founded on such liability.

**Same—When Assignee's Right of Action against Assignor Accrues**—**Case at Bar.**—Upon a plea by the assignor that the action against him did not accrue within five years, it is found that though the debt originally due from the obligor has been discharged by payments to and set-offs against the assignor, yet the assignee did not know, until after judgment in his suit against the obligor, that nothing was due; and it is also found that five years have not elapsed since the judgment: **Held**, that as part of the debt was discharged by a set-off, it was only the judgment which established the set-off as a payment, and until that judgment was rendered, the action did not accrue against the assignor.

On the 24th of March 1824, William Rice executed a sealed obligation to Zebulon B. Scates for 121 dollars 20 cents, payable the first of August 1825, under a penalty of 242 dollars 40 cents. Zebulon B. Scates assigned this penal bill to Joseph D. Scates on the 16th of February 1825. Joseph D. Scates re-assigned it to Z. B. Scates the 26th of October 1827. And Z. B. Scates, on the 10th of March 1831, assigned it to Wilson & Edmunds, for value received.

Soon after this assignment, Wilson & Edmunds brought an action of debt against Rice in the county court of Charlotte. The defendant having pleaded payment, by consent of the parties, the matter in difference between them in the suit was submitted

474 to the determination \*of two arbitrators, whose award was to be made the judgment of the court. The arbitrators,

\*See monographic note on "Assignments" appended to *Ragsdale v. Hogy*, 9 Gratt. 409; monographic note on "Arbitration and Award" appended to *Bassett v. Cunningham*, 9 Gratt. 684.



after hearing the parties and examining the evidence offered, awarded that the bond be credited by 70 dollars, paid on the 11th of December 1826 to J. D. Scates, who then held the bond as assignee of Z. B. Scates. There being a balance of 73 dollars 39 cents, with interest from the 1st of January 1821, due from Z. B. Scates to Rice on his guardianship account, and this credit, as well as the other, having arisen before the assignment to Wilson & Edmunds, and the two together being more than would pay off the bond, the arbitrators directed that the bond should be credited by so much of the said balance as would, with the first credit allowed, be sufficient to discharge the bond. The award consequently was, that Wilson & Edmunds were not entitled to recover any thing of Rice by their suit. On the 5th of March 1833, the court rendered judgment in favour of the defendant Rice, pursuant to this award.

On the 22d of June 1836, Wilson & Edmunds commenced an action in the circuit court of Smyth county against Zebulon B. Scates their assignor. Their declaration contained two counts. The first, after setting forth the obligation and assignments, stated, that by the assignment to the plaintiffs, the defendant undertook and promised the plaintiffs that the sum of 121 dollars 20 cents, mentioned in the obligation, was justly due and owing by Rice, and in no wise paid off and discharged by offsets against, or payments to, either the defendant or J. D. Scates; and it then averred that the said sum of money, at the time of the assignment to the plaintiffs, was not due and owing by Rice, but had been paid off and discharged by legal offsets and payments existing previous to and at the time of the transfer to the plaintiffs, and that the same, or any part thereof, was not recoverable at

475 law from Rice. The \*second count, after setting forth the obligation and assignments, stated the suit against Rice, the submission of the same to arbitration, the award of the arbitrators, and the judgment thereupon.

The defendant demurred generally to each count of the declaration, and the plaintiffs having joined in the demurrer, the matter of law was argued, and adjudged for the plaintiffs. The defendant then pleaded non assumpsit, and that more than five years elapsed after the cause of action accrued, before the institution of the suit; upon which pleas issues were joined.

At the trial, the only evidence introduced by the plaintiffs to support their action was the record of the proceedings and judgment in the suit against Rice. Whereupon the defendant asked the court to instruct the jury, that if they should believe, from the evidence, that the defendant did not consent to the reference or arbitration mentioned in the second count of the declaration, and had at no time sanctioned the same, and that he had never expressly promised or agreed to pay the claim demanded in that count, and had never acknowledged that the said claim or demand was due from him to the plaintiffs, then the plaintiffs were not entitled to recover upon the second count; which instruction the court

refused to give, and the defendant excepted to the refusal.

The jury returned a special verdict, finding that at the date of the assignment to the plaintiffs, viz. on the 10th of March 1831, nothing was due on the obligation, but the same had been fully paid to J. D. Scates a former assignee, and to the defendant; finding also that this fact was unknown to the plaintiffs until after the rendition of the judgment in the suit against Rice, the record of which was set forth at large; and finding that more than five years had elapsed since the assignment to the plaintiffs on the 10th of March 1831, before the institution of this action, but that less than five years  
476 \*had elapsed between the rendition of the judgment in the suit against Rice, and the institution of this action.

The circuit court adjudged the law upon the special verdict to be for the plaintiffs; and a supersedeas was allowed to the judgment.

Watson for plaintiff in error.

B. R. Johnston for defendant in error.

PARKER, J. (after stating the facts of the case, as above detailed), said: The plaintiff in error seeks to reverse the judgment, because, as his counsel contends, the defendants in error had no right to submit the suit brought by them against Rice to arbitration, and because the act of limitations is a bar to the action. The demurrers and the instruction moved are but different modes of raising these questions.

The declaration alleges the assignment, the suit brought, the agreement to refer, the award that the bond had been discharged by payments and offsets claimed by the obligor, and the judgment thereon. From these facts it infers the liability of the assignor; and, as I think, rightly infers it. Whether the award bound him or not, the judgment of the court is to be presumed to be right until the contrary is shewn. This was a sufficient foundation for the assumpsit, unless the defendant could controvert the facts found by the award, and shew that the judgment was erroneous. The assignees had a right to submit the case to arbitration, even though the award might not bind the assignor, or be evidence against him; and the judgment was binding, unless he could make it appear that the facts stated in the award, upon which the plaintiffs lost the cause, did not exist. These facts he was at liberty to controvert, and I presume he did controvert them before the jury, who distinctly reaffirm them in the special verdict.

477 \*Then, as to the act of limitations. Admitting, for the sake of argument, that if a bond is paid and then assigned, an action accrues to the assignee against the assignor from the date of the assignment, in analogy to the doctrine asserted in *Rice v. White*, 4 Leigh 474; *Battley v. Faulkner*, 3 Barn. & Ald. 288; *Short v. McCarthy*, Id. 626, and *Howell v. Young*, 5 Barn. & Cres. 259, and that the noninstitution of a suit for 5 years from that date bars the assignee, the doctrine does not apply to this case. Here, a part of the payment consists in an offset claimed by Rice against the assignor, which



was unknown to the assignees, and might never have been claimed by the obligor. It was only the judgment which fixed it as a payment; and therefore the action did not accrue against the assignor, until that judgment was rendered. Until suit brought, it was quite uncertain whether Rice would claim that offset, or bring his action against his guardian on his bond; nor was its justice and legality finally ascertained until the judgment. Previous to this time, the defendants in error could not have asserted their rights under the assignment; for it could not appear that Rice would plead or claim the offset, and it was their duty to ascertain this fact before they sued the assignor. If any part of the debt was due from Rice, they could not have excused themselves from suing him; and if, upon this state of facts, they had instantly sued the assignor, alleging that 70 dollars had been paid to Joseph D. Scates, and that, for the balance, Rice had a legal offset against Zebulon, they must have failed in their action.

The judgment must therefore be affirmed. The other judges concurred. Judgment affirmed.

478 \*Tapp's Adm'r v. Rankin.

July, 1838, Lewisburg.

(Absent BROOKE, J.)

**Equitable Relief against Judgment—Negligence—Ignorance of Counsel.**—Although it may be manifest that great injustice has been done a defendant at law, by the verdict and judgment against him there, yet if this injustice has not been produced by any fraud or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management a court of equity can give him no relief.

The reporter not having been furnished with the record in this case, the state of it is extracted from the opinion concurred in by a majority of the judges.

**\*Equitable Relief—Negligence.**—Where a party through his own, or his agent's, or attorney's, negligence fails to avail himself of a defense which he might have made at law, he will not be relieved in equity. *Slack v. Wood*, 9 Gratt. 40, 43, and *foot-note*; *Wallace v. Richmond*, 26 Gratt. 67, 69, and *foot-note*; *Mackey v. Mackey*, 29 Gratt. 173; *Scott v. Hore*, 21 Fed. Cas. 836, all citing the principal case. See also, *foot-note* to *Holland v. Trotter*, 22 Gratt. 136. For further information on this subject, see monographic *note* on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410; monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

**Chancery Practice—Bill without Equity—No Objection Made.**—If at the hearing of a cause, the case made up upon the pleading and proofs, is one of which a court of equity has no jurisdiction, the bill should be dismissed, though the defendant has made no objection to the jurisdiction, either by demurrer, plea or answer, but has defended himself on the merits. And in such a case, an appellate court will reverse a decree in favor of the plaintiff, and dismiss the bill, though no objection to the jurisdiction was taken in the court below. *Green v. Massie*, 21 Gratt. 356, 363, citing with approval the principal case. See further on this subject *foot-note* to *Green v. Massie*, 21 Gratt. 356.

M'Korkel having brought an action of assumpsit against Rankin in the county court of Augusta, obtained a verdict and judgment therein, in August 1814. Thereupon Rankin exhibited a bill of injunction in the superiour court of chancery at Staunton. The bill alleged, that the complainant had paid the whole debt for which M'Korkel had brought suit, "as evidenced by receipts and orders in his possession:" that on the trial, he was unable to prove M'Korkel's handwriting, and a verdict was found against him for the amount claimed: that M'Korkel being an obscure man, there were few persons who had ever seen him write, or knew any thing of his handwriting: that a witness by the name of Stewart, summoned on the part of M'Korkel, did prove that he was directed by M'Korkel, as his agent, to give up to the complainant the original evidences of the debt then claimed, and take his bond for a much less sum, to wit, the sum of £37. 15. which he acknowledged to be the balance due: that in relation to the proof of the receipts and orders, one of M'Korkel's witnesses had told the complainant, he thought he would know the handwriting of M'Korkel; but the complainant did not

479 \*present his credits on the trial, because he found they could not be established: that he believes, a certain Vincent Tapp had knowledge of the principal facts stated in the bill, and, at least, a perfect knowledge of the handwriting of M'Korkel; but it being discovered that Tapp was surety in the action at law, for the costs which might be recovered against the plaintiff in that action, and therefore "precluded from giving evidence, as he was, on the trial, called on to do, with an offer of being relieved, which was not accepted by counsel, as he believes," the complainant was thus deprived of his evidence, and is obliged to seek relief in equity, by appealing to the conscience of M'Korkel and Tapp: that he was surprised on the trial by these circumstances, and the jury most unexpectedly gave a verdict against him for the full amount of the claim, and more, notwithstanding Stewart's evidence as aforesaid: and that the court refused to grant him a new trial. Tapp was made a defendant to the bill, along with M'Korkel.

Tapp died before the cause was matured as to him. In 1825, the suit was revived against his administrator, who put in an answer, stating, among other things, that since the bill was filed, his intestate had become the assignee of the judgment. The assignment was obtained in 1815, while the injunction was pending.

The answer of Tapp's administrator was the only one filed; the cause having been proceeded in against M'Korkel by publication.

Upon the proofs exhibited, the circuit court of Augusta (to which the case was transferred) pronounced a decree awarding a new trial at law. From this decree an appeal was allowed.

Baldwin and Michie for the appellant.

Peyton and A. H. H. Stewart for the appellee.

480 \*PARKER, J. The first question for

consideration in this case is, whether the plaintiff in the injunction has shewn sufficient equity on the face of his bill, to entitle himself to relief. If he has not, the injunction ought to have been dissolved on motion by any person interested, though no answer was filed. *Minturn v. Seymour*, 4 Johns. Ch. Rep. 173; *New York Printing and Dyeing Establishment v. Fitch*, 1 Paige 97. It can, indeed, scarcely require authority to satisfy us, that an injunction, which ought not to have been granted, should not be continued.

[Here the judge recited the allegations of the bill, as they are above set forth; and then proceeded as follows:]

These are the facts stated in the bill, upon which the complainant applied for and obtained an injunction. Was the court justified in granting it? I think it was not. The rule is now well settled, that after a trial at law, if there appear to have been no fraud or surprise upon the part of the plaintiff, equity cannot relieve the defendant from the consequences of mere negligence, notwithstanding it may be manifest that great injustice has been done him at law. If it appears that by the use of proper diligence he could have defended himself successfully, however hard his case, equity must not interfere; and this upon sound principles of general policy, which no court is at liberty to disregard. For this may be cited the cases of *The Auditor v. Nicholas*, 2 Munf. 31; *Faulkner's adm'r v. Harwood*, 6 Rand. 125; *Arthur v. Chavis*, Id. 142, and several more recent cases.

The bill on its face shews, that the defendant at law took no steps to defend himself before that forum. He chose to rely on the plaintiff's witnesses, without ascertaining the fact whether they could or could not prove M'Korkel's handwriting, and without enquiring for other testimony. He depended on the declaration of one of them, that he thought he should know it, without giving

himself the trouble to shew him the receipts and orders, \*and place the matter beyond a doubt. It does not even appear from his bill, that he attempted to prove the receipts and orders on the trial, or that he produced them at all before the jury; for in two places it is alleged that he withheld and failed to produce them, without pretending that he endeavoured to obtain other witnesses, and failed. Nor is this all. He charges that there was a person present at the trial who was well acquainted with M'Korkel's handwriting, and with all the matter of his defence; and yet he made no attempt before the court to have his evidence received. And what reason does he assign for this gross omission? No other, than that this person was surety for the costs of suit, if the plaintiff should be cast in the action. He had nothing to do but to release Tapp (if indeed his being the plaintiff's surety for costs formed any objection to his testimony for the defendant) and, according to his own shewing, to prove by him his whole case; and yet he was so ignorant or negligent as to omit this obvious duty. This is too palpable a departure from the legal diligence required of every suitor, to entitle

the complaint to relief. And then as to his complaint that upon the plaintiff's own evidence the jury gave an improper verdict, in assessing damages to a greater amount than £37. 15. as proved by Stewart, and that the court refused to grant a new trial, it is only necessary to say, that he has shewn no reason for not filing a bill of exceptions, and carrying the case to an appellate court. That this was his proper remedy, and that equity will not interfere on such a ground, is settled by *Syme &c. v. Montague*, 4 Hen. & Munf. 180, and the other decisions referred to in 2 Rob. Pract. 213.

It is to be observed, that the plaintiff in the injunction does not allege that he has discovered new evidence since the trial, which he knew not of, or by reasonable diligence could not have obtained, before; nor that any material adventitious circumstances had arisen, which were not foreseen, and could not have been guarded against. It appears from his own bill, that he had every reason to believe it was at least doubtful whether he could prove the receipts and orders, unless Tapp was admitted as a witness. It would therefore have been the most common act of prudence, to take the necessary steps to obtain the benefit of his testimony; or, if he chose not to rely on that, to file his bill for a discovery in aid of his defence at law. After seeing the necessity of proving his offsets, he ought not to have waited to take his chance before a jury, but ought to have applied sooner for the assistance of equity. In every point of view, his conduct was marked by gross neglect, or by that ignorance of the law which "excuseth no man."

If this be so, the case is at an end. No plea or demurrer is necessary to raise an objection to the jurisdiction, where no equity appears on the face of the bill. *Pollard v. Patterson's adm'r*, 3 Hen. & Munf. 67.

This opinion renders it unnecessary for me to say any thing of the proofs in the cause, although I have carefully looked into them. They are of a nature to induce me to fear that injustice may have been done to the appellee, by a verdict and judgment for the full amount of the plaintiff's claim, and to wish that he could have had the advantage of another trial. But this he cannot have, consistently with sound and well established principles; and if he could, there is much reason to doubt whether equal injustice might not now be done to the appellant.

The decree directing a new trial must, in my opinion, be reversed, and the bill dismissed with costs.

CABELL and BROCKENBROUGH, J., concurred.

\*TUCKER, P. I cannot concur in the decree of reversal pronounced by my brethren; but I have so often and so unsuccessfully presented my views upon this question of jurisdiction, that I deem it neither necessary nor proper to repeat them here. The decree must be reversed and the bill dismissed, according to the opinions of a majority of the court.

Decree reversed and bill dismissed.

## 484 \*Handly v. Snodgrass and Others.

July, 1838, Lewisburg.

**Executors\*—Suit to Surcharge and Falsify Accounts—What Delay Insufficient for Refusing Relief.**—The delay of legatees for eight years to institute a suit to surcharge and falsify the settled accounts of an executor, is not sufficient ground for refusing relief, especially as one of the complainants was a female and under age when the settlement was in progress, though probably of full age when it was returned to the court of probate and recorded.

**Same\*—When Interest on Funds in Executor's Hands Applied to Disbursements.**—The principle established in *Garrell &c. v. Carr &c.*, 3 Leigh 407, applied where the will directed the estate to be put out at interest. The executor not having chosen to do so, he is to be considered as a borrower, and annually charged with interest; and such interest, and not the principal, is to be applied to the disbursements.

**Decrees;—Interest on Interest—Case at Bar.**—Although a decree gives interest on a sum which, according to the mode of stating the account, is itself interest, yet if it be manifest that a settlement upon proper principles would have made the balance larger, and that such balance would have been principal, the decree will not be reversed at the instance of the debtor.

**Legacies—Decree in Favour of Legatees Jointly—Right of Executor to Reversal.**—Where the decree for a sum due by an executor to legatees is in favour of all the legatees jointly for the whole sum, instead of being in favour of each legatee severally for his proper part, the error is not one by which the executor is aggrieved, and he has no right to have the decree reversed therefor.

**Executor's Account\*—Proper Mode of Stating.**—The proper mode of stating an executor's account after a reasonable time has been allowed for payment of debts, laid down in the opinion of the court delivered by the president.

\***Executors.**—On all matters pertaining to executors, see monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

†**Executorial Accounts—Settlement—Payments to Be Applied to Discharge of Principal.**—In *Anderson v. Piercy*, 20 W. Va. 326, it is said: "In executorial accounts both here and in Virginia the payments are applied to the discharge of principal and not of interest, so long as any principal is due; and the interest is brought into the account only at the close of the transaction. See *Granberry v. Granberry*, 1 Wash. 246; *Sheppard v. Starke*, 3 Munf. 29; *Burwell v. Anderson*, 3 Leigh 362. While this is the general rule for settling an executor's account, it is not an invariable one; but there is in this case no necessity to point out the exceptions to it, as they are inapplicable to the case under consideration. These rules for the settlement of an executorial account are continued, till there has been a reasonable time allowed for the payment of the debts of the estate, when the executorial account proper should be closed, and the balance then due from the executor should be charged against him as a borrower; and until the distribution of the estate from that time the account between him and the residuary legatees should be adjusted as an account between debtor and creditor. See *Handly v. Snodgrass*, 9 Leigh 480; *Garrett v. Carr*, 3 Leigh 416."

‡**Decrees.**—See monographic *note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

**Decree for Legacy—Failure to Require Refunding Bond—Effect.**—The former decisions, that a decree in favour of a legatee against an executor, which omitted to require a refunding bond, would be considered erroneous, and for such error would be reversed with costs, reviewed by the court, and a different rule now established.

**Same—Same—Appellate Practice.**—Where it is apparent that such omission was not intentional, but resulted entirely from inadvertence, an appellate court, if the decree be right in other respects, will affirm it so far as it has gone, with costs to the appellee as the party substantially prevailing, and will then proceed to make such further decree in relation to a refunding bond, as the court below ought to have made.

Robert Snodgrass made his will on the 3d of September 1806, whereby he desired  
485 all his just debts to \*be paid by his executors, for which purpose he subjected his estate in the first instance. Then he disposed of the residue as follows:

"I desire and do hereby authorize my executors to rent out my real estate and hire out my negroes, except the old woman Magg, who I wish to be hired by my executors, and in case she should be rendered incapable of work, as much of the money arising from her hire to be applied to her support; and all the rest of my personal estate, and the money (as much as is necessary) arising from said rent, hire and sale, to be applied to the maintenance and schooling of my children, and the balance, if any, to be put out to interest. I also desire, when my youngest child comes of age, that my land be sold in the way my executors think most to the interest of my children. I also will that as my children come of age or marry, that they receive an equal share of my personal estate; and as the education and maintenance of my youngest children will be more than the older ones, my will further is, that my executors pay, out of the rent of my land, such expenses as the guardian shall think necessary for that purpose. I also will, that the balance of the rent of the land, if any, and the money arising from the sale of said land, be equally divided be-

§**Refunding Bonds.**—See monographic *note* on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

¶**Appellate Practice—Costs.**—In *Marks v. Hill*, 15 Gratt. 400, 423, a decree was reversed with costs to the appellees. The court, citing the principal case, *Blessing v. Beatty*, 1 Rob. 287; *Williamson v. Howard*, 3 Rob. 39, and *Boyce v. Smith*, 9 Gratt. 704, as justifying it in decreeing the costs of the appeal to the appellees, said: "In all of these cases (cases above cited) the appellant succeeded in obtaining the correcting of errors, which if allowed to stand, might have operated to their prejudice; yet, in each case, the costs of the appeal were given to the appellee. In some instances, the decree of the circuit court was affirmed without prejudice; in others the decree was amended, and as amended, affirmed; and in others, the decree was reversed with costs to the appellees." See principal case also cited in *Drake v. Lyons*, 9 Gratt. 57.

For further authority in point, see monographic *note* on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

tween my sons Tilghman and William Adams, and my daughters Sabra, Elizabeth, Jenny and Miranda, when my youngest child comes of age. And I do request my friend and neighbour Edward Mitchell to take the guardianship of all my above named children, and to put out my said children to such places as he thinks best, and to superintend the education of my said children, and bind out my sons to trades when they come to proper age for that purpose. And I do hereby appoint my brother Joseph Snodgrass and Tilghman West executors of this my last will and testament."

At November term 1806 of Botetourt county court, the will was proved and admitted to the record, and Joseph \*Snodgrass qualified as executor. At the same time an order was made appointing appraisers of the personal estate; under which an appraisement was made in the same month. It amounted to 4101 dollars 31 cents.

Joseph Snodgrass, the executor, died in the summer or fall of 1809, having made a will, which was duly recorded, whereby he appointed Alexander Handly and John Walker his executors. Handly alone qualified; and thenceforth he acted as the executor of Robert Snodgrass.

Under an order of the court of probate, made at October term 1809, the accounts of Joseph Snodgrass as executor of Robert were stated by commissioners appointed for the purpose; and according to this settlement, which was returned to court and ordered to be recorded at August term 1810, there was a balance due from the executor on the 25th of November 1809, of 3066 dollars 78 cents.

Under an order made at February term 1823, a commissioner in chancery reported, that after giving notice to the parties, he had examined the accounts, and found the balance due from Joseph Snodgrass as executor, on the same 25th of November 1809, to be 2775 dollars 97 cents. He also took an account of Handly's transactions as executor of Robert Snodgrass, shewing how much he had received and paid, to November 1822, without making any annual rests. Handly having rendered an account of interest received by him for money loaned out, the commissioner debited him with the amount so received, but made no charge against him of interest upon the yearly balances.

The same commissioner made another settlement, under an order made at February term 1826, in which he charged Handly with farther sums received by him, gave him credit for farther payments and for commissions upon his receipts, ascertained the balance due from him, and stated the portions to which the different \*legatees were entitled of the balance thus ascertained. This settlement was returned and ordered to be recorded at November term 1826.

In 1834, a bill was filed in the circuit court of Botetourt by Tilghman Snodgrass, William A. Snodgrass and Miranda Snodgrass, to surcharge and falsify the accounts settled in 1823 and 1826. It stated, that Sabra and Elizabeth, two of the daughters mentioned in the will of Robert Snodgrass, had

died intestate and without issue, and that Jenny, another daughter, by her will gave the whole of her interest in the estate to the complainant Miranda for life, remainder to Robert S., Henry W. and William N. Snodgrass, infant children of Tilghman Snodgrass. The bill, besides detailing objections to numerous items in the accounts, particularly insisted that the executor ought to be charged with interest on the balances in his hands, annually, and that his disbursements ought to be defrayed out of the interest on the balances. It alleged that there were no demands against the estate, to prevent him from putting out those balances at interest; that loans were in fact made by him, and that borrowers were required to pay usurious interest. Handly and the infant children of Tilghman Snodgrass were made defendants.

Handly, by his answer, strongly objected to the settlements of 1823 and 1826 being disturbed after such a lapse of time, and relied upon the circumstance that the last settlement was made on the motion of the guardian of the complainant Miranda, and at the instance of the other plaintiffs in this suit. He stated, that when that settlement was returned to court and ordered to be recorded, all the complainants were upwards of twenty-one years of age, and some of them, as he believes, near thirty years old. And he charged that all of them were personally present, and that they were satisfied with and acquiesced in the settlement. They received from him the amounts coming to each according \*to the settlement, and executed to him refunding bonds.

The infant defendants answered by a guardian ad litem.

An order was made by the circuit court, directing Handly to settle his accounts before a commissioner of the court. Under this order, the commissioner stated an account, making annual rests on the 25th of November in each year. He charged the executor with the sums annually received by him for rents and hires, and gave him credit each year for commissions and disbursements, which were thus paid out of the receipts in that year. By stating the account in this way, and putting the disbursements against the principal, it appeared that on the 25th of November 1827, the day to which the settlement extended, the whole principal was exhausted; but there was a balance of interest due the estate, amounting to 1733 dollars 42 cents.

Both parties excepted to the commissioner's report, and the circuit court overruled the exceptions of both. Whereupon the court,—being of opinion that, under the circumstances of the case, the transactions should be considered as having closed on the 25th of November 1827, at which time the executor should have paid over to those entitled the amount in his hands; that the parties, from that period, stood towards each other in the relation of debtor and creditor, and the amount in the executor's hands should be considered as principal, upon which he should pay interest,—adjudged, ordered and decreed that the defendant Handly pay to the plaintiffs the said sum of 1733 dollars 42 cents,

with interest from the said 25th of November 1827, and their costs of suit.

From this decree an appeal was allowed, on a petition of Handly, repeating the ground taken in his answer as to the effect of the former settlements, and assigning the following additional errors:

489 1. That the circuit court had, by its decree, given interest upon the sum of 1733 dollars 42 cents from the 25th of November 1827 until paid, whereas the report of the commissioner shewed this balance to be composed entirely of interest, and the allowance of interest upon it was giving to the plaintiffs compound interest.

2. That the court had given a joint decree in favour of the plaintiffs, instead of ascertaining and determining how much the plaintiff Miranda was entitled to receive in her own absolute right, and how much she was to hold and enjoy during her life.

3. That the plaintiffs were not required to give refunding bonds.

Brockenbrough and Edward Johnson for the appellant.

J. F. Anderson and F. T. Anderson for the appellees.

TUCKER, P. The 1st point relied upon by the appellant in this case is, that the appellees having unreasonably delayed for eight years to institute this suit to surcharge and falsify the account of 1826, their bill should have been dismissed without farther enquiry. I cannot think so. One of the complainants was a female and under age when that account was in progress, though probably of full age when the report was returned and confirmed; and though the other complainants were of full age, the gross errors in the account of 1826 must satisfy every mind, that an equally gross ignorance alone could have prevented their taking measures for its correction. Moreover, the statute of 1826 having now established a limitation of ten years for suits of this description, we cannot, in a case like this, however inclined to frown upon stale demands, reject a party whose suit has been commenced within that period. Now here, the foundation of this suit being to surcharge and falsify the account of 1826,

490 the limitation must be taken from that date; or at most from \*1825, the maturity of the youngest child, before whose attainment of full age no account could be demanded according to the provisions of the will. I do not think, therefore, that this objection is valid.

2. As to the charge of interest upon interest from 1827. If this charge were wrong, still it is obvious that had the account been properly settled, the balance against the executor would exceed the sum now reported to be due. Carter's ex'ors v. Cutting and wife, 5 Munf. 238; Burnley's adm'or v. Duke &c., 1 Rand. 108. For by the will the estate was directed to be put out at interest, and according to the decision in Garrett &c. v. Carr &c. if the executor did not choose to do so, he is to be considered as a borrower, and should be annually charged with interest, and the interest and not the principal should be applied to the disbursements. A settlement upon this principle, even without holding him to

strict account for his large profits made by usury, would have made the balance much larger; and moreover, that balance would have been principal, as the interest and not the principal would have been absorbed by the disbursements. Moreover, the transactions of the estate were closed in 1827, at latest. They should have been considered as closed soon after the testator's death. According to the case of Garrett &c. v. Carr &c. the balance should have been struck after a reasonable time allowed for payment of the debts. The balance should have been charged against him as a borrower; and from that time until the distribution, the account should have been adjusted as an account between ordinary debtor and creditor. When the time of distribution arrived, the amount appearing due should have been apportioned at once among the distributees, and the portion of each carried to the separate account of each individually. It would then of course have been due, and being, as to them, a principal sum due, it would carry interest. The result is precisely the 491 \*same as the case now stands; and there is no error in this regard.

3. The next point I shall consider is the objection to the joint character of the decree. This is doubtless irregular, but it is no concern of the appellant; since the complainants having made themselves his joint creditors by taking a joint decree, he can safely pay to all or any, and the receipt of any one will be good against all. He can then suffer no injury; and if so, he was entitled to no appeal, since the statute gives the appeal only to those who are aggrieved by the decree. And such has always been the course of this court. The plaintiff in error must shew an error to his prejudice, or he will not be entitled to a reversal.

4. The remaining error assigned is the omission to require a refunding bond. I am free to confess, that in many former decisions of this court, this omission has been considered as a substantive error, for which decrees have been reversed with costs. The hardship of this case, however, with the conviction of the utter uselessness of such a bond, where thirty years have elapsed from the testator's death, and where his debts seem not to have amounted to 100 dollars at his decease, had pressed upon my mind the consideration of the propriety of conforming our practice in relation to this matter, to the recent decisions of the court in analogous cases, rather than to the former adjudications. It seems to me, that it is an abuse of justice to reverse the decree of an inferior court, not for an error in the actual judgment of the court, but for a mere omission or oversight, which in many cases the losing party stands by and witnesses without objection, that it may be used to his advantage in a superior tribunal. It is obvious that the failure in those cases to require bond is always an oversight. It is never intentional. If a court were to refuse to require it, there would be good ground of complaint. But where it is but an 492 omission, and where all the principles and details of a decree are in favour

of the appellee, ought the court nevertheless to reverse the decree? or ought it not rather to affirm it, taking care to correct it in the matter in which it is defective? In favour of the latter course of proceeding, there are numerous precedents of the affirmance of decrees in which there were important omission or defects to the prejudice of the appellant, where it was apparent that they resulted not from the judgment of the court, but from inadvertence. Of some of these cases I will take notice. In some, there was a reversal with costs to the appellee; in others, there was an affirmance, with a correction of the error merely.

Of the first description is the case of *Vail v. Nelson*, 4 Rand. 478. That was an injunction by a vendee against his vendor, on the ground that a title could not be had. The injunction was dissolved, and a conveyance ordered. The vendee appealed. This court was of opinion that the order was defective, in not annexing it as a condition of the dissolution, that the conveyance should be made. Yet it gave the appellee his costs, though it might seem that the appellant had good cause of appeal. The same principle was followed in *Cunningham v. Patterson*, 3 Rand. 66, where the court erred in not converting the necessary parties. In that case, judge Cabell, delivering the opinion of the court, makes this very appropriate remark: "Had the appellant, at the hearing of the cause, brought to the view of the inferior court the defects in the bill and in the order of publication, they would doubtless have been there amended or supplied. Not having done so, he shall not lie by and take advantage of them in the appellate court, to throw on the opposite party the costs of an appeal which the law never intended to allow for the correction of such defects." These are wise and just sentiments; and from the influence of them, courts have sometimes said that the counsel shall not  
493 be permitted \*to raise in the appellate court, for the first time, a point which, if made in the court below, might have been obviated. 18 Johns. Rep. 559. We follow this principle frequently, in rejecting objections to accounts where there has been no exception, and in other cases. *Brockenbrough & al. v. Blythe's ex'ors & al.*, 3 Leigh 619. And though it is not followed in all cases, yet I am of opinion that in cases of this description the principle is peculiarly appropriate.

I proceed to notice some cases, where, for errors against the appellant, the court has not reversed the decree, but has simply corrected the error. Such are the cases where the appellant's bill has been dismissed absolutely, when it should have been dismissed without prejudice. In these cases, although the appellant is aggrieved by a decree concluding his rights forever, yet the error is merely corrected, and the decree affirmed. Of this we have many examples. *Jones v. Pilcher's devisees*, 6 Munf. 425; *Stott & c. v. Baskerville & c.*, Id. 20; *Rootes v. Holliday & c.*, Id. 251; *Ellis v. Baird*, Id. 456. So too in *Rankin v. Bradford & al.*, 1 Leigh 163, 172, on an appeal by the purchaser of a trust sub-

ject, he was held liable. The court of chancery, however, directed an account of profits of a part of the slaves he had purchased and afterwards sold, with a view to charge him with those profits, instead of interest, for which alone he was liable. Here was an error by which he would have been aggrieved. Yet the decree was affirmed with costs to the appellee, and corrected instead of being reversed. So in *Lewis & c. v. Billips & c.*, 1 Leigh 366, though a decree was rendered against the holders of the legal title for a conveyance, without taking an account of the expenses of procuring it, and making the payment of them a condition precedent to the conveyance, yet there was no reversal, but an affirmance with costs, and the decree corrected.

494 \*Such, in my opinion, should be the course in this case. This court is not bound to follow a practice which is found pregnant with mischief. The practice of the courts should not, indeed, be lightly changed; but it is not like the rules of property, which can only be changed by legislative power.

Upon the whole, I am of opinion to affirm the decree with costs; correcting the error, as was done in *Hefner v. Miller & others*, 2 Munf. 43.

The other judges concurred. Decree affirmed with costs, and omission to require a refunding bond corrected.

#### 495 \*Parsons v. M'Cracken and Wife.

July, 1838, Lewisburg.

**Legacies—Distribution—Acquiescence—Effect—Case at Bar.**—A female slave is bequeathed by a father to his daughter, but the name of the slave having been altered after it was first written, it is doubtful whether the bequest is of Harriet or Helen. The executors, considering Harriet to have been the slave intended, deliver her to the daughter. She is of equal value with Helen, and indeed preferred by the daughter, who, though not of age, accepts her, and hires her out until Harriet dies. Helen is delivered to another legatee, and sold by him. After about twenty years from the time that the slaves were delivered to the legatees respectively, and more than five years from the time that the daughter attained full age, a bill in equity is brought by her husband and herself, to recover Helen and her children. **Held**, the length of time, and the acquiescence of the daughter in the manner of executing the will, are sufficient grounds for dismissing the bill.

**Statute of Limitations—Disability Must Exist When Right of Action Accrued.**—It seems, if a party

\***Statute of Limitations—Disability Must Exist When Right of Action Accrued.**—In *Jones v. Lemon*, 26 W. Va. 635, it is said: "In regard to the statute of limitations, the rule is well settled, that unless there is an express saving in the statute, no person will come within its exceptions, and the limitations will operate against persons under disability as well as against others; and the express exceptions refer only to such disabilities as exist at the time the right of action first accrued; for while, if several disabilities exist together at that time, the statute will only begin to run at the cessation of the last of them, yet if a second disability occur after those

claim the benefit of the saving for infants and femes covert in an act of limitations, no other disability is available than the one which existed when the right of action accrued.

The will of James Parsons was admitted to record in the county court of Hardy on the 13th of April 1813; and on the same day, Rebecca Parsons and Isaac Parsons qualified as executrix and executor.

By a transcript from the records of the said court, it appeared that the will contained, amongst other things, the following clause:

"I give and bequeath to my three daughters Betsy, Amanda Malvina and Rebecca Parsons 1000 dollars each, to be paid to them out of my home place, by my son James Parsons, when they arrive at twenty-one years, and to their heirs. And to Betsy I give negroes Sally and Sambo (son of Jane); to Amanda Malvina I give negroes Viney and Jerry; and to Rebecca I give negroes Helen and Tom. All this I bequeath to my three daughters and their heirs forever."

496 \*Rebecca having intermarried with William M'Cracken, a bill was filed by M'Cracken and wife in the circuit court of Hardy county on the 20th of November 1833, setting forth, that the executors never assented to the bequest of the said slave Helen, but suffered the testator's son James Parsons to make sale of her to George Fisher, who still had her and her children, which were numerous, in his possession, and refused to give possession of them to the complainants. The executrix and executor were made defendants, together with James Parsons and George Fisher.

Rebecca Parsons the executrix answered, that immediately after the death of the testator, his will was opened and examined by her and her coexecutor, with a view to its execution and the distribution of his property according to its provisions; when it became apparent that the slave Harriet was bequeathed to his daughter Rebecca, the female complainant, to whom she was accordingly delivered. Respondent stated, that although there might to a stranger be some difficulty in deciphering the name of the female slave bequeathed to Rebecca, yet she encountered none, inasmuch as she was

then existing have ceased, it cannot be pleaded, for it is the settled law, that if the statute has once begun to run, no subsequent event will interrupt it. 1 Bar. Ch'y Pr., sec. 34; Ang. on Lim. secs. 194, 197; *Parsons v. M'Cracken*, 9 Leigh 496; *Caperton v. Gregory*, 11 Gratt. 506; 1 Rob. (new) Pr. 606." And in *Hancock v. Hutcherson*, 76 Va. 612, it was said to be a well established principle that one disability cannot be tacked on to another to avoid the limitation to any proceeding in law or equity.

In accord, see *Blackwell v. Bragg*, 78 Va. 529, 536, 536; *Drumright v. Hite*, 2 Va. Dec. 468; *McDonald v. Hovey*, 110 U. S. 619, 4 Sup. Ct. Rep. 143, 144; *East Tennessee, etc., Co. v. Wiggin*, 68 Fed. 451, all citing the principal case. Also, in *Dennis v. Anderson*, 3 H. & M. 289; and *Hudsons v. Hudson*, 6 Munf. 352, it was held that when the act of limitations once begins to run, its operation does not cease by the intervention of infancy, coverture, or any other legal disability.

acquainted with the intention of the testator, and the general understanding of the family as to that intention, previous to his death. Harriet was always regarded in the family, previous to the testator's death, as the slave intended to be given to Rebecca. After he died, and Harriet was delivered to Rebecca, she was controlled, hired out &c. by Rebecca, until she the said Harriet died. At the time when Fisher was negotiating with James Parsons for the purchase of Helen, Rebecca was present, advised him to purchase her, and represented her to be an honest, faithful and industrious servant.

Isaac Parsons the executor stated in his answer, that shortly after the testator's death, to wit, in the winter of 1814-15, he removed to the county of Randolph, where he remained about seven years, and 497 that he had not controlled \*or made any distribution of the property of the testator; that, in fact, the whole estate, together with a copy of the will, was delivered to James Parsons, who, by its provisions, was made responsible for the testator's debts.

The clause of the will creating this responsibility is as follows:

"I give my said son James all out surveys, and all property not willed or bequeathed, and all debts due me, and subject him my said son to the payment of all my just debts and funeral expenses, and direct that all property undivided or willed be disposed of for this purpose, and the surplus, if any, be his, if a deficiency be made good by him."

James Parsons answered, that shortly after the testator's death, the executors delivered him the negro girl Helen, and he held her until 1821, when she was levied upon by the sheriff, under an execution of Nicholas guardian of the heirs of Jonathan Parsons against the testator's estate, and in order to discharge the same, he sold her and her child to Fisher for 400 dollars, which was applied in payment of the execution. Respondent stated, that after the death of the testator, a copy of the will was procured, and, as well as he recollects, the name of the slave bequeathed to Rebecca was there written Harriet; that it was understood by all parties that Harriet was the slave bequeathed to her; and he never heard otherwise, until M'Cracken brought a suit at law against Fisher. After Rebecca came of age, he heard her say that she believed Harriet was the girl intended for her, and that she would rather have had her, if she had not died. Respondent relied upon the statute of limitations in bar of the claim, and prayed that he might have the benefit of it as if specially pleaded.

Fisher stated in his answer, that upon examining the original will, the court would perceive that the name of the female slave had been altered; that it appeared,

498 \*from the colour of the ink, to have been first written Helen, and to have been subsequently altered with paler ink to some other name, supposed to be Harriet; that the change was manifest in the two letters "rr," which appeared in paler ink. He relied upon the understanding of the family

that Harriet was the slave bequeathed to Rebecca, and upon the statute of limitations; and insisted that even if the slave purchased by him was the slave bequeathed to Rebecca, and if the statute of limitations should not be a bar, yet as Rebecca accepted Harriet as the slave bequeathed to her, held her in possession until she died, was present when respondent purchased, and set up no claim, and she and her husband had so long acquiesced in the transaction, a court of equity should not sanction the claim.

The plaintiffs replied generally to the answers, and depositions were taken on both sides, the purport whereof is mentioned in the opinions of the judges.

At the hearing, the circuit court decreed in favour of the complainants against James Parsons for 400 dollars (that being the price at which it was agreed by the parties that the female slave in the bill mentioned was sold by James Parsons to George Fisher on 15th of June 1821) with interest from the said 15th of June 1821 till paid, and the costs. And the decree provided that if the execution should prove ineffectual, the defendants Isaac Parsons and Rebecca Parsons were then to pay the complainants so much as they should fail to make from James Parsons, and execution might issue against them for the same. For the costs, the decree was joint against the said three defendants; and as to Fisher the bill was dismissed.

On the petition of James Parsons, an appeal was allowed him; and the parties consented of record that the cause should be tried at Lewisburg.

The attorney general for the appellant.

Kercheval for the appellees.

499 \*PARKER, J. The decree in this case ought in my opinion to be reversed, and the bill dismissed with costs.

In the view I take of the law applicable to the facts stated in the record, it is not very material to determine whether the girl Helen delivered to James Parsons the younger by the executrix and executor of the testator, was the one intended for Rebecca the complainant, or not. There is certainly sufficient indistinctness in the handwriting of the original will, to render it a very doubtful question of fact, whether the testator wrote Helen or Harriet; which ought to have been submitted to a jury, if the case turned upon it, and which serves to free all the parties concerned in the subsequent arrangement, by which the first named slave (sometimes called Ellen) was delivered to the appellant, and Harriet to Rebecca, from every imputation of fraud, or wilful substitution of the one for the other. This being so, I am willing to regard the case as one in which the representatives of the testator, intending to deliver to Rebecca the slave bequeathed to her, by mistake delivered to her another of equal value, whilst they assigned her slave to the appellant, as one of those to which he was entitled under the will: and in this, the strongest point of view for the appellees, I can see nothing to prevent the appellant from claiming the benefit of the act of limitations.

As soon as the executrix and executor attempted to distribute the property bequeathed by the will among the different legatees, they assented to the legacies, and vested the legal title in each one, according to his or her respective rights. Thus by delivering to Rebecca, with intent to comply with the will, a slave, although not the right one, they assented to the legacy of such slaves as she was really entitled to, and the legal title passed. Any act done by an executor shewing that he wishes to carry the will of his testator into effect, and

500 \*that he does not desire to detain the property from the legatee for payment of debts or for any other purpose, is an assent (2 Wms. on Ex'ors 846); and here there was the most unequivocal evidence of consent to the bequest to Rebecca of two slaves, both of whom the executors supposed they had delivered at the same time that they distributed the other slaves among the rest of the legatees. After that distribution, the trust was at an end, and whether the slaves bequeathed got into the hands of third persons, or even returned to the possession of the executors, the legatees of James Parsons the elder might have maintained their actions at law to recover them, unimpeded by any difficulty about the legal estate. Doe v. Guy, 3 East 120; 2 Wms. on Ex'ors 849.

What then can prevent the appellant from claiming the benefit of the act of limitations? His possession was adverse to all the world, and there can be no doubt that after five years he would have been protected against the action of the trustees. But in cases of this nature, the bar of the trustee is a bar of the cestui que trust. 2 Preston on Abstracts 380. And moreover, he was, at most, only constructively a trustee, or a trustee by implication; and confessedly, against such trusts, the acts of limitations may run, so as to bar the cestui que trust. Id. 377; and Kane v. Bloodgood, 7 Johns. Ch. Rep. 90, where all the cases are reviewed. The trusts unaffected in a court of equity by the act of limitations, are only the technical and continuing trusts which are not cognizable at law, but are the mere creatures of equity, falling within its proper, peculiar, and exclusive jurisdiction. But here the appellant never assumed any trust for the benefit of the appellee Rebecca, and if he was a trustee at all, he was such by implication; and even that was at an end, after the representatives of James Parsons the elder divested themselves of the trust by assenting to the legacies, and perfecting, by delivery, the legal title of the legatees.

501 \*The case, then, was one to which the plea of the act of limitations would certainly apply; and we have only to inquire whether the facts proved supported the defence set up by the appellant.

James Parsons the testator died in 1813. Rebecca Parsons and Isaac Parsons qualified to his will in April of that year. Soon after, they delivered the slaves bequeathed to the respective legatees, with intent to comply with the directions of their testator, and amongst them the slave Harriet to Rebecca the appellee, who was then about the age of



16, and the slave Helen to the appellant. In the year 1824 or 1825, Rebecca attained full age, and in 1833 this suit was brought. From the period of her majority, the act began to run, and no subsequent disability would arrest it. If therefore her marriage was afterwards (a fact not ascertained by the record) it would not avail her; and if it took place during her minority, she was bound to prove it (if not to reply it) in answer to the appellant's plea. But suppose she had averred and proved that the disability of coverture occurred before the disability of infancy had ceased: this would bring up the question whether cumulative disabilities occurring in the same person will prevent the operation of the act. Considering the act as a wise and beneficial statute of repose, intended to quiet titles to property after the lapse of a reasonable time, without working injustice to claimants, I am of opinion that cumulative disabilities ought not to prevent its operation; and that, upon a sound construction of the act, a party claiming the benefit of the proviso can only avail himself of the disability existing when the right of action first accrued; since otherwise the assertion of claims might be postponed for the period of the longest life, and possessions disturbed after sixty, eighty, or even a hundred years. It is well settled in England, that if successive disabilities occur in different persons, they afford no protection.

502 *Doe v. Jesson*, 6 East \*80. The American authorities go farther, and apply the same rule to disabilities in the same persons; and there is no adjudged case in England to the contrary, although Blanshard and Preston have taken a distinction between successive disabilities in the same, and in different persons. The American authorities to which I refer, and which I am disposed to follow, are *Eager and wife v. Commonwealth*, 4 Mass. Rep. 182; *Demarest v. Wynkoop*, 3 Johns. Ch. Rep. 129; *Jackson v. Wheat*, 18 Johns. Rep. 40; *Bradstreet v. Clarke*, 12 Wend. 602; *Thompson and others v. Smith*, 7 Serg. & Rawle 209; *Doe et al. v. Lewis et al. v. Barkdale*, 2 Brock. Rep. 436, to which may be added the case of *Swann v. Selden*, in this court, where I understand the same doctrine was recognized by judges Cabell and Brockenbrough.

Nor do I think that the executors were liable after such a lapse of time, and under the circumstances of this case. The trust was not a continuing one, but at an end when they assented to the legacies. They acted in good faith in delivering Harriet, instead of Helen, to the appellee Rebecca, for, being of equal value, they could have had no motive to act otherwise. This arrangement was acquiesced in for near 20 years, and for 8 or 9 after Rebecca attained the age of 21; and if Helen had died, instead of Harriet, we should have heard no complaint from the appellees. Under this state of things, it would, as I think, be inequitable to charge these representatives with the value of the slave Helen, even admitting that she, and not Harriet, was the one designed for Rebecca by the testator.

BROCKENBROUGH, J. From an inspec-

tion of the original will in this case (brought up by a subpoena duces tecum) it seems doubtful what was the name of the slave devised to Rebecca Parsons, now Mrs. M'Cracken, the female appellee. It is difficult to make out either the name of Harriet or Helen. It is apparent that the 503 \*name begins with an H, and that there has been an alteration. This alteration was no doubt made by the authority of the testator before publication of the will, there being no suggestion to the contrary.

To my vision it appears that the word was first written Helen, in black ink: that it was altered with paler ink; the first e converted into a; then two r's mounted on the l and second e (the tops of the two r's in pale ink are plainly visible); then an i made out of the first member of the n, the dot of the i and the top of it being made in pale ink; then an e made out of the second member of the n; and the dash to the n, made originally with the black ink, converted into an obscure t, by a cross at the top of the dash with pale ink; thus making the name Harriet. Such is my impression, I may say my conviction, from the appearance of the paper.

But such is the confusion in the word, produced by the alteration, that parol evidence is, in my opinion, admissible to prove what slave was intended. It is apparent from the will itself, that the testator intended to bequeath a female and a male slave to his daughter Rebecca. He had three daughters, Betsy, Amanda Malvina and Rebecca, whom he meant to make equal. To each of them he gave one thousand dollars, to be paid at the age of twenty-one. In the same clause he says, "And to Betsy I give negroes Sally and Sambo (son of Jane)" (that is, a female and male negro); "to Amanda Malvina I give negroes Viney and Jerry" (another female and male); "and to Rebecca I give negroes H — and Tom." It seems morally certain that he intended to give a female negro with a name beginning with the letter before mentioned, and a negro boy Tom. But what female was intended? Here is a latent ambiguity. If it were strictly a patent ambiguity, such as occurs when a blank is left for a devisee's name in a will, then indeed no parol evidence

504 \*would be admissible. *Baylis v. Attorney General*, 2 Atk. 239, 2 Williams on Executors 738. The result of this decision would be, that the plaintiff Rebecca would not be entitled to any female negro, and the bill would be dismissed. But the will shewing that a female negro was intended to be bequeathed (being probably Harriet or Helen) the ambiguity is latent, and susceptible of being explained by parol evidence. It is like the case of a blank for a christian name only, or of a devise to Mrs. G. in which cases the ambiguity was declared to be latent, and parol evidence admitted to explain who the person was. *Price v. Page*, 4 Ves. 680; *Abbot v. Massie*, 3 Ves. 148; 2 Williams on Executors 738.

If we admit the parol evidence, there can be little doubt that Harriet was the negro bequeathed, and not Helen. The answer of James Parsons the residuary legatee avers,

that shortly after the death of the testator, the clerk of Hardy court furnished the executor with a copy of the will, in which the name written was Harriet. The clerk proves that he furnished the copy, and took pains to write the name exactly as it was written in the will; he does not say whether he copied it Harriet or Helen, or what it was, nor is that copy in the record; so that the proof on that subject is not so strong as it might have been made. There were, however, only two females in the estate whose names began with an H. These were Hannah and Harriet. The former was superannuated, and she could not be the person. The scrivener, however, might have given another name beginning with H. by prefixing that

aspirate to Ellen, there being a young slave known by the name of Ellen or Eleander. But that the name, though most probably written Helen originally, was subsequently changed to Harriet, is proved by the following evidence. The executor and executrix (the eldest son and widow of the testator) who saw the original \*will, and had the first copy made out by the clerk, delivered Harriet to the plaintiff Rebecca. They had no motive for giving up Harriet instead of Ellen, since the former was as valuable as the latter. Four members of the family, witnesses in the cause, prove that the testator had been heard to say that he intended Harriet for his daughter Rebecca; that Rebecca, both before and after the death of her father, claimed Harriet as hers; that the family, after the death of the testator, uniformly considered Harriet as belonging to Rebecca; that Rebecca, though a young lady under age, held Harriet as her own, and hired her out; and that Rebecca, when the defendant James Parsons, the residuary legatee, was about to sell Ellen to pay a debt of the testator, advised George Fisher to purchase her, thus disclaiming any right to the said Ellen. This is a mass of corroborative testimony, proving, to my satisfaction, that Harriet, and not Helen, was the slave bequeathed. It is so strong, that I do not think it was necessary to direct an issue to try the fact. For this reason, I am of opinion that the decree should be reversed, and the bill dismissed.

But, secondly, admit that the name is Helen, and that by mistake the executors gave their assent to the legacy of Harriet, and delivered her as the slave bequeathed: can the appellee M'Cracken and his wife Rebecca now recover Ellen and her offspring, or their value, from the residuary legatee James Parsons, to whom Ellen was delivered by the executors soon after the death of the testator? or are they not barred by the statute of limitations?

I will here remark, that if Rebecca Parsons had been of age when the executors delivered to her the girl Harriet, and she had in due time, having discovered the mistake, filed her bill in equity against the executors to recover Ellen, she could not have recovered her, without tendering to restore Harriet to the 506 executors or \*to the residuary legatee, if Harriet was living. Equity would require the restoration as a condition of the recovery, because it would be iniquitous to

recover both when only one was given. If Harriet had died before the demand of Ellen, then a question might arise whether a loss occasioned by the act of God would fall on her who was in possession of Harriet, or on him to whom she belonged, and from whom the possession had been withheld. I incline to the opinion that Ellen and her offspring could not, in that case, have been recovered by Rebecca, without holding her responsible for the value of Harriet whilst living. Nor do I think that the circumstance of Rebecca's being under age when she received Harriet as the negro bequeathed to her, would make any difference. I apprehend that her infancy would not, in such case, change the rule of equity.

Passing over this question, however, let us next enquire whether the appellees M'Cracken and wife are not barred by the act of limitations from a recovery against the appellant Parsons? The executors assented to the legacy of Ellen with the other residuary estate to James Parsons, in 1813, soon after the death of the testator, and gave him possession of the said slave. This was an adversary possession, and he and Fisher held the possession till 1833, when this suit was brought. An adversary possession of a slave for five years confers of itself a legal title, and that adversary possession and title in James Parsons and Fisher is a complete protection to them against the demand of Mrs. M'Cracken, whether hers be a legal or an equitable claim, unless her disability of infancy or coverture extended to the period of the suit brought, or unless Parsons can be deprived of the benefit of the act by being a trustee for Mrs. M'Cracken.

If she had the legal title to Ellen conferred on her by the assent of the executors, 507 who by mistake gave the \*possession to another, then unquestionably she is barred from asserting her legal right, by the adverse possession of five years in another, after her disability ceased.

But if the legal title to Ellen did not pass to the female appellee by the assent of the executors as aforesaid, (as I incline to think it did not\*) yet her equitable title is barred as against her colegatee, though it may not be barred as against the executors. The statute of limitations is a good plea in equity, as well as at law; for though equitable actions are not within the words of the statute, yet the time prescribed by it has been adopted by courts of equity as a proper period for a bar in analogous cases.

Now, the executors having assented in 1813 that the legatees should take their respective legacies, the right of Rebecca Parsons to file

\*Note by the Judge. If a testator bequeath a horse to A. and a mule to B. and the executor, intending to give his assent to these legacies, by mistake assent to B.'s taking the horse and A. the mule, or give possession in that way to the several legatees, does the legal title to the horse vest in A. so that he can recover him from B. in an action of detinue? I incline to think not, because the assent of the executor has never been given to A.'s taking the horse: his title is therefore still inchoate, and can only be enforced, I apprehend, in equity.

her bill for the recovery of Ellen accrued at that period. At that time she was under the disability of infancy; but that disability ceased in 1824. If she married after she came of age (a fact not ascertained) her subsequent coverture was not a disability which would obstruct the operation of the statute: and even if she married whilst yet an infant, we cannot mount one disability on another so as to present a continuous obstruction to its operation. This is abundantly shewn by my brother Parker, and I will not repeat his arguments, nor his authorities. The disability of infancy ceasing in 1824, and the suit not being brought till 1833, she is barred by the act.

508 \*But it is said that the defendant James Parsons was a trustee, quoad the slave Ellen, for his sister, and that trusts are not within the statute. But this is not such a trust (if a trust at all) as will impede the operation of the statute. At most, he is only a constructive trustee; and such a trust will not enable a cestui que trust to recover, who is otherwise barred. *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 90. If the appellant be such a trustee, yet he has always denied the right of his cestui que trust to recover: he has held possession of the slave for nearly twenty years under a title adverse to hers, and he cannot be compelled to hold it under the same title, merely to enable her to set aside the statute. *Hudsons v. Hudson's adm'r &c.* 6 Munf. 352. As to the appellant James Parsons, then, the bill should have been dismissed.

The reversal of the decree as to the appellant will necessarily reverse it as to the executors; for as they were decreed to pay the money only in the event that the plaintiffs should fail to recover it by execution against the appellant, and as they can have no execution against the appellant, none can issue against the executors. But a question arises whether the bill should be directed to be dismissed against them also.

They have not pleaded the act of limitations; but, under the circumstances of the case, it would seem to me to be against equity to render any decree against them.

They assented to the legacies, and delivered possession, as they understood the will, and as it was understood by the respective legatees: there was an acquiescence under this distribution for twenty years; for more than eight years after the female appellee arrived at full age, and for more than twelve years after Ellen was sold to pay the testator's debts. By allowing this long period to elapse, she has enabled the residuary legatee to resist effectually the demand against him, and if a decree be now rendered against

509 the executors, \*they would be forever precluded from recovering over against that legatee. I think, therefore, that the bill should likewise be dismissed against them.

On the whole, I repeat my opinion, 1st, that the female appellee never had a claim against either the executors or the residuary legatee, the slave given to her being Harriet and not Ellen; and 2ndly, that if it was Ellen, yet the act of limitations bars the recovery.

TUCKER, P. Upon inspecting the original will in this case, I think that the uncertainty as to the female slave intended to be given to Rebecca is so great, that she cannot be regarded as entitled to any particular female, though she had doubtless a right to some one out of the estate. One was accordingly assigned her, of equal value to Ellen; and after twenty years the transaction cannot be unravelled.

But admit that the doubtful name is Ellen or Helen (for with many persons the names might seem the same) yet the executors, in delivering over the legatees, as they were bound to do, have in good faith delivered to her Harriet, whom the female appellee preferred, and considered as the slave designed for her; and she accordingly accepted her, and hired her out till her death. Ellen, on the other hand, was delivered to the appellant, as part of his residuum, and has been sold for payment of the testator's debts. Now, although Rebecca was under age, and might have objected if the wrong slave was delivered to her, yet it behooved her, or those holding her rights, to make the objection in reasonable time, at least after she came of age in 1824. For as in partitions, however irregular, length of time will give a sanction to the division, where there has been no fraud, unfairness or inequality (3 Call 13, 2 Rand. 418, 2 Atk. 542,) so, *pari ratione*, in the delivery of their legacies to specific legatees, although there be a mistake, and the slave of A. be given to B. and that of B. to A. yet if there is no wrong done, and all

510 \*the parties have acquiesced for years, a court of equity must quiet the respective parties in their possession. It will not permit them to hold back and wait the course of events; to abide by the distribution or allotment until circumstances change, or to keep themselves aloof, so as to enforce or abandon their right according as events may make it advantageous. In this case, had Harriet lived, and Ellen died without children, the appellees would doubtless have held on to the slave delivered to them as their legacy; and the death of Harriet and the fruitfulness of Ellen is the obvious occasion of the present controversy.

It is true that Rebecca was an infant; but she came of age in 1824, when her disability ceased; for, notwithstanding some loose opinions to the contrary, she cannot tack the disability of marriage to that of infancy. *Swann v. Selden*, lately decided in this court. *Stowel v. Zouch*, Plowd. 355; 2 Hen. & Munf. 306. Her claim, then, should have been asserted within five years from that date, for her brother's possession was in every sense adverse to hers. Even if he were a constructive trustee (which I doubt) yet the trust with which he is affected would not deprive him of the protection of the statute. *Kane v. Bloodgood*, 7 Johns. Ch. Rep. 123; *Beckford and others v. Wade*, 17 Ves. 97; *Elmendorf v. Taylor*, 10 Wheat. 168; *Hudson v. Hudson's adm'r &c.* 6 Munf. 352. He is only a trustee for the sake of the remedy. He holds the legal title derived from the executors, claiming the slave as his property, and thus having a possession adversary to all the world.

More than eight years have elapsed since the removal of his sister's disability, so that the statute offers a perfect bar to her demand.

Upon the whole, I think the decree should be reversed, and the bill dismissed.

The other judges concurring, decree reversed and bill dismissed.

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**\*Parks v. Hewlett & C.**

July, 1838, Lewisburg.

(Absent BROOKS, J.)

**Scroll—When It Has the Force of a Seal.**—A scroll affixed to an instrument has the force and obligation of a seal, when it appears by the instrument that the person making the same affixed the scroll by way of seal.

**Same—When Affixed by Way of Seal—Case at Bar.**—Where it is stated at the foot of an instrument of

**\*Scrolls—When Affixed by Way of Seal.**—In Virginia, by statute (1 Rev. Code, p. 510, § 94; Va. Code 1887, § 2841), it is provided: "Any writing, to which a natural person making it shall affix a scroll by way of seal, shall be of the same force as if it were actually sealed." Under this statute, the question naturally arises, When is a scroll affixed "by way of seal"?

Where a writing is required by law to be under seal in order to be effective, it is not necessary for a scroll affixed to the signature of the grantor to be recognized as a seal in the body of the writing in order for such scroll to be regarded affixed "by way of seal." In such a case, the instrument is considered under seal (or, in other words, the scroll is considered affixed "by way of seal") if the instrument be acknowledged or proved in order to authenticate it for recordation, although the scroll is not recognized in the body of the instrument. Thus, in the principal case, an instrument of emancipation—which could only be effected by deed, and was wholly inoperative until recorded upon proof or acknowledgment as the act required—had a scroll affixed to the signature. This scroll was not recognized in the body of the instrument, but the attesting clause purported that it was sealed as well as delivered, and it was proved by the subscribing witnesses in court and admitted to record. It was held that the instrument was a sealed instrument, for it sufficiently appeared that the grantor affixed the scroll by way of seal.

Again, in *Ashwell v. Ayres*, 4 Gratt. 283, an instrument purporting to convey land (which must be under seal to be effective) had a scroll attached to the grantor's signature. The scroll was not recognized as a seal either in the body of the instrument or in the attestation clause, but the paper had been acknowledged in court by the grantor as his deed and admitted to record. It was held that such acknowledgment was a sufficient recognition of the scroll as a seal to make the instrument a deed. See also, *Pollock v. Glassell*, 2 Gratt. 439, 454, citing the principal case.

But a different rule prevails where the writing is not required by law to be under seal. In such cases, it is the settled doctrine that the scroll is not affixed by way of seal unless it be acknowledged as a seal in the body of the instrument. See *foot-note* to *Clegg v. Lemessurier*, 15 Gratt. 108, for a collection of authorities supporting this proposition. In *Clegg v. Lemessurier*, 15 Gratt. 108, 119, the rule was thus stated: that in cases of contract in writing which might have been intended to be, indifferently, sim-

emancipation, that it was signed, sealed and acknowledged in presence of two attesting witnesses, and the instrument is afterwards duly

ple contracts or sealed instruments and in which the question is as to the character of the instrument and its legal effects and consequences, the fact that a scroll may be affixed to the name of the maker with or without the word "seal" written within is not of itself such a recognition of the scroll for a seal as will make the writing a sealed instrument; and that evidence dehors the paper cannot be admitted for the purpose of showing that it was in fact intended to be such an instrument. In this case, JUDGE LEE, delivering the opinion of the court, said that, while he concurred in the result reached by the principal case, and *Ashwell v. Ayres*, 4 Gratt. 283, these cases can be readily distinguished from such cases as *Baird v. Blaisgrove*, 1 Wash. 170; *Austin v. Whitlock*, 1 Munf. 487; *Anderson v. Bullock*, 4 Munf. 442; *Jenkins v. Hurt*, 2 Rand. 446; *Peasley v. Boatwright*, 2 Leigh 195; *Turberville v. Bernard*, 7 Leigh 302; *Cromwell v. Tate*, 7 Leigh 301; for, in each of these latter cases, the writing might have been indifferently an obligation under seal or a simple contract, and neither acknowledgment before witnesses or in court nor recording was necessary to make the writing operative.

And in *Bradley Salt Co. v. Norfolk, etc., Co.*, 95 Va. 461, 468, 28 S. E. Rep. 567, where it was held that an actual seal affixed to a contract for the sale of personal property must be recognized in the body of the contract in order to make it a sealed instrument, JUDGE BUCHANAN, in delivering the opinion of the court, said: "There is a class of cases like *Parks v. Hewlett*, 9 Leigh 511; *Pollock v. Glassell*, 2 Gratt. 439; and *Ashwell v. Ayres*, 4 Gratt. 283, referred to and explained in *Clegg v. Lemessurier*, 15 Gratt. 115, etc., in which the instrument under consideration was required by law to be under seal in order to be effective, where a different rule was applied. Nothing that has been said in this opinion is intended, in any wise, to refer to or affect the rule in that class of cases."

While all subsequent cases seem to approve the decision reached in the principal case, yet some of the views expressed by JUDGE PARKER, in delivering the opinion of the court, have been questioned. In *Clegg v. Lemessurier*, 15 Gratt. 116, it is said: "It is true that JUDGE PARKER, in his opinion in *Parks v. Hewlett*, seems strongly inclined to the views which he must have held when he decided the case of *Cromwell v. Tate* (7 Leigh 301), which was afterwards reversed and he uses various expressions which might embrace promissory notes as well as such instruments as that he was then considering; and he refers to the fact that in none of the previous cases relied on, was there any proof that the instrument had been actually sealed or scrolls annexed by way of seals. But it appears that he had not seen the opinion in the case of *Cromwell v. Tate*, in which all the judges had concurred, and it is impossible to suppose that the same judges who had so recently decided that case intended to disturb the principles on which it rested as to cases of that kind. No allusion whatever is made by any judge who delivered an opinion to any change of views in any respect, and it is plain they regarded the case they were considering as belonging to a distinct class and indeed we are informed by JUDGE PARKER that he had been assured by the judges who were present when *Cromwell v. Tate* was decided that there was nothing in their opinions affecting the

proved by the witnesses in the county or corporation court. It sufficiently appears that the person making the instrument affixed the scroll by way of seal.

**Emancipated Slaves—Liability of Increase for Debts of Emancipator.**—Though a slave emancipated by the owner is liable to be taken by execution to satisfy a debt contracted by the owner before making the emancipation, yet if the slave be a female, and have children after the emancipation, the children who are born while the mother is enjoying freedom are not liable to be taken for any such debt.

Suit for freedom in the circuit court of Kanawha county, by William Hewlett and Taylor Hewlett, suing in forma pauperis by Lavinia their mother and next friend, against Andrew Parks.

It appeared at the trial that Edmund Edrington had executed an instrument in writing, purporting to emancipate and set free his slave Lavinia, which concluded in these words: "In testimony whereof, I have hereunto set my hand, this 21st day of October in the year of our Lord one thousand eight hundred and seventeen.

Edmund Edrington (Seal.)

Signed, sealed and acknowledged in presence of us

Alex'r R. St. Clair, Walter H. Tapp."

The instrument so attested was, on the 17th of November 1817, proved by the two witnesses in the corporation court of Staunton. The woman Lavinia mentioned in the instrument was the mother of the 512 plaintiffs. \*The plaintiff William was born about one year, and the plaintiff Taylor about three years, after the execution and recording of the instrument. Both plaintiffs were registered as free persons, in the hustings court of Staunton, on the 8th of July 1823.

On the 25th of June 1825, Andrew Parks

question in the case of *Parks v. Hewlett*. JUDGE BROCKENBROUGH and JUDGE CABELL considered the case as clearly distinguishable from all the previous cases, and TUCKER, president, who had delivered the opinion of the court in *Cromwell v. Tate*, contented himself with concurring in the result to which JUDGE PARKER had come, for the reason, no doubt, that there were some views presented in JUDGE PARKER's opinion which to some extent conflicted with the opinion in *Cromwell v. Tate* which had not been seen by JUDGE PARKER when *Parks v. Hewlett* was decided."

And in *Reusens v. Lawson*, 91 Va. 246, 21 S. E. Rep. 347, the following language of JUDGE PARKER in the principal case is disapproved by BUCHANAN, J.; "If, in the attestation of an instrument, it is stated to have been sealed in the presence of witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper." JUDGE BUCHANAN says: "In the absence of other facts, I do not think such a paper as JUDGE PARKER describes could be held in this state to be a sealed instrument."

See further on this subject, monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801; monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

†Emancipation of Slaves—Condition Subsequent.—

obtained a decree for a sum of money against Edmund Edrington and John Temple; and soon afterwards he sued out an execution on the decree, and levied it upon the plaintiffs, on the ground that the debt due him was contracted by Edrington before the emancipation was made; that the woman Lavinia, being emancipated after the debt was contracted, was liable to be taken by execution to satisfy it; and that her children, born after the emancipation, could not be more exempt than herself.

The foregoing facts were stated in a special verdict, which found also facts in relation to the debt, to enable the court to determine whether it was contracted before or after the emancipation; but that question being immaterial in the view taken of the case, it is unnecessary to set out those facts.

The circuit court adjudged the law upon the special verdict to be for the plaintiffs; and a supersedeas was allowed to the judgment.

Baldwin and Summers for plaintiff in error. B. H. Smith for defendants in error.

PARKER, J. The first question naturally arising in this case, and to be first decided, is whether the instrument of writing executed by Edrington, purporting to emancipate Lavinia the mother of the defendants in error, which is dated the 21st of October 1817, and was recorded in the corporation court of Staunton on the 17th of the next month, be or be not made in pursuance of the act of assembly, 1 Rev. Code, ch. 111, § 53, p. 433.

513 \*The objection is, that it is not a sealed instrument; and by the act it is only made lawful "for any person, by his or her last will and testament, or by any other instrument in writing, under his or her hand and seal, attested and proved in the county or corporation court by two witnesses,

To the point that if the owner of slaves emancipated them he could annex no conditions subsequent, repugnant to the freedom conferred, the principal case is cited in *Forward v. Thamer*, 9 Gratt. 537, 539, and *foot-note*.

**Slaves—Distinction between Gift of Freedom and Gift of Property.**—In *Wood v. Humphreys*, 12 Gratt. 339, 340, MONCURE, J., discussing the question as to whether the doctrine of perpetuities applicable to bequests of personal chattels applied to a bequest of freedom of slaves, said: "There is a manifest difference between a gift of freedom and a gift of property. In some respects they are similar, but in most respects different. Many of our judges have admitted and commented upon this difference. Many of our decisions are founded upon it. *Maria v. Surbaugh*, 2 Rand. 238, is founded upon it; for the plaintiff, in that case, would not have remained the slave of the testator if there had been a bequest of the mother in remainder, instead of a bequest to her of freedom in futuro. *Parks v. Hewlett*, 9 Leigh 511, is founded upon it; for if the female slave in that case had been given to another person instead of being emancipated, her issue born afterwards would have been liable for the debts of the donor, instead of being exempt from such liability."

The principal case is also cited in *Jincey v. Winfield*, 9 Gratt. 713.

or acknowledged by the party in the court of the county where he or she resides, to emancipate and set free his or her slaves." This act, it is conceded, must be strictly complied with, and to effect emancipation, the instrument must be under the seal of the grantor.

That under which the defendants in error claim, is in the common form of deeds of emancipation, beginning "Know all men by these presents," and signed by Edmund Edgington, with a scroll annexed, in which the word seal is written. It is subscribed by two witnesses, who certify that it was signed, sealed and acknowledged in their presence, and upon their evidence it was duly admitted to record; but it concludes, "In testimony whereof I have hereunto set my hand this 21st day of October 1817," without saying, in the body of the instrument, any thing about a seal.

If the instrument, having a scroll to it, had been acknowledged in court by the party (as the act allows) instead of being proved by the witnesses, I think there could have been little question that it would have been a sufficient recognition of the scroll as a seal, to give it the force and obligation of a sealed instrument. All that is required by the common law, or by our act of assembly, is, that the impression in the one case, or the scroll in the other, should be added with intent to seal; and if the party shall acknowledge before the court an instrument having a scroll, as his act and deed, nothing more can be required. The act of 1788, which our courts have decided to be in affirmance of the common law of Virginia (*Jones & Temple v. Logwood*, 1 Wash. 42; *Buckner v. Mackay*, 514 2 Leigh 488,) declares that "any instrument to which the person making the same shall affix a scroll by way of seal,

shall be adjudged and holden to be of the same force and obligation as if it were actually sealed." It would be in derogation of that act, to decide that a scroll, affixed with the view of perfecting an instrument required by law to be under seal, and acknowledged by the party in court with the intent of complying with the law, was not a seal, because it was not called such in the body of the instrument; and it would be equally unreasonable to predicate the same thing of an instrument proved by witnesses who attested the sealing as well as the signing and delivery. The common law does not require that the party should any where in the instrument speak of a seal, but only that it be sealed, and the sealing proved. In Sheppard's Touchstone, a book of the highest authority, it is said (vol. 1, p. 55, Atherly's ed.) "A deed is good, albeit these words in the close thereof, in *cujus rei testimonium sigillum meum apposui*, be omitted, and albeit there be no mention made in the same that the deed was sealed and delivered; so in truth it be duly sealed and delivered, and the sealing and delivery be proved." Here, then, is an express authority that the proof of a seal is sufficient, although no mention is made of it in the body of the instrument; and as scrolls are placed by our law on precisely the same footing as seals, when affixed by way of seal, I take it to be clear law that a scroll may be proved to

have been so affixed, without mention of it in the body of the instrument. The true doctrine is stated with great clearness by chief justice Tilghman in the case of *Taylor v. Glassel*, 2 Serg. & Rawle 504. "There are two principles," says he, "well founded: one, that although in the body of the writing it is said that the parties have set their hands and seals, yet it is not a specialty unless it be actually sealed and delivered: another, that if it be actually sealed and delivered, it is a specialty, although no mention be made

515 \*of it in the body of the writing. The fact, and not the assertion, fixes the nature of the instrument." Thus, to constitute a sealed instrument, there must be a seal or scroll affixed, and some recognition of it in the instrument, or some evidence of it aliunde; but it can never be maintained that such evidence, whether by the proof of witnesses or acknowledgment of the party, will not supply the place of such recognition. If the maker says merely, "witness my hand;" if the attestation of the witnesses takes no notice of the sealing; if there are expressions in the instrument not usually found in deeds, but common in simple contracts, as if it commenced "For value received I promise" &c. all these are circumstances (and there may be others) affording strong presumptive evidence that the party did not intend to bind himself by deed, and has not so bound himself. When some of these circumstances exist, and especially when all concur, they may outweigh the mere circumstances of a scroll being annexed, which might be so easily placed there after the execution of the writing; but this presumption, like any other, may surely be rebutted by proof of the fact that the scroll was annexed by way of seal, and by the maker. Thus, suppose he says at the time, "I affix this scroll as my seal," or within the scroll he writes the word "seal," and then delivers it as his deed; I am at a loss to conceive how any court or jury could resist the conclusion that it was a sealed instrument.

It is said, however, that the decisions in this court are inconsistent with this opinion: and there may be some loose expressions to be found in them, giving countenance to the objection. But when the cases themselves are carefully examined, I am persuaded they will not be found to support it. They are the following: *Baird v. Blagrove*, 1 Wash. 170; *Austin's adm'r v. Whitlock's ex'ors*, 1 Munf. 487; *Anderson v. Bullock &c.*, 4 Munf. 442; *Jenkins v. Hurt's commissioners*, 2 Rand. 446; *Peasley v. Boatwright*, 2 Leigh 195, and a late case not yet reported.\* These cases, except the last, I have critically scanned; and by giving the facts of each, with the opinions of the judges, it would be easy to shew that they do not exclude proof aliunde of the sealing of the instrument. But this would swell my opinion to an inconvenient length; and I must content myself with a few general observations respecting their scope and effect. In all of these cases the writings purported to be signed only. They had

\**Cromwell v. Tate's ex'or*, 7 Leigh 301.

either no attesting clause, or it was merely in the form "Teste A. B. &c." without noticing the sealing. In most of them a consideration is expressed; a circumstance unusual, as the judges say, and unnecessary in specialties, but common in simple contracts of the character of those in question. In none of them was the instrument such as the law required to be recorded, or such as it made available only when sealed; and in not one was there any proof that the instrument had been actually sealed, or scrolls annexed by way of seal. The court had to judge by inspection of the paper, and by inspection only; and the judges say that as in its beginning, conclusion and attestation, no mention is made of its being sealed, and the fact is not otherwise proved, but rendered improbable by other circumstances, the mere accident of a scroll being found was insufficient to shew it was affixed by way of seal, when possibly it might have been added by inadvertence, or afterwards by the holder. Judge Tucker, indeed, in the case of *Austin's adm'x v. Whitlock's ex'ors*, goes somewhat farther; but his observation was not necessary to its decision, since no evidence deors the instrument was offered, and the case did not turn upon it. The instrument concluded "witness my hand," and the attesting witness, who was then dead, had not attested its sealing.

517 \*The case referred to as lately decided and not yet reported may have gone somewhat farther, and (as my judgment in the court below was reversed) I may think, too far. But, as well as I recollect its circumstances, the only one which distinguished it from the previous cases, was the fact that the word seal was written within the scroll. But there were no attesting witnesses, and no proof that the word seal was written by the maker of the note; and as the judges present who decided it assure me there is nothing in their opinions affecting the present question, I do not feel myself trammelled by it.

Assuming, then, that an instrument of writing, not stated in the body of it to be sealed, may, if it have a scroll, be proved to be a specialty by attesting witnesses to its sealing, notwithstanding it concludes "witness my hand," the next enquiry is, whether it appears by this record, that the scroll was affixed by Edrington as his seal?

The attesting clause (which is a part of the instrument necessary under the act of assembly to the validity of the instrument, unless it is acknowledged in court by the grantor) purports that it was sealed as well as delivered; and it was proper that mention should be made, by way of attestation, of such sealing and delivery. Sugden on Powers, p. 237. On the proof by the oaths of these witnesses, the deed was afterwards ordered to be recorded. It could not have been legally admitted to record as an instrument of emancipation, unless the witnesses swore that it was sealed, as well as acknowledged and delivered, in their presence. These circumstances amount at least to prima facie evidence that the instrument was duly sealed, and greatly outweigh the

single presumption arising from the fact that no notice is taken of it in the body of the writing. A much stronger case is stated by Sugden, in his treatise on powers, 518 p. 236, where he says, on the authority of Lord Eldon, that "if, in the attestation of an instrument, it is stated to have been sealed in the presence of witnesses, it will, in the absence of evidence to the contrary, be presumed to have been sealed, although no impression appear on the parchment or paper." Here, besides the attestation, something equivalent in general to an impression in wax does appear; to wit, a scroll.

Doubtless, Edrington intended to make this instrument of writing conform to the act of assembly. It does so in all other particulars; and the witnesses to it declare that it conformed also in the requirement of sealing. This of itself would distinguish this case from all others which have come under the consideration of the court of appeals, and leaves no doubt on my mind that the court below was right in regarding the instrument as a deed of emancipation duly executed.

On the other questions presented by the record, I concur entirely in the views taken by the president, and in the conclusion to which he arrives on the whole case.

BROCKENBROUGH, J. The emancipation law enacts that a master may emancipate his slave by an "instrument in writing, under his hand and seal, attested and proved in the county or corporation court by two witnesses, or acknowledged by the party in the court of the county where he resides." The statute respecting seals says, "any instrument to which the person making the same shall affix a scroll by way of seal," shall be adjudged to be a sealed instrument.

The current of decisions in this court is, I think, that the mere annexation of a scroll will not make it a sealed instrument, but if it shall appear, either from the body of the instrument itself, or from the clause of attestation, that the scroll was affixed by way of seal, it is then a sealed instrument. 519 Although that clause is no part of the instrument, yet as it is written on the same paper, if it appear from it that the scroll was affixed by way of seal, it is just as good as if the obligor had in the instrument itself declared it to be a seal. In *Baird v. Blagrove*, the agreement had a scroll opposite to each signature: the conclusion was "as witness our hands," and the attestation simply "teste;" neither spoke of the instrument being sealed. President Pendleton said, "The court are not satisfied that this is to be considered as a sealed instrument. It is in no part of it expressed to be sealed. The attestation is the same as in common simple contracts not under seal." The irresistible inference is, that if the attestation had been in different form—if it had recognized the seal, it would have been sufficient.

That position is also to be deduced from the opinions of the court, and particularly from that of judge Roane, in *Austin's adm'x v. Whitlock's ex'ors*, 1 Munf. 487. I am satisfied that it is in no manner impugned by the



case of *Cromwell v. Tate's ex'or*, not yet reported.\*

In the case before us, the instrument is signed by Edrington, and has a scroll annexed to his name, in which is written the word seal; but as he does not, in the body of the instrument, speak of it as a seal, this would not do. But the clause of attestation is not simply "teste," as in the two cases above mentioned, but is written thus, "Signed, sealed and acknowledged in presence of us Alex'r R. St. Clair, Walter H. Tapp;" and on the evidence of the subscribing witnesses it is admitted to record as an instrument emancipating the slave Lavinia and her four children. It was, then, an instrument under Edrington's hand and seal, as much as if he had placed there a seal of wax.

The next question arises from the proviso, which says that all slaves so emancipated shall be liable to be taken \*by execution, to satisfy any debt contracted by the person emancipating them, before such emancipation is made.

Admitting that the debt for which the defendants in error were taken in execution was contracted by Edrington to Parks before the instrument of emancipation was executed (which, however, does not clearly appear from the special verdict) still the question arises whether the afterborn children of the freedwoman can be taken in execution. On the principle that the child follows the condition of the mother, and that the mother became absolutely free by the instrument of emancipation, subject only to the contingent liability of being taken in execution for prior debts, I am of opinion that the defendants in error, being born free, were not liable to be reduced to slavery. On this point I refer to the opinion of the president, in which, and the grounds on which it is founded, I entirely concur.

I am of opinion that the judgment be affirmed.

CABELL, J. I have carefully examined all the reported cases as to scrolls annexed to deeds by way of seals; and I am perfectly satisfied that this case is materially different from all of them. There is a fact in this case, which is not to be found in any of the former cases. In the attestation by the subscribing witnesses, they expressly state that the instrument was signed, sealed and acknowledged in their presence; and, as I understand the record, they prove the same thing on oath before the court. The act of assembly gives validity to scrolls annexed by way of seal, without specifying the manner in which such annexation shall be proved. It does not require it to be recognized in the body of the deed. Here it is stated by the subscribing witnesses in their attestation, and is moreover proved by their oaths. I am clearly of opinion that the instrument is a good deed.

521 \*The case of *Maria & c. v. Surbaugh*, 2 Rand. 228, is, in my opinion, conclusive of this case; and I have nothing to add

to the luminous exposition of it, made by the president.

The judgment must be affirmed.

TUCKER, P. I shall say nothing on the first point in this case, which has been so satisfactorily disposed of by my brother Parker, except to declare my concurrence with him in the result to which he has come.

Taking the instrument of emancipation, then, in this case, to be a good deed, we are brought to the enquiry whether the children of the mother born after the execution of the deed are subject to the creditor's execution?

And here let me say at once, that this case must be ruled by the act of assembly, and brought within the operation of the proviso, or the creditor must fail. The case of *Woodley v. Abby*, 5 Call 336, decided by a divided court, and standing altogether alone, does not form so imperative a rule as to compel us to embrace it with all its consequences. If these cases of emancipation are to be brought within the rules of law as to fraudulent alienations, then emancipated slaves are not only liable to the subsisting debts of the emancipator, but if he was in embarrassed circumstances, they would be chargeable, by a fishing bill, for prospective debts also. I cannot think that such a construction would be obedient to a statute, whose emphatic terms declared that the slave emancipated under it should be as free, to all intents and purposes, as if emancipated by the act itself. Emancipation is not strictly a gift of property. It is the exoneration of a human being from the bonds which our institutions have fastened upon him, and which the beneficence of our times has authorized the master to remove. Still less can I look upon it as a gift without consideration.

522 The considerations moving \*to the act are of the gravest character, and but for the proviso in the statute, I should consider the emancipated slave as forever discharged from the creditor's demand, at least where it has not assumed the character of a direct lien. I shall therefore proceed to consider the case under the law as it now stands.

First, let us see what is the immediate effect of the whole statute upon the condition of the slave. And here it is clear that by the deed of emancipation he is instantly emancipated and set free; he is, upon its execution, entirely and fully discharged from servitude, and "enjoys as full freedom as if he had been particularly named in the act." He is entitled immediately to a copy of the instrument of his emancipation, from the clerk. He is at once invested with all the rights of a freeman, except those political rights from which, by other laws, every black is excluded. With the protection of his free papers, he may go where he pleases without question. He is at once entitled to acquire and enjoy property. His person is under the protection of the laws, and he has a right to sue for injuries done to person or to property. He may even acquire lands and hold slaves, and will transmit them by inheritance to his children. If charged with a capital offence, he is tried like a freeman, and the law throws around him the same

\*Reported 7 Leigh 301.



protection of a grand jury, and the same right of challenge to his triers, which the white man enjoys. And all this notwithstanding the proviso; of which we need no better evidence than this, that were it otherwise, no free negro could have these privileges who claims his freedom since 1792, inasmuch as all have been subject to the operation of that proviso.

Lavinia, then, upon the execution of this deed, became to all intents and purposes free; subject indeed to be taken by execution for the antecedent debts of her master, but still free. Whatever might be the effect

523 \*of an execution levied upon her, and a sale under it to satisfy a debt, until such levy and sale she is unquestionably free. If the creditor does not elect to levy the execution upon her, her enjoyment of freedom is not disturbed. If, out of the avails of her labour, or by the aid of others, she can discharge the debt, her freedom cannot be disturbed. If an execution is even levied upon her, yet if she can shew that there is other property to satisfy the debt, it will be held liable (*Woodley v. Abby*, 5 Call 350), and she will continue to enjoy her freedom, which never can even be suspended until a sale. For even though there be no other means of satisfying the debt, she would not be sold absolutely, but only for such a length of time as would be necessary to discharge it. *Patty v. Colin*, 1 Hen. & Munf. 519. What would be her state during that time, has not been settled by any adjudicated case. But I should humbly apprehend that in such a case, at least, as that of a temporary sale, though the purchaser would exercise over her the rights of a master, she would not be considered as a slave. If she were so considered, all her acquired property would devolve upon her master, and all her other rights as a freewoman would be annihilated, though her term of service might be but for a year, and though she should at any time be enabled to redeem herself by discharging the debt.

Be this as it may, Lavinia became absolutely free upon the execution of the deed, subject only to a charge for payment of debts. She never has had an execution levied on her, and if living, she is now free, and has been so ever since 1817. Her status then has always, since 1817, been that of a freewoman, and so still continues. If then her children follow the condition of the mother, according to the maxim "*partus sequitur ventrem*," her children must be free, as she was free, when they were born, and has always continued free since, and still so continues, if living.

524 If it be otherwise, it \*leads to this singular consequence, that her emancipation is perfected by the sale of them; it is consummated forever (provided there be no further debt) by the satisfaction of this execution by the sale and perpetual servitude of her children. She who was born a slave, and expressly subjected to the debt, is made free; and those who were born free, and not expressly subjected by the act, are made slaves.

But it is said that the qualification attached to the emancipation of Lavinia, of liability to execution, extended to those who

were born afterwards in her state of freedom. I think not. We should not extend the proviso of the statute to those whom it does not expressly embrace, nor should we adopt a principle in direct conflict with what is now the well established law of the land. In *Maria &c. v. Surbaugh*, 2 Rand. 228, this court decided that the condition of the child was to be determined by the existing condition of the mother at the time of its birth, without regard to any changes in that condition by any possible future event. It decided that a child born in the actual status of slavery of the mother was absolutely a slave for life, although the day after its birth the mother's enjoyment of her freedom accrued under a deed of long anterior date. If then the child can derive no advantage from the certain prospective freedom of the mother, shall he be prejudiced, on the other hand, by the uncertain contingency of her subsequent reduction to slavery? If we mete out equal and impartial justice to all, we cannot affect the child by a possible change of status in one direction, when we deny him the benefit of a certain change in another. We cannot refuse to consider him as following the status of his mother at the time of his birth, when he will thereby become free, since we hold him to that status by which he is made a slave. Accordingly, we find judge Green declaring in *Maria &c. v. Surbaugh* (and judge Cabell concurred) "that the

525 \*civil state of the children, with all its consequences, is determined by the civil state of the mother at the time of their birth, without regard to the present obligation of a free woman to serve, or the present right of a slave to be free, thereafter. The sole enquiry is whether, at the time of the birth of the children, the mother be in fact slave or free, without regard to what may be her future state." And judge Brooke observes that "the rule that children shall be bond or free according to the condition of the mother, imports the condition at the time of the birth, in exclusion of any future right to liberty;" and by consequence (I will add) in exclusion of any future obligation to servitude.

These views might be much enlarged and illustrated; but I shall content myself with what has been said, as presenting the reasons upon which I am clearly of opinion to affirm the judgment.

Judgment affirmed.

526 \**Greenlee's Adm'r v. Bailey.*

July, 1838, Lewisburg.

(Absent BROOKE, J.)

**Detinue\*—Death of Defendant—Revival by Consent against His Administrator—Effect.**—Upon the death of a defendant in detinue, if his administrator consent that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a *scire facias* against the administrator, alleging

\***Detinue.**—On matters pertaining to detinue, see monographic note on "Detinue and Replevin" appended to *Hunt v. Martin*, 8 Gratt. 578.

that the property had come to his possession and was detained by him.

**Same\*—Same—Same—Failure of Administrator to Plead De Novo—Effect.**—In such a case, if the administrator, instead of pleading de novo, go to trial upon the plea put in by his intestate, he cannot, after verdict against him, arrest the judgment because of his own failure to plead anew.

**Same\*—Same—Same—Judgment.**—The judgment against the administrator, in such a case, is personal against him for the property or its alternative value; but it provides, as to the damages and costs, that the same are to be levied of the goods and chattels of the intestate, in the hands of the administrator.

William Bailey brought an action of detinue, in the circuit court of Rockbridge county, against Samuel Greenlee, for two slaves named Bill and Sall. The defendant pleaded non detinet, and actio non accrevit within five years; upon which pleas issues were joined. Pending the cause, the defendant died, and a scire facias was issued to revive it against James Moore sheriff of Rockbridge county, to whom the estate of the defendant had been committed. The scire facias contained no allegation that after the death of the intestate the property came to the hands of his administrator. It was duly executed and returned. Subsequently, Moore the sheriff and administrator died; and the estate of the original defendant, unadministered by Moore, having been committed to Joseph Allen a succeeding sheriff, "by consent as well of the plaintiff as of Joseph Allen administrator as aforesaid, by their attorneys, it was ordered that this suit be revived in the name of said

527 \*Allen administrator as aforesaid." The jury found a verdict for the plaintiff, and the court rendered judgment thereupon, against the administrator personally for the slaves or their values, but to be levied, as to the damages and costs, of the goods and chattels of the intestate, in the hands of the defendant to be administered. To this judgment a supersedeas was allowed.

The attorney general and Peyton for the plaintiff in error.

Baldwin for defendant in error.

**PARKER, J.** Since the decisions of Catlett's ex'or v. Russell, 6 Leigh 344, and Allen's ex'or v. Harlan's adm'r, Id. 42, it must be taken as settled law that an executor or administrator cannot be charged in detinue, merely on the possession of the testator or intestate; and that the thing sued for must have come to the hands of the representative himself, and be detained by him. If he so detains, an original action may be maintained against him on his own possession, or the suit brought against the testator or intestate may be revived by scire facias; but if so revived, there must be a suggestion in the scire facias, that the specific thing, after the death of the testator or intestate, came to the hands and possession of the executor or administrator; or on the return of a scire facias executed, requiring him to shew cause

generally why the action should not be revived, the plaintiff should file a count alleging such possession. If, therefore, the administrator Allen had given no consent to the revivor, and such a scire facias had been served upon him as was issued against Moore, without new pleadings, this judgment must have been reversed. But he consenting that the suit should stand revived, and dispensing with a scire facias, must be taken to have consented to its revivor on such terms and conditions as justified the plaintiff

528 in continuing \*the action against him, and without which he could not have revived it at all. That is to say, it stood revived as if the plaintiff had alleged in a scire facias the fact of a possession and detention by Allen himself, after the death of his intestate. In this situation, he might have pleaded de novo; but he proceeds to trial on the plea of non detinet filed by his intestate, thus admitting his own possession under his intestate, but denying that the latter detained the slaves against the rights of the plaintiff; and there is a verdict against him. The case of Murdock &c. v. Herndon's ex'ors, 4 Hen. & Munf. 200, shew that it is now too late to object to that verdict.

As to the form of the judgment, making him personally liable for the slaves and their values, while the costs and damages were to be levied de bonis testatoris—I can only say that such is understood to have been the opinion of a majority of the judges in Catlett's ex'or v. Russell; and I concur in their opinion.

**BROCKENBROUGH, J.** The first question here is as to the effect of the consent order, namely, "that the suit be revived in the name of the said Joseph Allen administrator as aforesaid." After the death of the original defendant, a scire facias was issued against Moore the first administrator, to shew cause why the issue which had been made up between the plaintiff and the original defendant should not be proceeded in to a final judgment. In this scire facias there is no suggestion that the slaves sued for in the action of detinue, came, after the death of the intestate, to the hands of the administrator. Such a suggestion in the scire facias was deemed proper by this court in the case of Allen's ex'or v. Harlan's adm'r, 6 Leigh 42, and in Catlett's ex'or v. Russell, Id. 344. But if the suggestion be not made in the scire facias, it was deemed indispensable that a count should be added against the executor or administrator, charging that the thing sued for had come to the

529 \*hands of the said representative. The whole court were of opinion that the executor could only be chargeable in detinue by force of his own possession; the possession and detention by the decedent not being sufficient.

When the estate of Greenlee was committed to the hands of the second administrator (the plaintiff in error) it was agreed that a scire facias to revive might be dispensed with, and that the suit should be revived in the name of the said administrator. The consent extended no further. There was no consent to dispense with any pleadings on the

See \* on page 188.

\*Judgments. — See monographic note on "Judgments" appended to Smith v. Charlton, 7 Gratt. 425.

part of the plaintiff, which might be necessary to charge the administrator himself. If such consent had been intended, it would hardly have been left to doubtful construction; it would have been plainly expressed: the defendant would not only have consented to revive the suit (which means to place it in the same situation that it stood in at the original defendant's death) but he would have consented to admit his own possession, and to dispense with any charge against him, or any defence for himself, on that subject. It can hardly be supposed that he did consent to do more than the plaintiff himself thought it necessary for him to consent to; and we have the evidence of the record to shew us, that the plaintiff only thought it was necessary to revive it against the first administrator, in the same plight in which it stood on the original defendant's death.

Understanding the consent order in this way, the case is almost identical with that of Allen's ex'or v. Harlan's adm'r. There, as here, there was a declaration against the original defendant, charging him with the detention of the goods; non detinet pleaded by him, and issue on the plea; then the death of the defendant; a scire facias against the executor, without a suggestion that the goods had come to his hands, and no count to that effect; a trial on the issue that the testator "doth not detain; verdict, departing from that issue, and finding that the executor doth detain; and judgment against the executor for the goods, or their alternative value, to be levied de bonis propriis. There was also judgment for damages and costs against the executor de bonis propriis; in which respect the case differs from this. That judgment was declared to be erroneous, and reversed by the opinion of the whole court. It was reversed, because there was nothing charging the executor with the possession and detention, no issue on that fact, no trial on that fact, and yet a finding of that fact, and a judgment conforming with the finding. The same error, I think, exists here; and I am for reversing the judgment on that account, and remanding the cause for a new trial.

Upon the hypothesis, however, that I am wrong in this, and that the plaintiff in error, by consenting to the revival of the suit, waived all enquiry into the fact of his own possession, or admitted it, still I think there is error in the judgment. The judgment is against the administrator for the alternative value of the slaves, de bonis propriis. As he was sued in his representative character, the judgment should have been against him in the same character, and to be levied, as to the value as well as the damages and costs, de bonis intestati. For my view on this subject, I refer to the opinion I expressed in Catlett's ex'or v. Russell, to which I still adhere. I had thought that on this point the opinions of three of my brethren, namely, the president, judge Brooke and judge Carr, were against me; but on examining the printed report of judge Carr's opinion, I think he waives a decision on it. I cannot therefore yield the point. This error would not require that there should be a new trial; but the judgment

should be reversed and corrected here.  
531 \*CABELL, J. If the plaintiff in the court below had sued out a scire facias against the administrator de bonis non, charging that the property had come into the possession of the administrator, and was detained by him; and if the administrator had not chosen to avail himself of his right to plead de novo. but had relied on the plea put in by the intestate, it is clear that he could not, after verdict, avail himself of this irregularity.

The consent of the administrator that the cause should stand revived against him without a scire facias, must be regarded as an admission that the cause might rightfully be revived against him; and as it could not be thus revived against him unless the property had come into his possession as administrator, his consent to revive must be regarded as an admission that the property had thus come into his possession. It placed the cause in the same situation as it would have stood in, if there had been a scire facias charging every thing essential to the maintenance of the action against the administrator. It is true that he might have controverted these facts by his subsequent pleading. But if he failed to do so, choosing to put in issue only the facts which had been controverted by the intestate, it is too late, after verdict, to avail himself of his own omission. He is irrevocably bound by his previous admissions, and by the verdict of the jury.

The case of Catlett's ex'or v. Russell (to which I feel myself bound to submit) is conclusive as to the manner of entering the judgment; which must therefore be affirmed.

TUCKER, P., concurred. Judgment affirmed.

### 532 \*Brown and Rives v. Ralston and Pleasants.

November, 1838, Richmond.

(Absent CABELL and BROCKENBROUGH, J.)

**Charter Party—Construction\*—Case at Bar.**—By charter party of affreightment, plaintiffs engage their vessel to take a cargo for defendants to a designated port, at a specified freight: and it is agreed that twenty running days shall be allowed for unloading and discharging the vessel after her arrival at the port of destination, and that for every additional day's detention, defendants shall pay 50 dollars demurrage: HELD, the stipulation for payment of demurrage does not affect the contract for freight, and if the consignee fails to unload and discharge the vessel within the lay days allowed, there being no impossibility of his doing so, and afterwards, while the vessel is detained on demurrage, the vessel and cargo be lost without the default of the master or mariners, the plaintiffs are entitled to recover the freight, as well as the demurrage.

**Carriers—Notice to Consignee—Sufficiency of\*—Case at Bar.**—Case in which the consignee of a cargo was held to have received sufficient notice that the master of the vessel was ready to deliver the cargo.

**Same—Vessel Detained on Demurrage—Protest by**

\*Carriers.—See monographic notes on "Common Carriers" appended to *Farish v. Reigle*, 11 Gratt. 697.

**Master Unnecessary in Case at Bar.**—Case in which a protest by the master of a vessel detained on demurrage was held unnecessary.

**Indebitatus Assumpsit—When It Lies on Special Contract.**—Where the terms of a special contract for work and labour, not under seal, have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general *indebitatus assumpsit*.

This is the sequel of the case which was before this court in November 1826, reported in 4 Rand. 504.

It was an action of *assumpsit*, brought by Ralston & Pleasants against Brown & Rives in the late superior court of law for Henrico county, in July 1817, upon a charter party in the following terms:

"Charter party made and entered into this ninth day of November 1809, between Ralston & Pleasants of one part, and Brown & Rives of the other, all residents of the city of Richmond, witnesseth that the said Ralston & Pleasants do hereby engage the brig Commerce, commanded by Dixon Brown, to take a cargo of tobacco and flour from

Richmond, Virginia, to Cadiz direct, at 533 5 \*pounds per hogshead and 11 shillings and 3 pence per barrel, british sterling, freight, with 5 per cent. primeage. Some doubts having arisen in the minds of the parties concerned, of the certainty of the vessel's being permitted to discharge her cargo at the aforesaid port of Cadiz, and if it shall so happen, on her arrival at that place, that she is not allowed (as now contemplated) to discharge there, but on the contrary shall be ordered off, it is understood and agreed that the agents of the shippers may direct her to any permitted port in Portugal or Spain, to the island of Madeira, or any of the Azores, more commonly called the Western Islands, by their paying, in addition to the above freight of 5 pounds and 11 shillings and 3 pence per hogshead and barrel, whatever may be the customary freight from Cadiz to the port they may order her, the same to be agreed upon by the parties' agents where she discharges; the concerned understanding that twenty running days shall be allowed for unloading or discharging the said vessel after her arrival at the port of destination, and the master notifying the consignee that he is ready to unload; and for every additional day's detention the before named shippers shall pay 50 dollars demurrage, quarantine always excepted, provided it is enforced with such rigour as to prevent vessels from discharging and landing their cargoes during its continuance, and not otherwise.

Teste Ralston & Pleasants.  
Robert Coventry. Brown & Rives.  
Dixon Brown."

**Indebitatus Assumpsit—When It Lies on Special Contract.**—It is a well known rule of law that, where the terms of a special contract have all been performed and nothing remains to be done under the contract except for the defendant to pay a specified amount of money, this money may be recovered under the general *indebitatus assumpsit* count. *Davisson v. Ford*, 28 W. Va. 632, citing the principal case. See further, monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

The declaration contained eleven counts. The 1st, after setting forth the agreement, the promise to perform all things in the agreement expressed or fairly implied, and that it was fairly implied that the defendants would provide and have, at the port of destination of the vessel, a consignee ready, on

her arrival, to be notified thereof by \*it 534 master, and to receive the cargo if \*it should be permitted to be discharged, averred that the plaintiffs did take on board the vessel a large cargo of tobacco and flour, the property of the defendants, which was consigned by the defendants to James C. Wardrop at Cadiz; that the vessel with her cargo proceeded with all convenient dispatch to Cadiz, where she arrived on the 19th of January 1810, where and at which time the master was ready to give notice of his arrival to the consignee James C. Wardrop, and to deliver the cargo to him according to consignment, if the said Wardrop had been at Cadiz; but the said Wardrop was not at Cadiz: whereby, and through the default of the defendants, it became impossible for the master to notify the consignee of his arrival.

It was further averred that there was no quarantine or other impediment to the immediate landing of the cargo at Cadiz on the arrival of the vessel, except that the defendants had not provided a consignee to be ready at the port of Cadiz to receive the cargo. And then it was alleged that by reason of the failure of the defendants to provide and have ready such consignee, the vessel with her cargo was detained in the port a long time; at the expiration whereof the master, acting for the benefit of the concerned, determined to submit the cargo to the disposition of the vice consul of the United States at Cadiz (the consul himself being at that time in the United States); under the direction of which vice consul a part of the cargo was landed at Cadiz, on which part the defendants paid to the plaintiffs the freight stipulated by the agreement; but from the circumstance of the vice consul's being occupied by duties of a public nature, or other causes to the plaintiffs unknown, but proceeding from no default on the part of themselves or their agents, 100 hogsheads of tobacco and 51 barrels of flour, part of the cargo, were suffered to remain on board the said vessel at Cadiz from the 19th day of

January 1810 until the 9th day of March 535 following (during \*all which time neither Wardrop nor any other consignee or agent of the defendants was at Cadiz to receive the said 100 hogsheads of tobacco and 51 barrels of flour, although during all that time no quarantine or other legal impediment existed to the landing and discharge of the cargo of tobacco and flour, and the master was ready at all times to deliver and discharge the cargo); on which last mentioned day the vessel, with the remaining cargo of tobacco and flour on board, without any fault or want of care on the part of the plaintiffs, or of the master and mariners belonging to the vessel, was, by a violent gale of wind, driven on shore on the coast of the bay opposite to Cadiz, which coast was in possession of the french army, then invest-

ing Cadiz in a hostile manner, where the said vessel was stranded, and thereupon was seized and burned by the said french army, and the remaining cargo was by the french army, without any default, negligence or want of care on the part of the plaintiffs, or of the master and mariners belonging to the vessel, wholly destroyed. And so the plaintiffs said that the detention of the vessel at Cadiz, and the nondelivery and subsequent loss of the remaining cargo, proceeded wholly and entirely from the default of the defendants in not providing and having ready at Cadiz a consignee to receive the cargo. By means of all which premises the defendants became liable to pay the plaintiffs the freight and primage upon the said 100 hogsheads of tobacco and 51 barrels of flour, and demurrage for 21 days more than the laying days in the agreement mentioned.

The 2d count was *indebitatus assumpsit* for freight, primage and demurrage; the 3d, *quantum meruit* for carriage and demurrage; the 4th, *indebitatus assumpsit* for freight and primage; the 5th, *indebitatus assumpsit* for demurrage; the 6th, *quantum meruit* for carriage; the 7th, *quantum meruit* for demurrage; the 8th, *indebitatus assumpsit* for work and labour; the 9th, 10th and 11th were counts for money paid, laid out and expended, for money had and received, and upon an *insimul computassent*.

The general issue being pleaded, a special verdict was found; upon which the superior court, being of opinion that the law was for the plaintiffs, and that they were entitled to recover freight, primage and demurrage, rendered judgment in their favour for the amount of damages conditionally assessed by the jury. An appeal having been taken by the defendants, this court set aside the special verdict, as not sufficiently certain, and awarded a *venire de novo*. The particulars in which the special verdict was considered to be defective, are stated in the opinions delivered by judges Green and Brooke, 4 Rand. 531, 2, 535, 6.

After the cause went back to the superior court, a second special verdict was found, in the following terms:

"We of the jury find, 1st, that on the 9th day of November 1809, an agreement of charter party was entered into between the plaintiffs and the defendants, which we find at large in these words, to wit:" (Here the charter party was recited.)

"2dly. That, in pursuance of the said recited agreement, the defendants shipped on board the said brig Commerce a cargo of 100 hogsheads of tobacco and 750 barrels of flour, and addressed the ship and cargo to James C. Wardrop at Cadiz, their agent and consignee.

"3rdly. That the said brig Commerce, so laden, proceeded on her voyage, and arrived safely with her cargo at Cadiz on the 19th of January 1810; and the said Dixon Brown, her master, immediately reported such his arrival to Richard S. Hackley, then acting consul of the United States at Cadiz, and also agent of the defendants there in the manner and to the extent herein after mentioned, and notified to the said Hackley that

he, the master, was then and there ready to deliver the cargo according to the charter party.

537 "4thly. That according to the course and usage of trade in such cases at the said port of Cadiz, vessels arriving there with cargoes are anchored in the bay of Cadiz, which is a spacious one, and the cargoes are deliverable alongside the vessels, to lighters sent from the shore by the consignees or agents of the shippers, and it is not the duty of masters to land their cargoes there in the ordinary course of trade; and there is no custom or usage of merchants other than the law merchant, either general, or particular respecting the particular trade to which the said recited charter party relates, or local respecting the trade between Richmond and Cadiz, existing at Richmond or at Cadiz, which affects the interpretation or effect of the said recited charter party, other than the usage and course of trade at the port of Cadiz, in this finding above set forth.

"5thly. That before the arrival of the said brig Commerce with her cargo as aforesaid, the said James C. Wardrop, the agent of the defendants, and the consignee thereof, had left and was at that time absent from Cadiz, at Valencia in Spain, and so remained until the month of July 1810; and Richard S. Hackley, then acting consul of the United States at Cadiz, and residing there, was the agent of the said Wardrop, the consignee as aforesaid, in regard to the flour part of the cargo. The said Hackley was not authorized by the said Wardrop to direct how the tobacco should be disposed of, without particular instructions relative to the said tobacco from the said Wardrop, to whom the said Hackley transmitted the letters of the defendants to the said Wardrop touching the said vessel and cargo, which were brought by her, and delivered to the said Hackley unopened; and the said Dixon Brown, the master of the said vessel, then and there had knowledge of such agency of the said Hackley in this particular.

"6thly. That shortly after, to wit, about 10 days from the arrival of the said

538 vessel and cargo at Cadiz, the said Hackley did receive instructions from the said Wardrop relative to the tobacco part of the said cargo, and undertook to act as the agent of the defendants concerning the same; and the said Hackley gave notice to the said Dixon Brown, the master of the said vessel, that he the said Hackley had received such instructions relative to the said tobacco from the said Wardrop, but he gave the said master no directions whatever at any time touching that part of the cargo, nor did the said master apply for any such directions.

"7thly. That between the 19th day of January 1810 and the first of March following, inclusive, the said Hackley received from on board the said vessel 741 barrels of flour, part of the said cargo, and paid the freight thereon.

"8thly. That at the time of the arrival of the said vessel at Cadiz, France and Spain being at war, a french army had invaded Spain, and about the same time, or shortly

after, was marching towards Cadiz, a strong place of war, open to the sea, and having its port and anchorage for shipping safe from any sudden attack by land, and the british, then the allies of Spain, having command of the sea on the spanish coast.

"9thly. That on the approach of the french army, great numbers of spanish troops came to Cadiz, and other spanish subjects took refuge there, and all the lighters and boats usually employed in transporting goods from and between ships in the harbour, and the town, were subject to impressment, and most of them were actually impressed by the government.

"10thly. That owing to this cause, many vessels remained unloaded in the harbour of Cadiz aforesaid from the 28th day of January 1810 (when the french army was marching to and threatened Cadiz) until the 7th day of March following; it being with the greatest difficulty that boats and lighters could be procured, and when procured they were

539 constantly liable to be \*impressed. But though there was such difficulty, yet there was not, during the whole time, from the time of the arrival of the said vessel at the port of Cadiz, until the time when she was lost and destroyed in manner hereinafter mentioned, any impossibility for the said Hackley to have procured boats and lighters to raise the whole cargo from the said vessel, and to discharge her.

"11thly. That the said 100 hogsheads of tobacco and 9 barrels of flour remained on board the said brig Commerce until the said 7th of March 1810, when, by a violent gale of wind, and without any fault of the master or mariners, the said vessel, with the said part of her cargo on board, was driven from her moorings in the harbour of Cadiz, upon the neighbouring coast of Spain, at a place in the possession of the french troops, by whom the vessel and cargo were burnt and destroyed.

"12thly. That at the time of the arrival of the said vessel at Cadiz, there was no market at that place for tobacco, and it was not intended by the said Wardrop, or by the said Hackley, after the latter undertook to act as agent in relation thereto, that the said tobacco should remain at Cadiz (unless it could be sold at a certain price, which could not be obtained) but it was by them intended that the same should be reshipped and sent to England: and that the said tobacco was purposely left by the said Hackley on board the said vessel, until he could make up his own mind what to do with it.

"13thly. That the said master of the said vessel was at all times, from the time of the arrival of the said vessel at the port of Cadiz, until the time when she was lost and destroyed in manner aforesaid, ready to deliver the whole, and each and every part of the said cargo, to the said consignee or his said agent, if they or either of them had sent boats or lighters to take the same from the vessel; and of this the said Hackley, 540 \*agent of the said consignee as aforesaid, was, at and during all the time, well apprized.

"14thly. That the said master of the said

vessel did in no wise give any consent to the delay of the said consignee, or his said agent, to take the said cargo, or any part thereof, from the said vessel, and to discharge the said vessel, except so far as he was bound by the charter party.

"15thly. We find that by the general custom of merchants, the demurrage agreed upon for detaining a vessel beyond her lay days, where there was no stipulation to the contrary, became due and payable daily.

"On the whole matter, if the court shall be of opinion, on the facts above stated, that the plaintiffs are not entitled to recover in this action, we find for the defendants. If the court shall be of opinion that the plaintiffs are entitled to recover for the demurrage only, then we find for the plaintiffs 1050 dollars, with six per cent. per annum interest thereon from the 7th day of March 1810 till paid, damages. If the court shall be of opinion that they are entitled to recover freight and primeage only, then we find for the plaintiffs 2209 dollars 64 cents, with six per cent. per annum interest thereon from the 7th day of March 1810 till paid, damages. And if the court shall be of opinion that the plaintiffs are entitled to recover freight, primeage and demurrage, then we find for the plaintiffs 3259 dollars 64 cents, with like interest from the 7th day of March 1810 till paid, damages."

The superiour court held that the law upon the special verdict was for the plaintiffs, and that they were entitled to recover freight, primeage and demurrage; and accordingly rendered judgment in their favour for 3259 dollars 64 cents, with interest from the 7th of March 1810 till paid, and their costs of suit. From which judgment Brown & Rives, the defendants, again appealed to this court.

541 \*C. Johnson and G. N. Johnson for appellants.

Leigh, J. Robertson and C. Robinson for appellees.

PARKER, J. The opinion which is about to be delivered by the president goes so fully into the main question argued before us, that I propose only to offer a few observations respecting it.

This case was before the court in the year 1826, upon a special verdict ascertaining the loss of the vessel and cargo during the demurrage days, and is reported in 4 Rand. 504. Judge Carr was then for affirming the judgment which had been rendered in favour of the plaintiffs in the court below; and I am much inclined to think that if I had been on this bench at that time, I must have concurred in his opinion. Judges Brooke and Green, however, held the special verdict to be imperfect in not finding, with sufficient precision, whether the delay in discharging the cargo was with the assent of the master, or otherwise, and whether it was or was not impossible to unload the vessel before she was driven from her moorings upon the coast of Spain, and there burnt by the french. For these omissions, they set aside the verdict for uncertainty, and awarded a venire de novo. But the whole court agreed, that after the lay days had expired, freight was recoverable, unless during that period there was no possibility of unloading the cargo, or unless

the master assented to the delay. The special verdict now before us expressly finds that the master did in no wise give any consent to the delay of the consignee or his agent to take the cargo from the vessel; that though there was a difficulty in procuring boats and lighters to unload her, yet there was not, during the whole time from the arrival of the vessel at the port of Cadiz, until she was lost and destroyed, any impossibility of procuring them; and that the tobacco (the freight of which is in controversy) was  
542 purposely left by Hackley, \*the agent, on board the vessel, until he could make up his mind what to do with it.

We have, therefore, the authority of all the three judges who sat in the case when it was first before the court, for saying that upon the state of facts now appearing, the appellees are entitled to recover for freight, as well as primage and demurrage. Conceding that their opinions do not bind us in the same conclusive manner that a former judgment of the court between the same parties binds, yet as the point now involved arose necessarily in the consideration of that case, the decision then made is an authority entitled to all the weight which is ever allowed to a single precedent in this court, and to much greater than the dictum of any judge, or even the judgment of any other court. Its authoritative force is strengthened by the fact that the opinions delivered in 1826 were given on great consideration, and after a minute examination of all the cases bearing upon the subject, and that now, after the most elaborate research, nothing has been found in principle, in justice, or in authority, to impeach them.

I might, under these circumstances, securely rest upon this case as an authority which, without very good reasons, I ought not to disregard. But if it is to be regarded as *res integra*, I am of opinion, upon principle, that the plaintiffs were entitled to recover their freight. Freight I consider to be a compensation for the carriage of the goods, for their delivery in the manner the shipowner is bound to deliver them, and for the lay days allowed to the consignee to take them from the vessel, where by the usage of trade he is bound so to take them. The manner of delivery, and the period at which the master ceases to be responsible, depend, in the absence of agreement, on the custom of the place where the voyage terminates. *Wardell v. Mourillyan*, 2 Esp. N. P. Cas. 603. *Abbott on shipping*, 222, 248. By

the custom at Cadiz, masters are  
543 \*not bound to land the cargo, but it is the duty of the consignee to send lighters for it from the shore. By the charter party in this case, he was allowed twenty running days to unload the cargo, and the case of *Lacombe &c. v. Wain &c.*, 4 Binney 299, gives him the whole time for sending for and receiving it. During that period he is in no default, and the freight is suspended, because the shipowner has contracted to hire the ship during the voyage and for the specified lay days, and to receive as a consideration the freight agreed on. But this very reasoning proves that if the cargo is not

delivered within the lay days, through the fault of the consignee, the freight is earned and must be paid; and it is plain that a majority of the court, in the case alluded to, thought that the reasonable construction of the agreement was, that the consignee might take his own time, provided he did not exceed the stipulated lay days. For the risk incurred by the shipowner during that period the freight was the premium, but for any other risk he would have been entitled to damages, ascertained in this case by express agreement. When the risk was run for which the freight was a compensation, on what principle can it be that the freight shall not be paid? The additional sum of 50 dollars a day for demurrage was intended to cover a new risk, commencing after the first had ended. It is inserted in the charter party, it is true, but it makes no part of the contract of affreightment. By that contract, connected with the usage, the goods were to be carried to Cadiz, and the captain was to remain there with his vessel twenty days, ready to deliver them. When he has done this, he has done all that he was bound to do under the contract of affreightment. The allowance of 20 days for unloading is equivalent to an agreement on the part of the freighter to unload within the 20 days; and if, through his default, the goods  
are not delivered, the responsibility of

544 the shipowner ceases, and the \*voyage contracted for is completed. The premium given for detaining the vessel longer, for any purpose, whether to unload, or to load, or to try the market, or give time to the consignee to make up his mind what to do with the cargo, has, in my opinion, no connexion with the freight, but is given for a wholly different consideration. If it were otherwise, the default of one contracting party might prejudice the rights of the other, and postpone his claim to freight, as well as that of the seamen to their wages, if not for an indefinite time at the caprice of the freighter, yet for a period the limits of which are nowhere defined, and are not easily ascertainable.

For these among other reasons, I feel no difficulty in deciding that the happening of the loss whilst the ship was detained on demurrage, does not, under the other facts proved in this case, bar the claim of the appellees for freight; and the other objections taken to the judgment of the court below, appear to me to be equally unfounded.

By the charter party, 20 running days are allowed for unloading and discharging the vessel, after her arrival in port, and the master notifying the consignee that he is ready to unload. This implies that there shall be an agent at the port of delivery, to whom such notice may be given. There is no analogy, that I can perceive, between the obligation of a shipowner to give such notice, and that of the holder of a bill of exchange. The notification to the consignee was for the purpose of fixing the commencement of the running days, as is apparent from the words of the charter party; and it is impossible to conceive that the parties meant, that if the consignee was at London or Canton, the running days should not commence until he



received notice. The reasonable construction is that he should be notified, not of the arrival of the vessel (which perhaps he was bound to take notice of) but of the readiness to \*deliver, if he was at the port ready to receive. But if this is questionable, we are well warranted in saying, from the facts found, that Wardrop was notified of the arrival and the readiness to deliver, and that his instructions to Hackley were predicated on that information. Besides, Hackley, both before and after he received instructions relative to the tobacco, which made him agent as to that part of the cargo as well as the flour part, was well apprized, as the jury find, of the captain's readiness to deliver the whole, when lighters should be sent to receive it; and I think that this knowledge, and the notice he had previously received, dispensed with the vain form of giving further notice. The case of *Chapman v. Keane*, 3 Adolph. & Ellis 193, 30 Eng. C. L. Rep. 69, in relation to the notice requisite to charge the drawer of a bill of exchange (where, as I think, much greater particularity is necessary, for reasons peculiar to that contract, than in this) might easily be enlisted in support of this view of the case, if it were not sufficiently plain of itself.

Then, as to the pleadings. If there was no consignee of the tobacco at Cadiz, and the tobacco was suffered to remain on board the vessel until it was lost, without the default of the master, the special count in the declaration is sustained. But if that count be not sustained, and the facts found entitle the plaintiffs to recover, the general counts are sufficient. The contract was not under seal, the remuneration was to be in money, and the terms of the agreement had been performed. The rule, I think, is very accurately stated by Judge Cabell in the case of *Brooks v. Scott's ex'or*, 2 Munf. 345, where he says that "in respect to debts for work and labour or other personal services, the rule is, that however special the agreement was, yet if it was not under seal, and the terms of it have been performed on the plaintiff's part, and the remuneration was to be in money, the party may declare either specially

546 "on the original agreement, or in indebitatus assumpsit on the express promise to remunerate (if there was one) or on the promise which the law implies on the execution of the agreement." To the same effect the doctrine is summed up in 1 Chitty's Plead. 4th American ed. 339, in these words: "Where goods have been sold and actually delivered to defendant, though under a special agreement, it is in general sufficient to declare on the indebitatus count, provided the contract was to pay in money, and the credit expired." And see justice Dennison's opinion in *Alcorn v. Westbrook*, 1 Wils. 117. Yet in these cases you may declare on the special agreement, and by proper pleadings recover on it. The cases of *Cooke v. Munstone*, 1 Bos. & Pul. N. R. 351, and *Ellis v. Hamlin*, 3 Taunt. 52, do not appear to me to militate against this doctrine.

On the whole, without noticing any other objection, I am for affirming the judgment.

TUCKER, P. The only question in this case, of any importance, is whether freight was earned by the vessel, which was lost during the demurrage without default on the part of the owner. The verdict finds that the master was at all times ready to deliver the cargo, and gave no other assent to the delay than he was bound to do by the charter party. It also finds that there was no impossibility for the consignee to procure the necessary boats and lighters for unloading; thus amply supplying the supposed deficiency of the former verdict. It is obvious that the judges who pronounced the judgment in this case as reported in 4 Rand. 504, would have had no difficulty in giving their opinions in favour of the plaintiffs on the present verdict. Yet as the judgment there is not binding, it becomes necessary that we should offer our own views of the subject.

My own opinion is, that in this case the freight was earned as soon as the lay 547 days were passed, the master \*having been "at all times ready to deliver the cargo, if the consignee or his agent had sent lighters to take it off," as they were bound to do. This could not be denied, if there was no contract for demurrage. But that contract could not fairly be construed to continue the risque of the freight. The detention was for the accommodation of the shipper,—to suit his convenience, or enable him to deliberate upon the best course to take with his adventure. It was a distinct and independent part of the contract, in no wise connected with the agreement for freight. It was a contract for a different service, to be paid for by a different price and at a different rate. The freight was the consideration of the hire of the vessel for the voyage and the lay days. The detention was to be paid for at 50 dollars per day extra. But there was no detention, until the owner had fulfilled his engagement for the freight. Until then, the delay was his own delay. The demurrage did not begin until the contract for freight was made complete. The vessel could not have demanded 50 dollars per day for demurrage, while she was yet earning her freight. Until the freight was fully earned, she was under hire to the shipper for the freight. She was not at the disposition of the owner, who could not hire her as a store ship at 50 dollars per day, while the shipper's right to her under the contract for freight was yet undetermined. Now it is admitted she had title to demurrage, and this is an admission that the freight was no longer "being earned," but that it was already earned. If so, the subsequent loss of the vessel and cargo without the owner's fault could not impair his right to freight.

As to the notice; the objection for want of it cannot prevail. If there was no consignee in Cadiz to receive notice, the defendants cannot complain. If Hackley was the agent, he had due notice. Indeed it seems to me clear that Wardrop must have received it as early as the 26th of January, since 548 his answer was received \*about the 29th. From the 26th of January till the 7th of March there are 41 days, making



20 for the lay days, and 21 for demurrage, as allowed by the jury. So that no difficulty exists as to this part of the case.

As to the protest; if ever necessary, it can only be where the owner has cause of complaint, or is about to take some step which may prejudice the shipper. Neither was the case here. There was nothing to protest about, for the master was quietly waiting the consignee's pleasure, and the vessel was lost while he was doing so.

The question as to the pleadings is settled by the case of *Brooks v. Scott's ex'or*, 2 Munf. 345, which is sustained by abundant authority. See 1 Chitty's Plead. 4th American ed. 339, 1 Selw. N. P. 58, and the cases there cited.

I am of opinion to affirm the judgment.

BROOKE, J., concurring, judgment affirmed.

### M'Coy v. Herbert.

December, 1838, Richmond.

(Absent BROOKE, J.)

**Sale of Growing Trees—Assignment.**—By the sale of timber trees standing, to be chosen by the vendee, an interest passes which the vendee may assign before election made.

**Same—Same—Rights of Assignee.**—The assignee having chosen and marked the trees, may maintain trover against the vendor for felling and converting them, although the vendor had no notice of the election.

Trover by M'Coy against Herbert, in the circuit superior court of law and chancery for Norfolk county, to recover the value of certain timber trees converted \*by the defendant. At the trial on the plea of not guilty, the jury found a verdict for the plaintiff for 125 dollars damages, subject to the opinion of the court on a case stated and agreed between the parties, which was as follows:

"It is agreed that on the 2d of January 1828, a contract was entered into between the defendant Herbert and Robert Carson junior, in the words and figures following: 'An agreement between Edward Herbert of Norfolk county of the one part, and Robert Carson junior of the other, sheweth that the said Edward Herbert has sold to the said Robert Carson fifty white oaks of his the said Robert Carson's choice, for the sum of 125 dollars, the payments to be as follows: on the first day of April next, 60 dollars; on the first day of July next, 32 dollars 50 cents; on the first day of October next, 32 dollars 50 cents. In witness whereof the parties above mentioned have set their hands and seals, this 2d day of January 1828.

Edward Herbert [Seal.]

Robert Carson jr. [Seal.]

"That on the 3d day of January 1828, a contract was made between the plaintiff M'Coy and the said Carson, and endorsed upon the contract between Carson and Herbert, in the words and figures following: 'For value received from Josiah M'Coy, I sell to

him the within fifty oaks. January 3, 1828. Robert Carson jr.'

"That the sums were paid afterwards by Carson, which were stipulated to be paid by the contract.

"That in the month of February 1828, the plaintiff M'Coy went on the lands of the defendant Herbert, in the absence of Herbert, and made choice of 40 white oak trees there standing and growing, and marked them; there being no other (or at least not 550 many other)\*trees growing on the land, suitable for said M'Coy's purpose. There were many more trees of various kinds upon the land, including many more white oak trees, but the latter not of such sizes and character as answered M'Coy's purpose, which was to supply timber for the navy.

"That in 1832, before the institution of this suit, all the trees thus marked by M'Coy were cut down by the defendant, and by him sent to Boston to be applied to naval purposes.

"At the time the contract was entered into between the defendant and Carson, the defendant owned a tract of land in the county of Norfolk, on which were growing the trees marked by M'Coy and cut by Herbert, as above mentioned. This land, at the time of the contract with Carson, was in Carson's possession as tenant by the year, and Carson continued in possession as tenant from year to year, till after the timber was cut by Herbert."

The circuit court held that the law upon the case agreed was for the defendant, and accordingly rendered judgment in his favour. On the petition of M'Coy, this court awarded a supersedeas to the judgment.

Leigh, for the plaintiff in error.

C. Johnson and G. N. Johnson for the defendant in error.

PARKER, J. I have some doubt whether Carson's right in the trees was not a mere chose in action, and therefore not assignable; but that doubt is not so strong as to induce me to dissent from the clear opinion of the other judges who heard the cause.

CABELL, J. Our lamented brother Brockenbrough, who heard the argument, had prepared an opinion in which I entirely concur. It is in these words—

551 "This case seems to me to be settled by both resolutions in Palmer's case, 5 Co. 24 b, and Croke Eliz. 819, where it is reported by the name of *Bassett v. Maynard*.

"In that case, sir Thomas Palmer had sold to Cornford 600 cords of wood standing in a forest, but the vendor had the election to specify them. It was resolved that 'Cornford had an interest which he might assign over, and not a thing in action, or possibility.' Why? Because, say the court, 'if sir Thomas did not assign them on request, Cornford the vendee might take them without assignment, for the grantor shall not be allowed by his act or default to derogate from his own grant.' That is to say, the right of the grantee, on the failure of the grantor to make the election, is precisely that which the grantee would have had, if the election had

\*See monographic note on "Trover and Conversion" appended to *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 168.

been cast on him in the first instance. And what is that right? The court answer, 'Then it follows that he had an interest which he might assign over;' and as authority for this, reference is made to 44 Edw. 3, 43 b.

"This position is as strongly reported in Cro. Eliz. where it is stated to be the opinion of the whole court. 'And here he (Cornford) hath an interest before the assignment made by sir Thomas Palmer, insomuch that if sir Thomas Palmer will not assign it in convenient time, he himself might take them: and therefore he may assign this interest, as 44 Edw. 3, pl. 43, is.'

"I think, then, that the first resolution proves that Carson had a right to assign to M'Coy (or, to use the language of the court in Cro. Eliz. he had the right to nominate M'Coy as the person who should elect) and that such assignee had the same right to elect, and to specify the particular trees, that Carson himself had when he made the purchase.

"In corroboration of this position that the grantee of cords of wood standing in a forest has an interest in \*them assignable before the election made, I refer to *Stampe v. Clinton alias Liford*, 2 Roll. Rep. 99.

"The second resolution in Palmer's case also supports, I think, the right of M'Coy the assignee in this case to recover the trees. That resolution proceeds on the hypothesis that the assignment by the vendee Cornford to Bassett the plaintiff was void. Yet, say the court, 'as Bassett felled them, he had possession, and that gives him a good title against the defendant and every stranger.' The defendant in that case (Maynard) was a subsequent vendee of sir Thomas, of such a quantity of wood as would make 4000 cords, at the vendee's election; and, say the court, 'the defendant cannot take that which is cut down, but ought to make his grant good out of that which is growing, and the possession of Bassett of that which he felled sufficeth to protect him.'

"Now here, if M'Coy the assignee had felled the trees, his possession (even if the assignment be void) would be good against a subsequent purchaser, who would have been compelled to make his purchase good out of the rest of the wood. How much stronger, then, would have been the right of M'Coy against the vendor, who had parted with the possession of the trees, and received full and valuable consideration for them.

"Nor can I see that the fact of the trees being only marked, and not felled, makes any difference, particularly as to the vendor. The marking of trees is a mode of taking possession of them, and, as such, is an indicium of property. It reduced to certainty and made specific the trees which were sold, as much as if they were felled. Nor was it necessary to give notice to the vendor that the trees were to be marked. The contract did not require notice, and the vendor was bound to let the vendee have such trees as would best suit his purpose."

553 \*TUCKER, P. The timber sold in this case was, even while yet standing,

a chattel in the estimate of law, according to the current of authority. 1 Ld. Raym. 182; *Parker v. Staniland*, 11 East 362; *Warwick v. Bruce*, 2 Mau. & Selw. 205; *Toller on Executors* 195; 4 Co. Rep. 62; 3 Bac. Abr. 64. By the agreement it appears that Herbert actually sold 50 white oaks of Carson's choice, and did not merely contract to sell them. By this sale a title passed to Carson to 50 white oaks, and although until election he could maintain no action for any in particular, yet upon making election his right was consummate. The title passed by the sale; the election enured merely to identify that which passed by the grant. Where, indeed, election creates the interest, nothing passes till election. But here the sale by Herbert, and the payment of the money, created the interest, and the election was only necessary to ascertain the property. If I give one of two horses at A.'s election, there the election creates the interest, and nothing passes till it is made. But when I sell for a consideration one of two horses at A.'s election, if the sale does not give a perfect title, it passes an interest at least, and the election does not create it. In the sale of real estate, nothing is more familiar. I sell 20 acres of my land, out of a tract of 100 acres, to be laid off at the election of the vendee. His title is immediate, and his election is only necessary to set apart his 20 acres in severalty; and this may be done without deed, which shews that it is not the election which creates the interest. Such right moreover is assignable, and the assignment would unquestionably pass the title, and the election also, as incident thereto. So in relation to personality. A title to it will pass by deed, even without possession. F. N. B. 140; *Perkins* 30; 1 Roll. Rep. 61; 2 Barn. & Ald. 551; 1 Bac. Abr. 527; tit. Bills of Sale. And though, until election, the grantee of one of several things can maintain no action, because the identity of \*the thing claimed is not ascertained, yet his right to have the property is perfect, and, if undisputed, is of course transferable. It is not, I conceive, a chose in action, the seller being as to him a trustee and not an adverse holder; and indeed, in this case, Carson was in possession until after the election.

In Palmer's case, 5 Co. 24 b., the right to select the trees was in the grantor sir Thomas Palmer, and it was contended that until selection of the identical trees, the grantee had no vested interest which he could assign. But the court held otherwise, adjudging that he had an interest before the assignment of the timber by sir Thomas, insomuch that if sir Thomas had not assigned in convenient time, he himself might take them, and therefore he might assign his interest: that is to say, the default of sir Thomas devolved the election on his vendee, and that right of election gave such an interest as was assignable. This seems to me good sense and plain reason; and the case has accordingly been approved by the judges of our own days; 3 Wilson 334. If, then, the devolving of the right of election on the grantee by the grantor's default, gave him such an interest

as was capable of assignment carrying the election with it, it is not perceived why the devolving of the election on him by the original sale should not have the same effect. I am therefore of opinion that Carson had an assignable interest, even before election; that the right of election passed to M'Coy, and that by his election, by marking the trees, his rights became consummate, and his action of trover was well maintained.

It is said, however, that no title passes till election, where the party is to elect between two things. This doctrine seems not very reasonable, where I have paid my money for the thing purchased, and have the right of election in myself. But admit it. After the assignment to M'Coy, if the property did not at once pass, the authority to elect nevertheless passed; for its effect \*was to give, as far as it could give, all the rights of the assignor. Now, even though the property could not pass, because it was not then identified, yet the right to have it when identified did pass, and with it the right to select the trees. What then was the effect of the selection? To identify the trees, and to render certain what had been sold by Herbert. At the moment of election, the title passed out of Herbert, if it had not done so before. Into whom did it pass? Admit that it passed into Carson. At the same instant, *uno flatu*, his assignment to M'Coy enured to vest it in him. All this occurred before the trees were felled; and M'Coy's right was thus consummate before the wrong done. The trees were his, and he had a right to sue for their value. Carson had no such right. This is obviously the justice of the case, and, as I verily think, the law of it also. I cannot concur in the refinement by which the just rights of the plaintiff have been defeated, and the wrongdoer protected from retribution for his gross violation of his own contract.

The want of notice of election has been objected; but it forms no just objection. M'Coy was not bound to give notice. After the grant, Herbert had no right to cut the trees without first calling on Carson or his assignee to elect. If he had done so, he would have received notice of the election; and the parties having agreed the fact that the trees were selected and marked by M'Coy, I think he was entitled to a judgment upon the verdict.

I am therefore of opinion to reverse the judgment of the circuit court, and enter judgment for the plaintiff.

Judgment of circuit court reversed, and judgment entered for plaintiff in error.

# 556 \*Long's Ex'or &c. v. Israel and Others.

December, 1838, Richmond.  
(Absent BROOKS, J.)

**Case at Bar—Sale of Land.**—A. in consideration of a certain price per acre to be paid him by B. undertakes to procure C. who is in possession of a tract of land as owner thereof, to make a good deed for the same to B. with general warranty; A. purchases the land from C. pays him the purchase money, and directs him to make the conveyance

to B. which is made accordingly, with general warranty; B. executes to A. his notes for the price agreed upon between them, and takes possession of the land, which he holds without eviction or disturbance: **Held,**

1. **Same—Same—Defect of Title—Equitable Relief.**—Equity will not injoin A. from collecting the money due him by B. whatever be the defects of C.'s title to the land.

2. **Same—Same—Same—Same.**—No eviction or disturbance of B.'s possession having taken place, defect of title is no ground for his coming into equity against C.

**Same—Same—Usury.**\*—B. represents to A. that he had been desirous of purchasing C.'s land, but had not done so, from inability to advance funds as speedily as C. required, and that he wishes A. to buy the land and let him have it; whereupon it is agreed that A. will buy the land as cheap as he can, and that B. will pay him 900 dollars for it. A. makes the purchase at the price of 750 dollars, and the land is conveyed to B. who gives his notes to A. for the 900 dollars. **Held,** the transaction between A. and B. is free from objection on the ground of usury.

**Sale of Land—Conveyance Erroneously Describes Land—Equitable Relief.**—Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.

**Chancery Practice—Costs—Form of Decree for—Case at Bar.**—On dismissing a bill filed by the heir and the executor of vendee, to have a title made for the land purchased, and meanwhile to injoin vendor from collecting the purchase money, decree for costs should not be against the plaintiffs jointly, nor against the executor *de bonis propriis*.

Appeal from a decree of the late superiour court of chancery holden at Clarksburg.

The bill was filed in August 1820, by Daniel Long, and set forth, that in 1814, the complainant, being desirous to acquire a tract of land in Harrison county, \*then belonging to Henry Coffman, and said to contain 225 acres, applied to Jacob Israel to purchase the same for him; being restrained from applying to Coffman himself, by a difference of a personal nature between them. That the price to be given for the land was limited by complainant to four dollars per acre. That Israel undertook the business, and some time thereafter informed complainant that he had made the purchase at four dollars per acre, payable in instalments. That complainant agreed to take the contract off his hands, and accordingly paid him 50 dollars in advance, and executed notes for 850 dollars more, making the sum of 900 dollars in all; and Israel executed a bond, binding himself to procure Coffman to make a title to complainant for the land. That Coffman did execute to complainant a conveyance purporting to be for the said tract of 225 acres, which was described therein by certain courses and distances. That for the purpose

\***Usury.**—See principal case cited in *Myers v. Williams*, 85 Va. 629, 8 S. E. Rep. 483. See also, monographic note on "Usury" appended to *Coffman v. Miller*, 25 Gratt. 698.

†**Costs.**—See monographic note on "Costs" appended to *Jones v. Tatum*, 19 Gratt. 720.

of securing to Israel the payment of 600 dollars of the purchase money (the residue having been satisfied), and indemnifying him as endorser for complainant on a note of 300 dollars due to the Virginia Saline bank, complainant executed to James Pindall a deed of trust, conveying the said tract of land, and another small tract. That the note to the Saline bank had been since paid by complainant, and he had also made additional payments to Israel on account of the land, amounting, with the previous payments, to 554 dollars. That the deed from Coffman to the complainant was drawn by Israel himself, who was a surveyor, and to whom the entire management of the business was confided by complainant; and Israel alleged that he had inserted in the deed the true boundaries and quantity of the land; but complainant had since discovered that the deed did not contain the real boundaries of the tract belonging to Coffman at the time of the purchase, but on the contrary, the boundaries therein set forth were

558 \*so materially different from the true boundaries, as not only to include a much smaller quantity of land than complainant had contracted for, but also to leave out the most valuable and desirable part of the tract; yet Israel, on having this mistake pointed out to him, had refused to do anything towards correcting it. That although Israel had represented that his purchase of the land from Coffman was at the rate of four dollars per acre, yet complainant had discovered that representation to be fraudulent, the real price being much less, amounting only, as complainant was informed, to between 500 and 600 dollars in the whole, instead of 900 dollars. That Israel had proceeded to force a sale of complainant's lands under the trust deed, at which sale Israel himself became the purchaser. That the sale was not made by the trustee Pindall, who was then absent from the commonwealth, but by a cryer acting under the directions of Israel, and without any previous advertisement; Israel himself stating, in order to discourage competition for the land, that there would be a dispute about it,—that complainant would contest the sale. That although complainant was still in possession of the land, yet Israel threatened to turn him out; denying the payment of the debt to the Saline bank; sometimes denying that he was the agent of complainant in the purchase from Coffman, or that complainant had paid any part of the purchase money of the land. That Pindall refused to release to complainant the legal title which he acquired as trustee, insisting that the sale had been duly and properly made in execution of the trust. That Coffman alleged that he sold to Israel, and intended to convey to complainant, no more or other land than was comprised within the boundaries specified in his said deed; and he claimed to hold the residue of the tract. The bill made Israel, Pindall and Coffman parties defendants; and prayed, that Israel be prohibited from disturbing complainant's possession, by

559 \*virtue of the sale and purchase under the trust deed; that the sale be set

aside, and the trust deed cancelled; that the title to the entire tract of 225 acres, should it be adjudged not to have passed by the conveyance from Coffman, be decreed to complainant; that Israel be prohibited from claiming any greater sum for the land, than the price contracted to be given by him to Coffman; or should the complainant be adjudged not entitled to more land than the boundaries mentioned in Coffman's conveyance contained, that the quantity within those boundaries be ascertained, and a deduction decreed for the deficiency, at the rate agreed upon between the complainant and Israel; and general relief.

The bond executed by Israel to Long, referred to in the bill, was exhibited therewith. it was dated the 17th August 1814, and was in the penalty of 2000 dollars, with condition that Israel should "cause and oblige Henry Coffman to make a good general warranty deed to Long for the tract of land that the said Henry now lives on, the same to contain 225 acres, more or less."

The conveyance from Coffman to Long, and the deed of trust from Long to Pindall, were also exhibited with the bill. By the former, Coffman and wife, for the expressed consideration of 650 dollars, bargained and sold to Long a tract of land in Harrison county, lying on Robinson's run, bounded according to certain courses and distances particularly set forth in the deed, and containing 225 acres, more or less: with a covenant of general warranty on the part of Coffman. By the said deed of trust from Long to Pindall, the power to sell the property therein conveyed was vested in Pindall, "or his heirs or assigns, or certain attorney."

All of the defendants answered the bill. The answer of Israel stated, that he had but lately removed to the neighbourhood, and was totally unacquainted with Coffman's land, when complainant applied to him, stating that he had been desirous of purchasing that land, but \*had not done so, from an inability to advance funds as speedily as Coffman required, and that he wished respondent to buy the land and let him have it; and it was then agreed between respondent and complainant, that respondent would buy the land as cheap as he could, and that complainant would pay respondent 900 dollars for it by instalments. That the terms of this agreement were proposed by the complainant himself. That respondent made the purchase from Coffman, at the price of 750 dollars, of which the sum of 100 dollars was to be paid immediately. That complainant accepted the conveyance made by Coffman, and executed his notes to respondent, as set forth in the bill. That until these transactions took place, respondent was a total stranger to Coffman's land, its title and boundaries. That it was fully understood between respondent and complainant, that complainant wanted and would take the land which had been conveyed to Coffman by William Hull, and was satisfied with Coffman's title thereto; and complainant himself particularly mentioned, that respondent ought to have the deed from Hull to Coffman, in order to describe the boundaries in the conveyance to

be executed by Coffman. That the description and boundaries of the land contained in the deed from Coffman to complainant were accordingly copied from Hull's deed to Coffman. That respondent never surveyed the land, or calculated the quantity, nor had he given to complainant any assurances, or in any wise deceived him, in relation thereto. That complainant still held the land under his title, to which he had made no objections until he was pressed for payment of the purchase money. That it was true, complainant had paid off the debt to the Saline bank, and 554 dollars of the purchase money of the land; and respondent had never denied either of those payments. That the sale under the trust deed was fairly and regularly made, by an attorney appointed by Pindall the trustee, \*in conformity with a power reserved in the deed; and it was not true that respondent had done any thing to injure the sale. That complainant well knew, and had been expressly informed by respondent himself, that he waived all claim to the land under the said sale, and that neither the trustee nor his agent had ever made, or been required to make, any conveyance thereof.

Coffman answered, that he knew nothing of the dealings between the complainant and Israel, stated in the bill. That in August 1814, respondent sold the land mentioned in the bill, to Israel, for 750 dollars, of which 100 dollars was payable immediately, and the residue in several instalments. That Israel had long since paid him the whole price of the land, and he, by Israel's direction, had conveyed the same to complainant. That complainant, before any treaty between Israel and this respondent, had been endeavouring to buy the land from respondent, but could not make a bargain therefor, because he would not or could not make payment so soon as was required. That respondent intended to convey to complainant, and supposed he had conveyed, the same land which he had purchased from William Hull as containing 225 acres; and he neither knew nor admitted that the tract contained a less quantity. As to the charge that a part of the tract was not included in the boundaries specified in his conveyance, respondent did not believe or admit the same to be true; but if it were true, he felt convinced that his title to the land intended to be conveyed was a good one, and hoped that the mistake in the boundaries might be corrected. And inasmuch as complainant had accepted the conveyance, and had never been evicted, or even disturbed in his possession, respondent insisted that there was no cause for prosecuting the suit against him.

Pindall, the trustee in Long's deed for the benefit of Israel, answered, that being absent from the commonwealth, he had, at the request of Israel, appointed one \*Webster his attorney to make sale under the trust; and on his return to Clarksburg some time afterwards, he was informed that the sale had taken place, but had been waived in consequence of objections made thereto by Long.

The complainant replied generally to the answers, and commissions were thereupon

awarded the parties for taking the depositions of their witnesses. By the testimony in the cause, the charges made in the bill, of Israel's agency for Long in the purchase of the land from Coffman, and of his fraudulent conduct therein, were clearly negatived; and the representation given by Israel, in his answer, of the nature and terms of the agreement between Long and himself, was fully sustained. But there was no doubt, that the description and boundaries of the land, contained in Coffman's deed to Long, and in William Hull's deed to Coffman, were grossly erroneous. The last mentioned deed was filed as an exhibit with the answer of Israel; and in the progress of the cause, three other conveyances of the same tract of land were filed; namely, a conveyance from John Hall the original patentee, to John Hull; a conveyance from the said John Hull to Joseph Lambert; and a conveyance from the said Joseph Lambert to William Hull, by whom the land was conveyed to Coffman the grantor of Long. The boundaries of the tract were differently described in each of the first four conveyances. And by two plans of survey made and returned in the progress of the cause by Cyrus Haywood surveyor of Harrison county (the first under an order of the court, the second, bearing date the 19th day of April 1823, by consent of the parties) the real boundaries of the land forming the subject of controversy were delineated according to the original survey made for John Hall, on which his patent was founded; whereby it appeared, that the conveyances aforesaid varied as well from the original survey as from one another, in the description \*of the boundaries, although the first of the series, the conveyance from Hall the patentee, was but slightly incorrect. But in the two last conveyances of the series, among numerous other mistakes of description, one of the original lines was wholly omitted, and the course of another reversed; and according to the surveyor's delineation of the courses and distances as given in those two deeds, the commencing and terminating lines did not meet at all, and the deeds embraced but 27½ acres of the land contained in the original survey. It further appeared that of the 225 acres comprised within the original survey, 27¼ acres was covered by an elder survey and patent of one Benjamin Robinson.

Pending the suit, Long the plaintiff died; and on the 16th of October 1822, the cause was revived by consent in the names of Henry Caruthers the executor, and Catharine Fitze the devisee of Long; who, at the same time, obtained leave to file a supplemental bill at the rules.

On the 20th of May 1823, the plaintiffs filed a supplemental bill; but this was done in court. The bill set forth, that since the death of Long, the plaintiffs had received notice from Benjamin Robinson, that he claimed the lands in the bill mentioned, sold by the defendant Israel to Long, and that his claim was founded on the following circumstances:—That John Hall the original holder of said land, and from whom William Hull the vendor to Coffman derived his title,

was a sheriff of the county of Harrison. and as such became delinquent to the commonwealth on account of the revenue tax collected by him : that a judgment was obtained by the commonwealth against the said Hall, and an execution issued, upon which execution he surrendered, among other lands, the aforesaid tract; he having the legal title thereto at the time of such surrender, and the judgment of the commonwealth moreover operating as a previous lien thereon:

564 that the said land \*was purchased in for the use of the commonwealth, and since the death of Long, the agent of the commonwealth had made public sale thereof, and Robinson had become the purchaser: and that Robinson had, since his purchase, not only asserted his claim to the land, but notified the tenants thereof to pay the rent to him. The plaintiffs expressed their belief, that on investigation, it would be found that the title to the land was not in Coffman at the time of his conveyance to Long. And they prayed, that Robinson might be made a defendant, and compelled to set out the nature and character of his claim to the land; that if it should appear that Coffman's title, at the time of his conveyance to Long, was defective, the contract between Israel and Long might be rescinded; and general relief.

On the day after the filing of the supplemental bill, the court set aside the order receiving it; expressing the opinion that it was filed too late to avail anything under the leave granted, and therefore formed no part of the case. And the court being also of opinion that upon the original bill, answers and evidence, the case was clearly against the plaintiffs, decreed that the bill be dismissed, and that the defendants recover against the plaintiffs their costs. From this decree the plaintiffs appealed.

C. Johnson and G. N. Johnson for the appellants.

Grattan for the appellees.

PARKER, J. I do not think the court of chancery committed any error in disregarding the supplemental bill. The object of that bill was to rescind the contract made between Israel and Long, and to recover back the purchase money from Israel, on account of an alleged defect of title in Coffman. But Long had no claim upon Israel for any defect of title to the land in the proceedings mentioned. He contracted

565 to take the \*title of Coffman; and in case of eviction, Coffman, not Israel, will be liable to him upon the covenant of warranty. Until eviction, however, which may never happen, this court cannot anticipate the operation of Coffman's covenant, by rendering him responsible in damages, to the same extent as he will be at law, should the title prove to be a defective one. This is not like the case where resort has been allowed to the preventive justice of the court, to arrest the compulsory payment of purchase money, when the purchaser can shew that his title has been questioned by a suit prosecuted or threatened, or is clearly defective. That proceeding is allowed against the person liable for the title, and whose claim for purchase money is sought

to be enjoined. But here, one person claims the balance of the purchase money, and another is liable on his covenant of warranty for the title; which brings the case within the direct and controlling authority of the principle stated in *Koger et al. v. Kane's adm'r &c.*, 5 Leigh 606.

Nor do I think that the contract, as set out in the answer of Israel, is liable to the imputation of usury. There was no agreement for the loan or advance of money to Long, and no forbearance of a debt due; but it is a contract on the part of Israel to sell Long a tract of land for 900 dollars, if he succeeded in purchasing it from Coffman. On the part of Long, it is an executory contract to pay the 900 dollars, depending, for performance, upon circumstances which might prevent its ever becoming a debt. His real object was to buy land, provided he could get it for a stipulated sum, and on suitable terms of payment; and there was no negotiation for the loan of money, or the forbearance of any debt. This is apparent, not only from his own account of the transaction, but from the stipulations of the bond taken from Israel when the contract was consummated. By that bond, Israel incurred a responsibility which it might have taken more than the 900 dollars 566 to discharge; \*for he bound himself in the penalty of 2000 dollars, to procure a good deed with general warranty to be made to Long by Coffman. Whatever therefore was the nature of the original executory agreement, it was relieved from all taint of usury when it came to be executed. But the decree is clearly erroneous in several particulars.

1. If the court was right in dismissing the bill and decreeing costs, it ought not to have decreed against the appellants jointly, nor against the executor *de bonis propriis*.

2. The deed from Coffman to Long was not such "a good general warranty deed" as Israel was bound to procure, for the tract of land described in the bond and intended to be sold. That deed was manifestly defective, conveying only a small portion of the land, and embracing other land not within the contemplation of the parties. These errors ought to have been corrected, by decreeing Coffman to execute a deed with general warranty for the land contained in the survey made by Cyrus Haywood on the 19th of April 1823; for although Long might probably, with the aid of parol evidence, have established the true boundaries of the land he contracted to buy, he had a right to insist upon a correct and sufficient deed.

3. The decree ought, I think, under the circumstances that had taken place, to have directed a reconveyance of the legal title outstanding in Pindall, upon the payment of the balance of the purchase money by Long to Israel.

The bill, therefore, ought not to have been dismissed, but a decree should have been entered conforming to this opinion, giving costs to the plaintiffs to be paid by Israel; and for not having done so, this court ought now to reverse the decree with costs, and remand the case for further proceedings.

567 \*CABELL, J. As to the merits of this case, I have nothing to say, but to express my entire concurrence in the opinion delivered by judge Parker.

But as reference has been made to the case of Koger et al. v. Kane's adm'r &c., 5 Leigh 606, I deem it my duty to avail myself of the occasion, to correct a mistake into which Mr. Leigh was led, in the report of that case. It is there stated, that the other judges concurred in the opinion delivered by the president. The fact was somewhat different. The court which decided that case consisted of only three judges; the president, judge Carr, and myself. There was no difference of opinion between the president and judge Carr. But I differed from them both, as to one point. I did not think that Kane, who had purchased from Koger, had agreed to "take the title of Preston;" and therefore I was of opinion that he still retained his right to injoin the purchase money due from him to Koger. On all other points I agreed with the rest of the judges. My opinion was reduced to writing and delivered in court, and I intended to hand it to the reporter. This, however, I omitted to do; and Mr. Leigh, finding but one opinion in the record which was given to him, naturally, inferred, and therefore stated, that the other judges had concurred. My opinion in that case will now be handed to Mr. Leigh, with a request that it may be published as a note to this case.\*

TUCKER, P. The decree in this case is, I think, plainly erroneous, in decreeing costs de bonis propriis against the executor, and in failing to require a new and sufficient deed to be executed by Coffman. The deed from Coffman to Long is void for uncertainty, as also is that from Hull to Coffman, for there is no other description of the land sold 568 than a setting forth of the \*boundaries, which not only do not cover the land sold, but do not meet. A tract of land may be well described without setting out the bounds; or it may be well described by setting out the bounds, without any thing more; but in this latter case, the boundaries set out ought to shew forth the land, so that it can be identified. The error in this case was anterior to Coffman's deed; but it may not perhaps be necessary to correct the deed to him, as well as that from him. It will suffice if Coffman makes a deed according to Hall's survey, as laid down on the plat.

I am also of opinion that the sale should have been set aside, on the authority of Gay v. Hancock &c., 1 Rand. 72, for no sale could have been fairly made where the title was so radically defective. But I see no foundation for the charge of usury, nor any error in refusing to make an allowance for the supposed interference with Robinson of 27¼ acres. As to the supplemental bill, it was obviously not necessary to settle the question whether Israel was entitled to his money. Had the deed been regular, the supposed superior title of the commonwealth would have been nothing to him, for he did not make himself in any way responsible for the title. He is

only bound to procure Coffman's deed with general warranty. When he does this, he is entitled to his money. Then, as to Coffman. If Long had purchased from Coffman, he might well say, "As the contract is still executory, I will not go on with it; equity will not compel me to take a bad title:" and in this way, the facts set forth in the supplemental bill would be important. But Long did not purchase of Coffman. He dealt with Israel, and Israel purchased of Coffman, and has paid his money for the land. The contract, then, cannot be rescinded by Long, and his only redress is upon his general warranty. This redress he cannot assert in a court of equity, nor in anticipation of an eviction which has not occurred, and may 569 \*never occur. He cannot assert it in equity, because that court is not the proper tribunal to give damages for breach of a warranty; nor can he assert it in anticipation of an eviction, on the ground that the title is defective, for that would be to convert a covenant of warranty into a covenant for good title, whereas they are essentially and intrinsically distinct. The vendor of land, who has some doubts about his title, but has had a long possession which a short time may mature into a perfect title, may be very willing to give a warranty, but very unwilling to covenant for good title, since that covenant subjects him to an immediate action if there be a single defect in the chain of title. It is on these principles that in England relief has been denied in equity by way of injunction, where the vendee has obtained his deed and possession. They are, I doubt not, the true principles of a court of equity. We have indeed gone farther in Virginia, in relieving by injunction; but we have never gone so far as to interfere except where the application was to restrain the recovery of the purchase money. That is not the case here. As to Coffman, this bill (except so far as it seeks a correction of the description in the deed) is purely an action upon the covenant of warranty, brought before eviction, and when probably no eviction may ever occur. Upon the whole, therefore, the supplemental bill was properly disregarded.

For the errors already mentioned, the decree is to be reversed, and the cause remanded for further proceedings.

The opinion delivered by CABELL, J., in the case of Koger et al. v. Kane's adm'r &c., 5 Leigh 606, (see his remarks, ante, p. 567,) was in the following terms:

I am of opinion, on general principles, that the purchaser of land is entitled to injoin the purchase money, for any deficiency in the quantity of the land, whether that deficiency arises from the fact that the boundaries in the deed do not contain 570 the stipulated \*quantity, or from the fact that a portion of the land contained within the boundaries of the deed is embraced by the superior title of others. I do not understand this position to be contradicted by the opinion of the other judges.

But I do understand the majority of the court to be of opinion, that in this case, Kane will not be entitled to any redress against Koger, and conse-

\*See the opinion in a note at the end of this case.

quently not against his assignee Salling, provided the deficiency in the quantity of land proceeds from defect of title to lands embraced by the calls of the deed. I understand this opinion to be founded on the particular nature of the title bond-executed by Koger to Kane, in which Koger binds himself "to make or cause to be made to the said Kane and his heirs, a good and sufficient deed in fee simple with general warranty," &c. It is admitted, as I understand the opinion, that if Koger had only bound himself and his heirs to make the deed in fee simple with general warranty, Kane would be entitled, notwithstanding he had received the deed, to injoin the purchase money. But it is contended that Koger, having contracted for the privilege of causing the deed to be made by others, has discharged himself from all obligation, both at law and in equity, by his causing the deed to be made by Preston. I cannot perceive the force of this distinction. If the acceptance of the deed from Koger himself would not discharge Koger, I cannot see how the acceptance of a deed made by another, at his request, should discharge him. I am decidedly of opinion that he is not discharged in either case. Although the execution of the deed, if conformable to the bond, be a discharge of the legal obligation, yet equity looks beyond the letter of the bond. It looks to the substance of the contract, which is, that a good and sufficient title in fee simple shall be made to the land contracted for; and when it sees that this has not been done, it will injoin the purchase money, the party not having got its consideration.

But this is not all. The deed executed by Preston, so far from complying with the spirit of the bond, is not a compliance even with its letter. The bond recites that Koger had sold to Kane "all that tract or parcel of land lying in Scott, being known by the name of the Flat Lick, containing four hundred and sixty-four acres;" and then goes on to declare that "if the said Koger shall make or cause to be made unto the said Patrick Kane, and to his heirs, a good and sufficient deed in fee simple, with general warranty, for the said four hundred and sixty-four acres," then the obligation to be void. Now, this is a positive stipulation that the land contracted for contained 464 acres; and it bound Koger to convey or cause to be conveyed 464 acres, with general warranty. But the deed made by Preston

571 did not even profess to convey 464 acres. It professes to convey and to warrant only the land contained within the boundaries mentioned in the deed, whether the quantity be more or less than the 464 acres. How then can the execution of this deed, if the quantity of land conveyed and warranted be less than 464 acres, be a compliance with a bond which calls for a deed conveying and warranting 464 acres? I am clearly of opinion that it does not take away Kane's right to redress against Koger.

I concur in the other parts of the decree prepared by the president. Note in Original Edition.

### Shearman Adm'r v. Christian and Others.

December, 1838, Richmond.

Administrators\*—Decree as to Credits to Be Allowed—

\*Administrators.—See monographic note on Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

Construction—Retainer—Case at Bar.—On appeal by an administrator from a decree in favour of a creditor of decedent, this court declared, "that in the accounts of the administration of the appellant, a credit ought to have been allowed him for the proper debts of his testator paid by him, so as not to subject him to a devastavit, and that so much of the decree as denied him those credits was erroneous;" therefore it reversed the decree, pro tanto. Of the debts of the testator which had been paid by the administrator, a large portion were simple contracts. HELD, the claim of the appellee creditor of decedent was, by the decree aforesaid of this court, determined to be a debt by simple contract only; and therefore, as against such creditor, the administrator has a right to retain the amount of his own simple contract demand against the testator.

Same—Ex Parte Settlement;—Effect.—The settlement of an administration account under an ex parte order of the court which granted administration, is prima facie evidence in favour of the administrator against creditors of decedent.

This is the sequel of the case between the same parties, which was before this court in November 1827; reported 6 Rand. 49.

The controversy arose on a bill exhibited in the superior court of chancery holden at Fredericksburg, by Christian and others, claiming as heirs and distributees 572 \*of John Fleet deceased, against Martin Shearman in his lifetime, to set aside, as fraudulently procured, a deed executed by Fleet in his lifetime, conveying almost his whole estate to Martin Shearman, and a will of Fleet devising and bequeathing to the same Martin Shearman his whole estate, of which will (as it appeared in the progress of the cause, though it was not stated in the pleadings) the said Shearman had qualified as executor. Martin Shearman died pending the proceedings; and they were revived against E. G. Shearman, administrator with the will annexed, and also a devisee and legatee of Martin Shearman, and Ellis and Tapscott the other devisees and legatees. The deed and will of Fleet being found and declared to be fraudulent, the proper accounts were ordered; and among others, the account of E. G. Shearman's administration of Martin Shearman's estate; and upon that account being reported, the question arose, whether the debt due from Martin Shearman for the profits of Fleet's personal estate and the principal thereof used by him, which he had claimed and enjoyed under the deed and will that had been set aside as fraudulent, was to be considered as a debt due from Martin Shearman in his character of executor of Fleet, and therefore of superior dignity to any proper debt of Martin Shearman, so as to exclude all credits claimed by E. G. Shearman, his administrator, for debts of Martin

†Same—Retainer.—See monographic note on "Debts of Decedents" appended to Shores v. Wares, 1 Rob. 1.

‡Same—Ex Parte Settlement—Effect.—See foot-note to Corbin v. Mills, 19 Gratt. 488; monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6; monographic note on "Commissioners in Chancery" appended to Whitehead v. Whitehead, 23 Gratt. 876.



paid by him, and to make the administrator chargeable with a devastavit to that extent? The chancellor held the affirmative, and made his decree against the administrator for the devastavit, accordingly. The decree was rendered in favour of Thomas Armstrong administrator of Fleet, who had qualified as such after the will of Fleet was set aside, and had been made a party defendant to the suit by a supplemental bill. And from that decree the first appeal was taken.

This court declared, "that in the accounts of the administration of the appellant" 573 (E. G. Shearman) "of \*the estate of his testator Martin Shearman, a credit ought to have been allowed him for the proper debts of his testator paid by him, so as not to subject him to a devastavit; and that so much of that decree as denied him those credits was erroneous;" therefore, the court reversed the decree pro tanto, with costs, affirmed the residue thereof, and remanded the cause to the court of chancery to be proceeded in according to the principles declared by this court, "either on the special report of the commissioner of the administration of the appellant, or on such further report as should be deemed necessary to a final decree."

When the case got back to the court of chancery, the accounts were recommitted, to be reformed according to the decree of this court; and upon the new report of this commissioner, two questions arose.

1. The new report allowed E. G. Shearman the administrator a credit for the sum of 1457 dollars 20 cents, which he claimed as due to him on simple contract from his testator Martin Shearman, and which he insisted he had a right to retain as against the plaintiffs. In the "special statement of the appellant's administration" referred to in the decree of this court, this sum was also credited to him as so much which he had a right to retain; and in relation thereto, the said special statement contained the following remarks of the commissioner: "The sum of 1457 dollars 20 cents is admitted in this account, which was excluded from the report" (meaning the report on which the decree reversed by this court was founded) "because of inferior dignity to the plaintiffs' claim, and because 1000 dollars of that sum is for one third of the schooner Lancaster, one half of which is entered in the inventory and appraisement signed by the defendant E. G. Shearman, and in the account of sales, as of the estate of Martin Shearman. The defendant Shearman requires that it be specially stated, that

574 veveyed by \*him to Martin Shearman, (and he exhibited a deed to that effect); that it was so conveyed, that he might take the oath required of him as surveyor of the port of Tappahannock, viz. 'that he did not own a vessel or part of a vessel,' &c.; that the said Martin was to have paid him, and did so, by his will; but that the property devised will be covered by his debts; and that unless this item is allowed him, as it increases the inventory and appraisement, it will be a double loss." In the progress of the cause after the same was remanded to

the court of chancery, there were filed as exhibits, a copy of the enrolment of the schooner Lancaster, and a copy of a deed made by E. G. Shearman to Martin Shearman, purporting to convey an interest in the said schooner; both of which copies were certified by the collector of the port of Tappahannock. The enrolment was dated the 30th of November 1810, and set forth, that E. G. Shearman had made oath that himself and Martin Shearman were "sole owners of the ship or vessel called the Lancaster of Fredericksburg." By the deed, E. G. Shearman bargained and sold to Martin Shearman, for the expressed consideration of one dollar, "one half of the goods schooner called the Lancaster of Frederickburg." This deed was dated the 28th of June 1811. There was also filed as an exhibit, an account of E. G. Shearman as administrator of Martin Shearman, settled by commissioners appointed for the purpose by an order of Lancaster county court made the 19th of November 1818, which was returned to and recorded in that court on the 15th of February 1819. In this account, among the debts of the year 1815, there was one in the following terms: "To cash paid E. G. Shearman's account, \$1457.20." The commissioner charged with reforming the administration account taken in the cause according to the decree of the court of appeals, having applied to the chancellor for instructions as to the effect

575 of the account settled \*under the order of Lancaster county court, the chancellor directed that it should be taken as prima facie evidence; "no part of the pleadings on the part of the plaintiffs having called for an account." The depositions of two witnesses examined on behalf of the plaintiffs (with a view, as it seemed, to shew that E. G. Shearman never had any interest in the schooner Lancaster) were also filed in the cause; but they proved nothing more than that the deponents had always understood the schooner to be entirely the property of Martin Shearman; one of the deponents adding, that Martin himself had told him she was his property.

By the reformed report it appeared, that the plaintiffs objected before the commissioner to the charge of 1000 dollars (part of the 1457 dollars 20 cents) for one third of the schooner Lancaster, on three several grounds; first, that E. G. Shearman's assignment to Martin Shearman was merely colourable, to enable himself to take the oath of surveyor; secondly, that if the assignment was bona fide, it was paid for by the devise and profits of the real estate of Martin Shearman; thirdly, that at all events the claim was but a simple contract debt, and the defendant had no right to retain. But after the report was returned, the plaintiffs filed but one exception thereto; which was in the following words: "The plaintiffs and the defendant Armstrong except to the allowance of the account due to E. G. Shearman (as appears by the report) of 1457 dollars 20 cents, because it is a debt of inferior dignity to theirs, and the decree of the court of appeals does not direct that it shall be allowed, but by strong implication forbids it."

2. The administrator claimed credits likewise for sundry small sums disbursed by him, chiefly for expenses in this suit. These credits were allowed in the "special statement" referred to in the decree of this court; but they were disallowed in the report 576 on which the chancellor's \*decree, reversed as aforesaid, was founded; and they were now again rejected by the commissioner in stating the reformed account. When that account was returned, the administrator excepted thereto, for the disallowance of the said credits; and also because the commission allowed him was inadequate,—because sundry articles of personal property bequeathed by Martin Shearman's will were charged to the administrator at the appraised value, instead of the price at which they were actually sold,—and because interest was charged to the administrator upon the hires of slaves kept by him.

The commissioner assigned, at considerable length, his reasons for rejecting the claims which formed the subject of the defendant Shearman's exceptions; but as those exceptions were disposed of by the chancellor on a different ground, and the court of appeals declined entering into any detailed consideration of this part of the case, it is deemed unnecessary to set forth the evidence relating to these claims, or the reasons which influenced the commissioner to disallow them.

The cause came on to be heard in May 1829, upon the reformed report, and the exceptions thereto; when the court of chancery, "being of opinion that it would be inconsistent with the decree of the court of appeals to sustain the exceptions taken by the defendant," overruled the same, and "for a like reason" sustained the exception taken by the plaintiffs and the defendant Armstrong administrator of Fleet, "the effect whereof is to increase the balance reported to be due by the defendant Shearman, by the addition of the sum of 1457 dollars 20 cents." The court accordingly decreed that the defendant E. G. Shearman pay to the defendant Armstrong administrator of Fleet, to be disposed of by him as such administrator, the whole balance so increased, amounting to 4656 dollars 14 cents, with interest &c. and to the plaintiffs their costs of suit.

577 \*From this decree, Shearman again appealed to this court.

Leigh, for appellant.

Johnson, Stanard and Patton, for appellees.

TUCKER, P., delivered the opinion of the court. We are of opinion that the question as to the dignity of the debt due from Martin Shearman's estate to Fleet's representatives was directly before this court upon the former appeal, and was directly decided. This is obvious from the opinions of the judges, to which we may refer as a guide in the interpretation of the decree. But it is, moreover, the direct result of the decree itself, since that allows a credit to E. G. Shearman against the demand of the plaintiffs, of all proper debts of the testator paid by him. These words refer, it is true, to debts already paid; since, after suit even by a simple con-

tract creditor, no voluntary payment to any other in the same decree is good. But of the debts already paid, a large portion were simple contracts, and were, by this decree, made good payments against the claim of Fleet's representatives. That claim must then have been held, and must now be held, to be a simple contract debt as between these contending parties. If so, E. G. Shearman the administrator has a right to retain his simple contract demand against it, even though he should not be considered to have paid it already, by demanding and receiving credit for it before the commissioners of the county court.

The only question, then, is as to the justice of his claim of 1457 dollars 20 cents, or rather of a part of it to the amount of 1000 dollars. We think the claim ought to be sustained. It was allowed by the commissioners of the county court, and the account settled

by them is prima facie evidence of the 578 justice of the demand; \*that is, the demand must be allowed unless it be disproved. On looking into the record, we find nothing to disprove it. There is indeed some difficulty raised, from E. G. Shearman's assertion of his having sold one third instead of one half of the schooner, and from Martin Shearman, as it is said, being credited in the inventory with only one half of the schooner, instead of the whole. As to the first, it is obviously a mistake of E. G. Shearman or the commissioner, since the deed referred to shews that he did convey one half, and not one third only. And as to the second; we do not learn what became of the schooner, and if Martin Shearman had parted with one half of his interest, and claimed but one half at his death, this difficulty would cease. But be this as it may, the appellees have never called in question these matters. In the last report, the commissioner, pursuing the directions of chancellor Green, allowed the account on the evidence of the settlement before the commissioners of the county court. The appellees did not except on the ground that E. G. Shearman had no interest in the vessel, or that 1000 dollars was too high a value for it. They objected before the commissioner, 1. that the assignment was colourable; 2. that the interest was paid for in the devise; 3. that their demand was of superior dignity. And this last was the only exception filed to the report. They waived all questions as to E. G. Shearman's interest, or the value of it. They cannot now call it in question. Had they done so before, every thing might have been explained, or perhaps every thing was explained, or admitted, because at that time the nature of the transaction was understood between the parties. There is indeed every reason to believe that E. G. Shearman had an interest in the vessel. What motive could there be for his false swearing that he had so in 1810, in order to the enrolment; or for making a deed to Martin Shearman for one half in 1811, to enable himself 579 \*to take the office of surveyor? Why did he not, on the last occasion, make oath that he had no interest, instead of making a deed for that which he had not? No

reason can be imagined. We must then take it that he had an interest; and the value of that interest was allowed 20 years ago by the commissioners of the county court, who probably best knew it. The plaintiffs' exception should, therefore, have been overruled.

With respect to the defendant Shearman's exceptions, we do not distinctly see that the commissioner erred in rejecting the items, and we are therefore of opinion that the exceptions were properly overruled.

Decree of chancery court reversed with costs, and decree entered, reducing the amount decreed against the appellant, by the sum of 1457 dollars 20 cents.

580     **\*Cheatham Adm'r v. Burfoot.**  
           **Same v. Buck Adm'r of Friend.**  
           **Same v. Friend Adm'r of Friend.**

December, 1838, Richmond.

**Glebe Land—Sale of—Rights of Freeholders in Proceeds**

**—Case at Bar.**—The glebe land in a parish having been sold by the overseers of the poor, under the provisions of the act, 1 Rev. Code, ch. 82 b, the proceeds of sale are paid over, by direction of the freeholders and housekeepers of the parish, to an agent by them appointed to invest the same in bank stock. The agent makes the investment, receives the dividends on the stock during his life, and dies without having accounted for such dividends. Then a bill is exhibited against his administrator, by one of the freeholders and housekeepers of the parish, suing as well for himself as on behalf of the others (of whom he states that he is the duly appointed agent), setting forth the above facts, and praying that the defendant may be decreed to pay to the plaintiff the amount of dividends received by the decedent in his lifetime. On demurrer to the bill, **Held**, the freeholders and housekeepers acquired no property in the proceeds of the glebe land, by the disposition thereof made as aforesaid, and this suit cannot be maintained.

**Administrator d. b. n.—Suit by—Devastavit of Predecessor.**—An administrator de bonis non can maintain no suit for the recovery of assets converted by his predecessor in the administration.

**Same—Same—Same—Revival.**—If such suit be instituted by the administrator de bonis non against the

representatives of his predecessor, a party who is sole legatee of the original decedent, and has also qualified as the successor administrator de bonis non, cannot revive and prosecute the suit, either in the character of a legatee, or in that of personal representative.

In October 1817, a bill was exhibited in the late superiour court of chancery for the Richmond district, by Lawson Burfoot, "one of the freeholders and housekeepers within the Manchester parish in the county of Chesterfield, who sues as well for himself as for and on behalf of the other freeholders and housekeepers within the said parish," against Branch Cheatham 581 and Peter \*F. Edwards administrators with the will annexed of Matthew Cheatham deceased. The bill stated, that sometime in the year —, the glebe land in the said parish being vacant, the overseers of the poor for the said county then in office, by virtue of the act of assembly passed the 12th of January 1802, entitled "an act concerning the glebe lands and churches within this commonwealth," sold the same in the manner prescribed by the said act, and collected the money arising therefrom. That by the direction of the freeholders and housekeepers within the said parish, or a majority of them, the overseers of the poor for the said county paid the said money over to the said Matthew Cheatham, whom the freeholders and housekeepers of the said parish, or a majority of them, had appointed their agent to vest the said money in bank stock. That the said Matthew accordingly, some time in the year —, purchased 40 shares in the stock of the bank of Virginia, and afterwards, in the year —, purchased two other shares in the stock of the same bank. That the said Matthew, from July 1806 to January 1808, both inclusive, drew from the said bank the dividends on 40 shares, and from July 1808 to January 1815, both inclusive, drew from the said bank the dividends on 42 shares, the whole of which dividends so received by the said Matthew amounted to 3507 dollars 55 cents. That the said Matthew had never in any manner accounted for the said dividends to the freeholders and housekeepers of the said parish. That the complainant was advised that the said Matthew, as agent for the freeholders and housekeepers of the said parish, was in duty bound to have vested the dividends drawn by him from the said bank, in additional bank stock, as soon as convenient after they were received, and that the defendants were bound to account for the 582 said dividends \*received by their testator, with interest thereon equivalent to what would have been the dividends on the shares that might have been purchased with the said 3507 dollars 55 cents; but the said defendants, although often applied to by the complainant, in his own right and as agent duly appointed by and on behalf of the other freeholders and housekeepers of the said parish, or a majority of them, had refused to pay the same, even with six per centum interest thereon. That no debt or demand existed against the said parish, and that there was no

**\*Administrator d. b. n.—Suits by—Devastavit of Predecessor.**—The commission of administration *de bonis non* extends only to *unadministered assets*, and the administrator *d. b. n.* cannot, therefore, call his predecessor to account for a devastavit, for that is an administration, though an ill one. The remedy in such case belongs to the creditors and others concerned in the estate. 3 Min. Inst. (2d Ed.) 571, citing *Coleman v. McMurdo*, 5 Rand. 52. *Cheatham v. Friend*, 9 Leigh 580, and *Dodson v. Simpson*, 2 Rand. 294. See further on this subject, monographic note on "Executors and Administrators" appended to *Rosser v. Deprist*, 5 Gratt. 6; Va. Code, § 2648.

In *Wooddell v. Bruffy*, 25 W. Va. 460, it is said: "By the sale of the land Kerr, the executor, converted the land into money or bonds due to himself and thereby such money or bonds became administered assets and could not legally pass into the hands of the plaintiff as administrator *de bonis non* of Bruffy.—*Estill and Eakle v. McClintic*, 11 W. Va. 399; *Cheatham v. Burfoot*, 9 Leigh 580."

\*1 Rev. Code, ch. 82, p. 79.

just objection to the payment of the said sum with interest, to the complainant, for himself and the other freeholders and housekeepers of the said parish. Wherefore the bill prayed that the defendants, administrators as aforesaid, should be decreed to pay the complainant, for and on account of the freeholders and housekeepers of the said parish, the said sum of 3507 dollars 55 cents, with such a rate of interest as might be deemed equitable.

The defendants put in a demurrer and answer to the bill. For cause of demurrer they shewed, that the bill was exhibited by the complainant alone, praying for the payment of the whole sum alleged therein to be due to the freeholders and housekeepers of the said parish, on behalf of himself and the said freeholders and housekeepers, without naming the said freeholders and housekeepers, or a majority of them, or shewing any authority under their hands, or by any law of the land, to institute a suit on their behalf as aforesaid: and further, that there was not any matter set forth in the said bill, as a foundation of equity for the court to interpose, but what was properly cognizable at law, and whereof the said complainant might have the benefit upon a trial at law, if the same were true. They then proceeded to answer the bill, claiming a credit for 1635 dollars paid by their testator in his lifetime at the request of the freeholders and 583 housekeepers, and contesting \*the demand of interest on the dividends received.

The court overruled the demurrer. By an account taken in the cause, and approved by the court, it appeared that after allowing the credit claimed as aforesaid by the defendants, the balance of the dividends received and unaccounted for by their testator amounted, on the 1st of January 1820, to 3237 dollars 21 cents, principal and interest.

In the same month of October 1817, a bill was exhibited in the same superiour court of chancery, against the same defendants, by Cornelius Buck sheriff of Chesterfield, administrator de bonis non with the will annexed of Edward Friend deceased. The bill set forth the will of Edward Friend, whereby he devised and bequeathed his whole estate, real and personal, to Edward O. Friend the son of his brother Joseph, and authorized and directed his executor to sell a plantation called Hannah Spring. Matthew Cheatham was named the executor. The bill alleged that the said Matthew, having renounced the executorship, qualified as administrator with the will annexed, took possession of the whole estate, real and personal, which was large, and received the whole profits thereof until his death; that he sold the plantation called Hannah Spring, for a large sum of money, the whole of which was paid to him in his lifetime; and that he died without ever having settled the accounts of his administration. That upon his death, administration of the estate of the testator remaining unadministered, with the will annexed, was duly committed to the plaintiff. That Edward O. Friend, the devisee and legatee mentioned in the will, was yet an

infant under the age of 21 years. The bill prayed that the defendants, administrators with the will annexed of the said Matthew Cheatham, might be compelled to settle the accounts of their testator's administration on the estate of Edward Friend, and 584 decreed to \*pay the plaintiff any balance that might be found due from the estate of the said Matthew to the plaintiff administrator as aforesaid.

The defendants answered, that when they came into possession of their testator's papers, they found them in great confusion and disorder; that they had been unable to discover any book or paper containing an account of his transactions with the estate of Edward Friend deceased, or any thing relating thereto, except some bonds or notes appearing to be due the same, and scrip for shares of bank stock, which were delivered by defendants to the guardian of Edward O. Friend, and except a few receipts for money paid by the said Matthew for clothing and tuition of the said Edward O. Friend; that they believed the estate of Edward Friend to have been inconsiderable, but, under the circumstances stated, they were unable to say what was the amount received from it by their testator, or to render any correct account of his transactions in the administration.

An account was taken in this cause, by order of the court, of the defendants' administration of Matthew Cheatham's estate; by which it appeared that on the 1st of June 1821, the defendant Branch Cheatham was indebted to the estate in the sum of 2372 dollars 18 cents, and the defendant Peter F. Edwards in the sum of 1828 dollars 8 cents. No account was directed or taken, in this suit, of Matthew Cheatham's administration on the estate of Edward Friend; but on the 12th of March 1822, the court decreed that the defendant Branch Cheatham should pay the plaintiff 1949 dollars with interest &c. and that the defendant Peter F. Edwards should pay the said plaintiff 1501 dollars 95 cents with interest &c. "which sums constitute the proportion to which the plaintiff in this cause is entitled, of the sum which appears by the said report to be in the hands of the defendants, belonging to 585 the estate \*of Matthew Cheatham deceased." The decree gave leave to the plaintiff to amend his bill and make new parties. And no further proceeding was had in this cause, until the final decree hereafter mentioned.

In the same month of October 1817, a bill was exhibited in the same superiour court of chancery, against the same defendants and the said Cornelius Buck administrator de bonis non &c. of Edward Friend deceased, by Thomas Branch late sheriff of Chesterfield, to whom had been committed the estate of Joseph Friend deceased, unadministered by the said Edward Friend and by the said Matthew Cheatham, prior successive administrators with the will annexed of the said Joseph Friend deceased. The bill sets forth the will of Joseph Friend, whereby the testator appointed Edward Friend and another person his executors, and desired them to sell, for the benefit of his son

Edward O. Friend, certain real property which he specified. There were no other provisions of the will. It was then alleged in the bill, that Edward Friend, having renounced the executorship, qualified as the administrator with the will annexed of Joseph Friend; and that the other person named as executor died, without having in any manner taken upon himself the executorship, or meddled with the estate. That immediately after the death of Joseph Friend, Edward Friend took possession of the whole estate, real and personal, which was considerable, and held the same until his death, without ever settling the accounts of his administration. That Edward Friend left a will, of which Matthew Cheatham was named executor; who renounced the executorship, and qualified as administrator with the will annexed. That shortly after the death of Edward Friend, the said Matthew Cheatham also qualified as administrator with the will annexed of Joseph Friend, of the estate unadministered by the said Edward Friend, and immediately took possession of the whole of such unadministered

586 estate, \*both real and personal, which he held until his death, without ever settling either the accounts of Edward Friend's administration, or the accounts of his own administration, on the estate of Joseph Friend deceased. That the defendants Branch Cheatham and Peter F. Edwards had qualified as administrators of the said Matthew Cheatham, with his will annexed; and that the estate of Edward Friend, unadministered by the said Matthew Cheatham, had been committed for administration to the defendant Buck, with the will of the said Edward annexed. That Edward Friend, the first administrator of Joseph, sold all the real property specified in the will, except one tract of land, and the purchase money was either collected by the said Edward in his lifetime, or was or might have been collected by Matthew Cheatham the administrator de bonis non, after Edward's death. That besides the real estate mentioned in the will, Joseph Friend was seized and possessed, at the time of his death, of a very considerable estate, both real and personal, and had debts due to him to a very large amount. That several claims of large amount were still existing against Joseph Friend's estate, and for the purpose of settling those claims, and making distribution of the estate, it was necessary that the plaintiff should bring all persons indebted to the said estate to a settlement. That Matthew Cheatham, from the time of his qualification as administrator de bonis non of Joseph Friend's estate, besides the collection of large sums of money due that estate, annually received the proceeds of large crops made on the land, and large sums for the hire of slaves. The bill (waiving any account of Edward Friend's administration on the estate of Joseph Friend, unless the payment of Joseph Friend's debts should make it necessary) prayed that the defendants administrators of Matthew Cheatham might be compelled to render an account of all the assets which were of the said

587 Joseph Friend at the time \*of his death, left unadministered by the said Edward Friend, before a commissioner of the court; that the court would decree to the plaintiff whatever property or money might have come to the hands of Matthew Cheatham administrator as aforesaid of Joseph Friend, belonging to said Joseph's estate; and general relief.

The administrators of Matthew Cheatham answered, that they had delivered to the plaintiff the bonds and notes belonging to Joseph Friend's estate, which they had found among their testator's papers; that the slaves, stocks &c. belonging to the said estate, had, since their testator's death, been received into possession of the guardian of Edward O. Friend, only child and heir of Joseph Friend; that they did not know, and could not ascertain from an examination of their testator's papers, what sums of money were or might have been collected by him on account of Joseph Friend's estate; but they had heard and believed that the said estate was not by any means profitable.

At this stage of the proceedings, Branch the plaintiff died, and the cause was revived in the name of William Clarke sheriff of Chesterfield and administrator de bonis non of Joseph Friend.

On the 3d of June 1819, the court made an order that the administrators of Matthew Cheatham should render before a commissioner an account of all the assets which were of Joseph Friend at the time of his death, left unadministered by Edward Friend at the time of his death, and of the said Matthew Cheatham's administration thereof, as well as an account of their own administration of Matthew Cheatham's estate. On the 19th of February 1820, the order was extended, so as to require the same defendants to settle an account of Matthew Cheatham's administration of the estate of Edward Friend deceased.

On the 7th of March 1820, the commissioner reported that he had found it impracticable to separate the transactions

588 \*relating to Joseph Friend's estate, from those relating to Edward Friend's estate. He therefore returned a joint account of Matthew Cheatham's administration of both estates, shewing a balance due from the said administrator, on the 31st of December 1819, of 14908 dollars 94 cents, principal and interest. In this account, the administrator received credit for a number of bonds belonging to the estates of the two decedents, which appeared to have been transferred by him to the guardian of Edward O. Friend. The account so stated was approved by the court.

The two causes of Burfoot against Cheatham's adm'rs, and Joseph Friend's adm'r against Cheatham's adm'rs, were actively prosecuted during a long period. The proceedings in each were very similar, and generally simultaneous; and as well at the time of pronouncing the final decree, as on occasion of various interlocutory decrees, whereby partial payments were directed to be made to the plaintiffs respectively, the causes were heard together. In the progress of

each case, new parties were brought before the court as defendants, the additional parties being the same in each; and various additional accounts were thereby rendered necessary, and from time to time were taken. It is not material to detail the particular proceedings in the case of Burfoot plaintiff; but in the suit instituted by the administrator of Joseph Friend, it is necessary to state a part of the proceedings with some degree of minuteness.

In the last mentioned case, the record states that on the 13th of June 1822, on the motion of the plaintiff, leave was given him to amend his bill and to make new parties; and the cause was sent to the rules to be further proceeded in. And at the rules holden in the clerk's office in the month of July 1822, "came Edward O. Friend administrator de bonis non of the said Joseph Friend deceased, by his counsel, and exhibited his bill

by way of amendment and supplement 589 to the original \*bill aforesaid, against the aforesaid B. Cheatham and P. F. Edwards, administrators with the will annexed of M. Cheatham deceased, and a certain Martha Cheatham, which amended and supplemental bill is in the words following, viz.—To the honourable Creed Taylor, judge of the superiour court of chancery for the Richmond district: Humbly complaining sheweth unto your honour your orator Edward O. Friend, administrator de bonis non with the will annexed of Joseph Friend deceased, and also administrator de bonis non with the will annexed of Edward Friend deceased, that your orator is the only child, sole devisee, legatee and heir of the said Joseph Friend deceased, and is also the sole devisee and legatee of his uncle the said Edward Friend deceased." The bill then details the proceedings which had taken place in the two suits instituted by Buck administrator of Edward Friend, and by Branch administrator of Joseph Friend, respectively, against the administrators of Matthew Cheatham, stating the qualification of the successive administrators of Joseph Friend and Edward Friend, and that the complainant Edward O. Friend, having attained his age of 21 years, had recently qualified as administrator de bonis non of both the said decedents, with their respective wills annexed. Branch Cheatham, Peter F. Edwards and Martha Cheatham are made defendants, in the character of devisees and legatees of Matthew Cheatham deceased.

In April 1826, a further amended bill was filed by the said Edward O. Friend, styling himself simply "administrator de bonis non with the wills annexed of Joseph Friend and Edward Friend deceased," the object of which was to subject to the plaintiff's demand certain property, real and personal, charged to have been conveyed by Peter F. Edwards (who was now dead) for the benefit of his wife and children, by deeds made without valuable consideration, and certain other property 590 \*charged to have been conveyed by the said Edwards for the indemnity of

Edwards as administrator of Matthew Cheatham. This bill further charged that Branch Cheatham and the said Edwards executed a joint bond as administrators of Matthew Cheatham, with Thomas Graves junior, O. Winfree and the said William Winfree as their sureties. The surviving co-obligors of Edwards in this administration bond, and the representatives of those who were now dead, and all the parties interested under the several deeds executed as aforesaid by Edwards, in his lifetime, were made defendants.

On the 3d of July 1829, the three causes of Burfoot plaintiff, Buck administrator de bonis non of Edward Friend, plaintiff, and Edward O. Friend administrator de bonis non of Joseph Friend, and also administrator de bonis non of Edward Friend, plaintiff, came on to be finally heard. The court declared that after exhausting the whole property of Matthew Cheatham deceased which came to the hands of his devisees and legatees, Branch Cheatham, Peter F. Edwards and Martha Cheatham, there still remained due to the plaintiff Burfoot the sum of 1460 dollars 47 cents with legal interest from the 27th of April 1829, and to the plaintiff Edward O. Friend the sum of 6394 dollars 79 cents with like interest from the same day; and that it was manifest that the assets of Matthew Cheatham's estate applicable to the payment of the debts due to the plaintiffs, if they had been preserved from waste, and managed with ordinary care, would have been amply sufficient to satisfy the principal money and interest due the plaintiffs from the said estate. Therefore the court decreed that the defendants Branch Cheatham, W. Findley sheriff of Chesterfield and administrator of Peter F. Edwards deceased, out of the estate of his intestate in his hands to be administered, and William Winfree the 591 surety for the faithful \*administration by Branch Cheatham and Edwards of Matthew Cheatham's estate, pay to the plaintiff Burfoot and the plaintiff Edward O. Friend the sums of money respectively due them with interest as aforesaid, and to the several plaintiffs in the three causes their costs of suit.

From this decree the defendant Branch Cheatham appealed.

Stanard and Rhodes for the appellant.

Johnson, Leigh and Taylor for the appellees.

PARKER, J. These cases have been argued, by the direction of the court, on preliminary questions affecting the rights of the complainants in the court below to sue in the characters they respectively held.

Lawson Burfoot exhibited his bill in the character of "one of the freeholders and housekeepers within the Manchester parish in the county of Chesterfield," suing "as well for himself, as for and on behalf of the other freeholders and housekeepers within the said parish." He proceeded to state that the overseers of the poor for the county, by virtue of the act of assembly passed the 12th of January 1802, had sold certain glebe lands within that parish, and having collected the purchase money, had paid it over, by direc-

tion of the said freeholders and housekeepers or a majority of them, to Matthew Cheatham, their agent for the purpose of investing it in bank stock. That the money was so invested by Cheatham, and the dividends received by him, but that he had failed in his lifetime to pay them over, and that his administrators, although since applied to by the complainant, in his own right, and as agent duly appointed by and on behalf of the other freeholders and housekeepers, had still neglected and refused to pay them. The bill therefore was filed for an account and decree for the dividends remaining unpaid, with interest.

592 \*The defendants demurred to this

bill, assigning as causes of demurrer, that if the complainant had any cause of action, he had a plain remedy at law; and moreover, that he shewed no right to institute the suit, either in his own behalf, or in behalf of the freeholders and housekeepers of the parish of Manchester. I shall pass over the first objection, and confine myself to the enquiry whether the plaintiff was authorized to sue under the circumstances stated in the bill, admitting him to have been the duly authorized agent of the freeholders and housekeepers, and prosecuting the claim for their benefit as well as his own; and admitting also, for the sake of the argument, that the money was paid over to Cheatham to make an investment, by direction in writing under the hands of a majority of the freeholders and housekeepers, addressed to the overseers of the poor, and that the freeholders and housekeepers had authority thus to provide for the accumulation of the fund, before a final appropriation of it. Conceding all this, without which Burfoot would have had no ground to stand upon, still I think the demurrer ought to have been sustained. The act of assembly concerning glebe lands directs their sale by the overseers of the poor, and vests in them the right of action for the purchase money, and for all the purposes of carrying the act into effect. It does not give such right of action to the freeholders and housekeepers in any case, nor does it bestow upon them any property or interest in the fund. All that it does is to require the overseers, or a majority of them, to appropriate the money arising from the sale of the glebes, to the poor of the respective parishes, "or to any other objects which a majority of the freeholders and housekeepers therein may direct, by a writing from under their hands, directed to the said overseers;" provided that no appropriation shall be made "to any religious purpose whatsoever." This is no more than a bare

power or authority in the freeholders  
593 \*and housekeepers to direct the appropriation to other objects than the poor of the parish; and unless it could be shewn that they had a right to appropriate to their own individual use, and had done so, to the extent of giving to themselves a common property in the fund, by a partial disposition of it for accumulation, they could not sue in their own names, nor in the name of an agent. But it seems clear to me that the act does not authorize an appropriation to private and individual uses. The "other

objects" spoken of must be intended public objects, of a nature similar to the support of the poor, in respect of being a common benefit; and the appropriation to such objects is to be made by the overseers of the poor, and not by the freeholders and housekeepers. Their power is to direct the appropriation, and nothing more. Until the direction is given, the appropriation actually made, and all the purposes of the act fully accomplished, the right of action is vested and remains in the overseers of the poor, both by the terms of the law, and as trustees to carry it into complete effect. The object of the legislature, as shewn by the preamble and the enacting clauses of the act, was not to return the fund to the then freeholders and housekeepers of each parish, under the notion that it was drawn from their predecessors (for it was just as likely that the other inhabitants of the parish were the heirs and representatives of those contributing to purchase the glebes, as themselves): but the object was to apply it to the benefit of the people generally, on whom it devolved at the dissolution of the british government; and, as the best means of effecting that object, to authorize those particularly interested in the common good to direct the appropriation, for public uses. An appropriation to private, individual uses would not only have defeated the manifest purposes of the act, but have been attended with difficulties and inconveniences, arising out of

the number and shifting character  
594 of the freeholders \*and housekeepers, which we cannot suppose to have been within the contemplation of its framers.

Again, the direction to pay over the fund to an agent for investment is no appropriation to any definite object, and therefore there are none to claim as persons in whose favour the power has been exercised. It is, at most, only a partial execution of the authority conferred by the act, which left in the freeholders and housekeepers nothing more than a bare authority to direct its farther application to the contemplated objects, uncoupled with property or interest. until, at least, such further appropriation was actually made. It is argued that the object was to increase the fund by accumulation, and then finally appropriate it. If this be so, it cannot be pretended that the freeholders and housekeepers have a right to sue while the objects of appropriation remain uncertain. The cases in which one or more plaintiffs have been allowed to become the champions of the rights of others, as well as of their own, are all cases where there is a common property or interest involved, and not a mere authority delegated by law. The principle on which they depend was clearly stated by lord Macclesfield in *Chancery v. May*, Prec. in Ch. 592, and is fully illustrated in the cases cited in 2 Madd. Ch. Pract. 180, and in *Calvert on Parties to Suits in Equity*, pp. 28, 29, 30,—but it is unnecessary to refer to them, as my opinion turns upon the right of the freeholders and housekeepers themselves to sue, and no one contends that one or more persons can bring a suit in the name of others, however numerous, who could not



sue in their own names if their number were smaller.

So much for the case of Cheatham against Burfoot. As to the two other cases of Cheatham against Friend, I regret to say that I cannot distinguish them from the case of Wernick's adm'r v. M'Murdo &c., 5 Rand. 51, which this court is bound to respect. They were commenced and

595 \*prosecuted throughout by successive administrators of Joseph and Edward Friend, to recover assets converted by Matthew Cheatham a former administrator. They asked, indeed, for a general account; not, however, to enable them to distinguish between assets converted and assets remaining in kind, and to receive the latter; for every step in the cause shews that it was for assets administered they sued, not for assets unadministered. It appeared at an early stage of the cause, that the assets of the latter character had in fact been delivered up to the guardian of Edward O. Friend; and no further notice is taken of them in any future proceeding. The commissioner's account, on which the final decree was obtained, includes converted assets alone. After that report was returned to court, the suits were revived by successive administrators de bonis non, claiming the benefit of that proceeding, and asking a decree for the balance found due, consisting altogether of converted assets; and the final decree affirms their title to have the benefit of that proceeding, and to recover the assets so converted. Now, if Edward O. Friend had been only the administrator de bonis non of Joseph and Edward, it is plain, under the authority of Wernick's adm'r v. M'Murdo &c. that he could not recover these assets, nor even ask an account of them. But it is said that the first administrators de bonis non sued in respect of their title to the unconverted assets; that Edward O. Friend the succeeding administrator had a right to revive that suit; and that, as he was also the heir, distributee and legatee of the two Friends, he might, in such revivor, include his claim to the converted assets, as he might, in an original suit, have claimed in both characters. The answer to this view of the case, satisfactory to my mind, is, first, that it is perfectly obvious the first administrators sued for converted assets alone; secondly, that Edward O. Friend made himself a party to the proceedings already had, in no other

596 character than as \*administrator de bonis non, the allegation in his first bill that he is also heir, devisee and legatee (which he omits in his subsequent amended bill) being merely the incidental statement of a fact, and not explanatory of the character in which he revived the suit; and thirdly, that if he had attempted to revive and to have the benefit of former proceedings, in a different character from the one originally asserted, and under which those proceedings were had, he could not have succeeded, without a violation of the rules in relation to bills of revivor and supplemental bills, properly so called, or original bills in the nature of

supplemental bills. As to a mere bill of revivor it is unnecessary to speak. A supplemental bill must be in aid of what the court has already done; and it has been decided that if a plaintiff sues without good title, but afterwards acquires it, he cannot make it effective by amending his bill. *Pilking-ton v. Wignall*, 2 Madd. Ch. Pract. 244; *Story's Equity Plead.* 275, § 339. By a parity of reason, if one sues in one character, under title derived from that character, and dies, another having the same title, and also a different one, cannot make the last available by amendment or any other continuance of the original suit. *Story's Equity Plead.* *qua supra*. One of the characteristics of a supplemental bill is, that the plaintiff sues in respect of the same title in the same person as stated in the original bill. *Ibid.* *Calvert on parties to Suits in Equity*, pp. 96, 100; *Mittf. Plead.* 64, (margin.) There can in this mode be no change of interest affecting the questions between the parties, but only a change of the person in whose name the suit must be further prosecuted (*Mittf. Plead.* *qua supra*); and neither in this way, nor by an original bill in the nature of a supplemental bill, which lies where new parties with new interests in the same subject are brought before the court (for the cases in which an original bill in the nature of a supplemental bill lies, see *Story's Equity Plead.* 279, et \*seq. § 346, 347, 348, 349, 350,) can persons set up different and distinct rights from those asserted in the original bill, nor can a party plaintiff in his own right have the benefit of proceedings instituted and conducted by persons claiming in a representative character. Edward O. Friend could only claim the converted assets by a different title from that asserted in the original bill, and for them his only remedy was by a new suit.

The case presented in this record amounts to this. Administrators de bonis non have instituted suits calling for the settlement of an administration account, which, according to Wernick's adm'r v. M'Murdo &c. they had no right to investigate, and which it was not necessary to investigate, to enable them to recover assets unadministered. The settlement is made of the converted assets alone, and then another person attempts to obtain the benefit of that proceeding, not by the same title first asserted, but by a different and even hostile one, having no privity with the other. And that title is set up for the first time in this court; although it is perfectly obvious, that in the court below, all the proceedings were conducted, and the decree finally obtained, by virtue of the title asserted in the original bill. All this appears to me to be entirely irregular, and must cause a reversal of the decree; however reluctant we may be, after the proceedings have been spun out to such a length, and when great injustice may be the possible consequence, to pronounce such an opinion.

The other judges concurred. Decree reversed, and bills dismissed.



# CASES ARGUED AND DETERMINED IN THE GENERAL COURT OF VIRGINIA,

COMMENCING JUNE TERM, 1838, AND ENDING  
DECEMBER TERM, 1839.

601      **\*JUNE TERM, 1838.**

JUDGES PRESENT.

<i>Smith,</i> <i>Saunders,</i> <i>Upshur,</i> <i>Field,</i> <i>Lomax,</i> <i>Thompson,</i> <i>Duncan,</i>	<i>Fry,</i> <i>Clopton,</i> <i>Baker,</i> <i>Christian,</i> <i>Allen,</i> <i>Douglass,</i> <i>Nicholas.</i>
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Commonwealth v. Hill and Others.

June, 1838.

**Criminal Law—Insolvency of Prosecutor—Dismissal of Indictment.\***—Under the 66th section of the act regulating criminal proceedings against free persons, 1 Rev. Code, ch. 169, the prosecutor's insolvency or inability to pay costs is, ordinarily, good cause for ruling him to find security for such payment; but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given.

**Same—Same—Same.**—An indictment will not be dismissed, though the prosecutor be insolvent, if the court would ex officio have directed a prosecution to be instituted.

602      **\*Thomas Hill junior, Elias M'Intire and Joseph Tetrick** were indicted in the circuit superiour court of Harrison county, for an assault and battery upon William Nay. The indictment was found "upon the information of William Nay of said county of Harrison, labourer, sworn and sent to the grand jury to give evidence, at his own request, as prosecutor on the part of the commonwealth." After pleading not guilty to the indictment, the defendants obtained a rule on the prosecutor, to shew cause why he should not give security for costs, upon an affidavit by one of the said defendants, stating that the said prosecutor did not own real or personal estate sufficient to pay the defendants their costs, should they be acquitted; that he was unmarried, and obtained a support by occasional daily labour in the neighborhood. The rule being returned executed, the defendants moved the court to make the same absolute, unless the prosecutor should prove to the satisfaction of

\*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674; monographic note on "Fines and Costs in Criminal Cases" appended to Pifer v. Com., 14 Gratt. 710.

the court, that he had estate sufficient to pay the costs of the defendants in the event of their recovering a judgment for them, or should give security for the payment of such costs. The attorney for the commonwealth offered to shew cause against the rule, that the assault and battery charged against the defendants was of a highly aggravated nature. Whereupon the court, with the consent of the defendants, adjourned to the general court, for novelty and difficulty, the following questions: 1. Whether, under the 66th section of the act regulating criminal proceedings against free persons, 1 Rev. Code, ch. 169, p. 615, the insolvency or inability of the prosecutor to pay the costs is of itself sufficient cause for compelling him to find security for such payment, and, upon failure to do so, for dismissing the indictment with costs? 2. Whether the circumstances connected with the charge, shewing it to be aggravated or otherwise, ought to be examined by the court, in order to determine whether it is such a case as the public interest should require to be prosecuted, although the prosecutor may be unable to pay the costs?

The general court decided, in answer to the questions adjourned,

That under the 66th section of the act referred to, if the prosecutor be insolvent or unable to pay the costs, that is, ordinarily, good cause for ruling him to find security for such payment: but that, in the exercise of this authority, the court ought to have a regard to the character of the prosecution; and if, in its opinion, public justice requires that the prosecution should proceed, the court may, in the exercise of a sound discretion, refuse to dismiss the indictment, although the prosecutor be insolvent, and security for costs be not given; and that it would be a good ground for refusing to dismiss an indictment, although the prosecutor be insolvent, if, in the opinion of the court, it would ex officio have directed a prosecution to be instituted.

Commonwealth v. Lambert.

June, 1838.

**Duelling—Indictment—Sufficiency of.\***—An indictment at common law, charging that the defendant did fight a duel with pistols, is bad on demurrer.

\*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

In the circuit superiour court of law and chancery for Amherst county, at September term 1834, an indictment was found against the defendant, in the following words: "Amherst county, superiour court of law and chancery, to wit: The grand jurors impanelled and sworn at the September term of the said court in the year of our lord 1834, upon their oath present, that William M. Lambert, late of the county of Amherst, labourer, with force and arms, in the county

604 aforesaid and within the jurisdiction of the said court, on the first \*day of September in the year of our lord 1834, wilfully and maliciously, and by previous agreement with a certain William M. Davis, did fight with him the said Davis a duel with pistols, said weapons with which he did fight as aforesaid, being such as the probable consequence from which might be the death of the said Lambert or of the said Davis, which said duel, fought with the weapons aforesaid, and at the time and place aforesaid, was an evil example to others, and form of the statute in such case made and provided, and against the peace and dignity of the commonwealth."

The defendant moved the court to quash the indictment, for the following among other reasons apparent on the face thereof: 1. Because the indictment does not correctly describe the court by its usual denomination, and consequently it does not sufficiently appear from the said indictment itself, that it was found by a grand jury impanelled in this court. 2. Because it is not charged in the said indictment, that the pistols mentioned therein were loaded. But "it appearing from the records of the court, that the said grand jury was impanelled and sworn for the said circuit court, and that the said indictment was regularly and legally found by them, and that the same was duly entered of record," the court overruled the motion to quash. The defendant then filed a general demurrer to the indictment, and the attorney for the commonwealth joined therein: whereupon the court, with the assent of the defendant, adjourned to the general court the following questions: 1. Were the defects alleged, or any others apparent upon the face of the indictment, sufficient to quash the indictment? 2. If not sufficient to quash, were the defects alleged or appearing, fatal on demurrer? 3. What judgment should be rendered on said demurrer?

The cause was argued in the general court by the attorney general for the commonwealth, and P. R. Grattan for the defendant.

605 \*ALLEN, J., delivered the opinion of the court.—It is unnecessary to consider the first question adjourned. The circuit court, having overruled the motion to quash, has decided that question, and if any error had been committed, it could only be corrected by writ of error.

The 2d and 3d questions render it necessary to consider whether the indictment is sufficient. The terms used in describing the offence are copied from our statute on duelling: but the indictment does not conclude against the form of the statute, and if sus-

tained, it must be because the offence charged is a distinct generic offence for which an indictment will lie at common law, or because the charge is equivalent to a charge for a common assault and battery, or an affray.

It is held by all the elementary writers, that a breach of the peace committed by fighting a duel is an aggravated misdemeanour at common law. 4 Blacks. Comm. 145. In like manner it is held that at common law, a challenge to fight a duel, or the sending letters intended to provoke a duel, is a misdemeanour, as tending to bring about a violent breach of the peace. But the actual breach of the peace in the one case, and the attempt to provoke a breach of the peace in the other cases, constitute the gravamen of the charges, and the means used are the acts by which the offence is committed or aggravated. But we have been unable to find any precedent of an indictment for fighting a duel, treating and describing the act of fighting a duel as a distinct offence to which punishment attaches. The parties might be indicted for an affray, for a common assault, or, if death ensued or a felony were committed, could be prosecuted for the murder or felony. The legal consequences resulting from an indictment or conviction for any of these charges, are known and ascertained. But if the act of fighting a duel is treated as a distinct offence, and the indictment may charge it in so many words, it might be

606 difficult to determine what \*is the precise character of the offence, what degree of proof would be necessary to make out the charge, and what would be the consequences of a judgment of acquittal or conviction. The terms fighting a duel would seem to imply something more than an assault; and if personal injury must have been inflicted to constitute the offence, then, though the parties may have actually met and fought, in the common acceptation of the terms to fight a duel, the offence would not be made out. To constitute an assault, there must be a blow, or the preparation to make one, or the presentation of a loaded weapon in striking or carrying distance. If evidence of this would be sufficient, then the offence would be consummated, although something took place to prevent the fight before it actually occurred.

It is equally difficult to determine what would be the consequences of a judgment on an indictment for such a charge. A conviction for an assault is a bar to a prosecution for a riot, an acquittal of manslaughter a bar to a prosecution for murder, of murder a bar to a prosecution for petit treason. 2 Va. Cas. 139; 2 Hale's P. C. 246; Foster's C. L. 329. "In cases of this kind," (says the reporter, in a note to the case of Commonwealth v. Kinney, 2 Va. Cas. 140,) "where two grades of offence are the result of the same act, the prosecutor should begin with the higher, and on failure, prosecute for the lower, or unite both offences in the same indictment, under separate counts." Murder, felonious shooting or maiming, an affray, an assault with intent to kill, may result from a duel. For either offence the party might be indicted,

and the indictment would apprise him for which of the specific results proceeding from the act of fighting the duel, he was prosecuted. And the consequences of a conviction or acquittal are ascertained by the law. But where the charge is for fighting a duel alone, it is uncertain whether he is proceeded against for a distinct offence independent of the results, or for \*any, or if any, for which, of the effects of the duel. And it is equally uncertain what would be the effect of a conviction or acquittal, in barring any other prosecution for an offence of a different grade, resulting from the act of fighting a duel.

The charge to fight a duel is not therefore equipollent with the usual charge in an indictment for an affray or common assault. It does not ascertain with sufficient precision the act for which the party is prosecuted. It is uncertain what degree of evidence would be required to make it out, and the consequences of a judgment are not ascertained. None of these difficulties are encountered when the old and accustomed forms are adhered to; and there seems to be no necessity, for the more effectual prosecution of breaches of the peace committed by duelling, to sanction a departure from them in this instance.

A majority of the court is therefore of opinion, that the indictment is not good, whether it is considered as charging the act of fighting a duel as distinct offence at common law, or as being equivalent to an indictment for an affray or a common assault. It is, therefore, in answer to the second and third questions, ordered to be certified that the demurrer to the indictment be sustained, and judgment entered for the defendant.

#### 608 \*Linkous v. Commonwealth.

June, 1838.

**Gaming—Indictment—Allegation as to Place.**—An indictment charging the defendant with unlawful gaming at the house of J. N. the same being a house of entertainment, is sufficient.

Petition for writ of error to a judgment of the circuit superiour court of Montgomery county, rendered against the petitioner upon an indictment for unlawful gaming.

The indictment contained two counts; the

\***Gaming—Indictment—Allegation as to Place.**—See monographic note on "Gaming" appended to Neal v. Com., 22 Gratt. 917; monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

**Indictments—Each Count a Separate Indictment.**—In State v. Smith, 24 W. Va. 817, it is said: "In all cases, however, in which there are two or more counts in the indictment, whether there is actually one offence, or several, each count is regarded as a separate indictment and is supposed to represent a distinct offence. *Linkous' Case*, 9 Leigh 612." To the same effect, the principal case was cited in Mowbray's Case, 11 Leigh 649; State v. Shores, 81 W. Va. 496, 7 S. E. Rep. 415. For other cases in point, see monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

first charging that the gaming took place "at the house of John Nicely, in the county aforesaid, the same being then and there a place of public resort;" the second, that the gaming took place "at the house of one John Nicely, the same being then and there a house of entertainment." The defendant moved the court to quash the second count in the indictment; which motion the court overruled. He then pleaded not guilty, and the jury impanelled to try the issue, found him guilty as alleged in the second count, and not guilty as alleged in the first count. Whereupon the defendant moved the court to enter judgment in his favour; but the court overruled the motion, and gave judgment for the commonwealth for a fine of 20 dollars and the costs of the prosecution. On the trial the defendant filed a bill of exceptions in these words—"Memorandum: After the court had instructed the jury, 'that if they shall be of opinion, from the evidence, that the defendant played cards at the house of John Nicely, as in the indictment is alleged, and that the house of said Nicely was one at which persons, who called therefor, were furnished with either meat or liquor, for which a charge was made, whether he had obtained a license or not, then the said house is, within contemplation of law, a house of entertainment, or tavern, and they ought to find a \*verdict of guilty'—the defendant asked for the following instruction, viz. That before they can find the defendant guilty under the second count in the indictment, it must appear from the evidence, that the house of John Nicely was a house of entertainment licensed by law, or that it was a place of public resort, at the time of the playing alleged in the said second count of the indictment. Which instruction the court refused to give; to which opinion the defendant excepts," &c.

Robert C. Stanard for the petitioner. I. The defendant was acquitted under the first count of the indictment, and no offence against the penal laws of the commonwealth is charged in the second count.

It is admitted that an indictment under the act to prevent unlawful gaming, which charges the gaming to have taken place (in the words of the fifth section) at "an ordinary, racefield, or other public place," or at a tavern (which is, *ex vi termini*, both an ordinary and a public place) or at a house of public resort, whether licensed or not, is good. *Hord v. Commonwealth*, 4 Leigh 674; *Wortham v. Commonwealth*, 6 Rand. 675. But here the words of the indictment are, "at the house of John Nicely, the same being then and there a house of entertainment."

1. A house of entertainment is not *ex vi termini* an ordinary, tavern, a house of public resort, or a public place. A house may be a house of entertainment, and yet neither of these. It is true that "house of entertainment" is a general term which may comprehend them all, but it does not necessarily import any one of them; and it is not sufficient that the terms used in the indictment should comprehend the forbidden place, along with other places not forbidden. The defendant has a right to require that the

charge which he is called upon to answer should be distinctly made; and as the place is of the very essence of the charge, 610 the terms "used should designate a forbidden place, and a forbidden place only.

2. A house of entertainment merely, is not "a tavern" within the 16th section of the act, upon the true construction of that section; and therefore the reasoning of the general court in the case of *Wortham v. Commonwealth* does not apply to this case.

The obvious intent and meaning of that section is, to embrace within the provisions of the act all houses of public resort, whether licensed or not, so as to subject the keepers of such houses, as well as those who play there, to the penalties of the act. The whole context and policy of the act sustains this construction. It is an act to suppress public gaming; or (in the words of the preamble to the 5th section) "to prevent gaming at ordinaries and other public places." The 16th section does, indeed, use the terms "every house of entertainment;" not absolutely, however, but in connexion with other words which explain and modify their meaning, and shew what sort of house of entertainment the legislature contemplated. It is as if the section read, "every house of entertainment and public resort," or, "that is a house of public resort," or, "being a house of public resort." It is impossible to suppose that the legislature meant to include under this section any and every house of entertainment, of every description and for any purpose. A. has a house at which B. and C. with their families board by the month, or by the year. They are not members of A.'s family, and therefore A.'s house is, for them, a house of entertainment; but it will scarcely be contended, that such a house is a tavern, within the 16th section of the gaming act.

II. There is nothing on the face of the record, on which judgment can be rendered against the petitioner.

The jury find him guilty of gaming at "a house of entertainment." Now, a house of entertainment is a place of public resort, or it is not. If it is not a place 611 \*of public resort, then, neither *ex vi termini* nor by operation of law, neither within the 5th nor the 16th section of the act, is it a forbidden place; and the court cannot pronounce judgment on such a finding, any more than if the jury found the defendant guilty of playing at the private house of A. or B. And if it be a place of public resort, then he is entitled to an acquittal, under the express finding of the jury, that he was not guilty of playing at a place of public resort. The whole verdict of the jury must be taken together; and, so considered, that verdict is merely nugatory, or it ascertains beyond all question, that whatever a house of entertainment may be, it is not a place of public resort.

LOMAX, J., delivered the opinion of the court.—The court is of opinion, that the authority of *Wortham v. Commonwealth* is

decisive in sustaining the second count in the indictment in the present case. The case referred to has decided (in conformity to the 16th section of the gaming law) that a house of public resort, whether licensed or not, is a tavern, and consequently is a public place within the terms of the 5th section; and that it is sufficient that the indictment should, in the terms of the 16th section, charge the gaming to have been committed in a house of public resort, and such charge is as correct as if laid in the words of the 5th section.

In the case now under consideration, the indictment charges (in like manner in the words used by the legislature in the 16th section) that the gaming was perpetrated in "a house of entertainment;" and it would seem necessarily to be brought, by the legislative definition of a tavern, which is considered a public place, within the scope of the 5th section, as was the case in *Wortham v. Commonwealth*.

Whatever complaint may be made of the vagueness of the expression "every house of entertainment," and the extent to which that expression may be carried, it 612 \*was fully competent to the legislative authority to adopt those terms in the widest construction; and if such appeared to be the design of the legislature, the courts would be bound to conform to it.

There is no occasion, however, for the apprehension that the words "a house of entertainment" can be liable to any dangerous or inconvenient latitude of construction. "A house of private entertainment" is an expression frequently used in the acts of assembly, and though the word private is used, yet for many purposes such houses are regarded as public. The meaning which the legislature attaches to these terms of description seems not liable to misconstruction. Nor does the expression seem more liable to misconstruction when the word private is dropped, and the house of entertainment is declared to be a tavern.

It is objected in this case, that the defendant having been acquitted upon the first count in the indictment, which charged the gaming to have been committed "at the house of John Nicely, the same being then and there a place of public resort," it is apparent that the house of entertainment where the defendant, under the second count, was convicted of playing, could not have been a public place. This objection assumes, that all the offences charged in the indictment must necessarily have been the same, and that no evidence was offered but of one and the same offence. This, the court thinks, is contrary to the intentment of the law, by which each offence in each count of the indictment is to be regarded as a separate, distinct offence, at least until it be shewn that there was only one offence. There is nothing in this record to shew that that was the case.

The court is of opinion that there is no error in the proceedings, and therefore refuses the writ of error prayed for.

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**\*Commonwealth v. Fells.**

June, 1838.

**Criminal Law—Power of Court to Discharge Jury.\*—**

In any criminal case, whether capital or other, the court has power, for good cause, to discharge the jury, and put the accused upon his trial before a new jury.

**Same—Same—Case at Bar.**—Such power held to have been properly exercised in a capital case, where the jury had been kept together for nine days without agreeing on a verdict, and the health of one of the jurors was suffering from confinement, while the personal attentions of another juror were required by the situation of his wife.

Sidney Fells, a free man of colour, was indicted in the circuit superior court of law and chancery for the county of Henrico and city of Richmond, for an assault upon William R. Geddy, a free white person, with intent to kill him; an offence which, by the statute passed March 15, 1832 (Sess. Acts of 1831-2, ch. 22, § 6; Supplem. to Rev. Code, p. 247,) is made punishable with death.

On the 16th of May 1838, a jury being impanelled for the trial of the prisoner, and having heard the evidence, were sent out of court to consult of their verdict, and after some time, not having agreed in a verdict, were adjourned over in the usual manner until the next day; and having the case again committed to them, again returned into court after some time, and declared that they could not agree. They were again adjourned as before, and so from day to day for nine days. On the ninth day, the jury being still unable to agree, one of the jurors addressed to the court and counsel engaged in the case, a letter in the following words: "Richmond, 25th May 1838. To the hon. judge P. N. Nicholas, and the counsel in the case of the Commonwealth v. Fells. Gentlemen, I herewith send you a certificate from dr. Bohannon, and in addition to that, would state that I am boarding with my family,

and that owing to the fact that our room is adjoining the house where we board, in another tenement, the family are unable to give mine that attention required by necessity. The only persons now staying with my wife, or that could without much delay be had, are two females, and were her accouchement to take place at night, the delay in procuring proper attendance I fear will be the cause of some disaster. I deem it unnecessary to say more, as my situation is one which every man of family must appreciate." Accompanying this letter was the following certificate from dr. Bohannon: "I hereby certify that Mrs. K." (the wife of the juror) "is momentarily expected to be confined, and that her situation is such as to require the kind attentions of her husband." This certificate was duly sworn to, as was also the above mentioned letter of the juror. At the same time the following affidavit of another juror was presented to the court: "City of Richmond, to wit: Personally appeared before me L. Carrington, a magistrate in and for the city aforesaid, Lewis Hill, one of the jurors in the case of *The Commonwealth v. Fells*, and made oath that his health is suffering from confinement, and he apprehends serious consequences will ensue, if longer confined." The court expressed the opinion that it had power in this state of things, to direct a juror to be withdrawn, and to discharge the rest of the jury; which was accordingly done. The attorney for the commonwealth then moved the court to award a new writ of venire facias, and to impanel a new jury for the trial of the prisoner. This the prisoner opposed, and moved for his discharge, on the ground that the discharge of the jury as aforesaid entitled him thereto. The court, not being advised what judgment to render in the premises, with the consent of the prison adjourned to this court the following questions for novelty and difficulty: 1.

appended to *Chahoon v. Com.*, 20 Gratt. 733; *Va. Code* 1897, § 4026.

**Same—Improper Discharge of Jury—Effect.**—In *State v. Davis*, 31 W. Va. 392, 7 S. E. Rep. 26, it is said, "It is by all the authorities agreed that, when a prisoner is once put upon his trial for a crime before a jury, he is entitled to a verdict from that jury, unless there exists a manifest necessity for its discharge before the verdict is rendered. Many of the authorities hold that as soon as the jury have charge of his case, upon a valid indictment, before a competent court, he is in jeopardy, and stands upon his deliverance; and, if the jury is improperly and illegally discharged, such improper discharge of the jury is equivalent to the acquittal of the prisoner, and the prisoner is therefore entitled to his discharge from further prosecution. *McCreary v. Com.*, 29 Pa. St. 323; *Com. v. Fells*, 9 Leigh 613; *Williams v. Com.*, 2 Gratt. 568; *State v. Garrigues*, 1 Hayw. (N. Car.) 241; *Spier's Case*, 1 Dev. 491; *State v. McGimsey*, 80 N. Car. 377; *Mahala v. State*, 10 Yerg. 532; *Ned v. State*, 7 Port. (Ala.) 188; *People v. Webb*, 38 Cal. 467; *People v. Hunkeler*, 48 Cal. 331; *State v. Walker*, 26 Ind. 346; *Shaffer v. State*, 27 Ind. 131; *Com. v. Cook*, 6 Serg. & R. 577." See also, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

**\*Criminal Law—Power of Court to Discharge Jury.**—As holding that the court may properly discharge the jury in a case of felony, whenever a necessity for so doing exists, the principal case is cited in *Williams v. Com.*, 2 Gratt. 570; *State v. Davis*, 31 W. Va. 395, 7 S. E. Rep. 26. But, in *Williams v. Com.*, 2 Gratt. 570, JUDGE CHRISTIAN, delivering the opinion of the court, said: "While we approve that decision (*i. e.* the decision in the principal case), we think that mere inability on the part of the jury to agree, presents no such case of necessity. We think, moreover, the exercise of such a power or discretion ought not to be allowed; that the accused is entitled to be tried by the jury he has selected in the first instance, unless there be some imperious necessity for their discharge; in which event another jury may properly be sworn to try him. The practice in Virginia has been, in the case of a hung jury in a trial for felony, either to adjourn the Court at the end of the term, taking no notice of the jury; in which case they are necessarily discharged by operation of law, or else to call the jury in and discharge them simultaneously with the final adjournment of the Court; which practices this Court approve and think right."

See further, on this subject, *foot-note* to *Williams v. Com.*, 2 Gratt. 567; monographic note on "Juries"

Whether the court possesses the power and authority to discharge a jury after they have been impanelled and sworn, upon being satisfied there is sufficient reason to believe that there is no probability \*of the jury agreeing in a verdict? 2. Whether, if the court does not in general possess the power before spoken of, it is right and proper to discharge the prisoner, taking into consideration the facts and circumstances which existed in this case, as disclosed by the record?

The cause was argued here by the attorney general for the commonwealth, and R. G. Scott for the prisoner.

UPSHUR, J., delivered the opinion of the court.—This court is desirous at all times to decline the expression of any opinion upon points not necessarily involved in the particular case before it. The first question, which presents the case of a mere inability of the jury to agree in a verdict, is of this description. If the course pursued by the court below can derive its justification from the facts and circumstances which existed in the case as disclosed by the record, it is unnecessary and might be mischievous to enquire what would be the power of the court under a condition of things much less strong and distinguishing. The response which we shall give to the second question must of necessity dispose of the case; and to this question we shall therefore confine ourselves.

It has long been well settled, both here and in England, that in cases of misdemeanour the court has power to discharge the jury and to put the accused upon his trial before a new jury; but it has not yet been decided in Virginia that the same power exists in trials for felony. The question, however, has frequently arisen in the courts of some of our sister states, and in the supreme court of the U. States, where it has been examined and discussed with so much learning and ability as to render unnecessary an elaborate examination of it here. In *The People v. Olcott*, 2 Johns. Cas. 301, judge Kent enters

into a full and very learned review of all the \*cases upon the subject. He shews very clearly that "the position generally denying the power of the court to discharge a jury sworn and charged in a criminal case, has originated (probably without further examination or enquiry) from a dictum to be found in the institutes of lord Coke," (1 Inst. 227 b. 3 Inst. 110,) "and that this dictum rests upon his single authority, without the sanction of any judicial decision. None of the decisions go any further than to prescribe a rule to the discretion of the court in particular cases. On the contrary, there are many authorities admitting and establishing the power of the court to discharge the jury, even in capital cases." The question again came up before judge Spencer, in *The People v. Goodwin*, 18 Johns. Rep. 187; 1 Wheeler's Cas. 470, where the last mentioned case was reviewed and approved. Judge Spencer, upon a full examination of all the authorities, comes to the conclusion, that "although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and

absolute necessity, and that it may be exercised without operating as an acquittal to the defendant; that it extends as well to felonies as misdemeanours," &c. The same doctrine is still more broadly laid down by the supreme court, in *The United States v. Josef Perez*, 9 Wheat. 579. That was a capital case; and judge Story, in delivering the opinion of the court, says: "We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." The same doctrine is laid down in *The United States v. Coolidge*, 2 Gal. 364; *The Commonwealth v. Bowden*, 9 Mass. Rep. 494, and *The Commonwealth v. Clue*, 3

Rawle 498. These cases do but affirm the law as it exists at \*this day in England. Whatever doubts there may have been in an earlier stage of her criminal jurisprudence, the doctrine is now well settled in *Ann Sealbert's case*; *Leach's C. L.* 620, in *Rex v. Stevenson*, Id. 546, and *The King v. Edwards*, 4 Taunt. 309. These cases all concur in establishing the power of the court to discharge the jury and to put the accused again upon his trial, in any case whatever, whether capital or otherwise.

What circumstances will justify the court in exercising this power, is not, however, so well established. In *Ann Sealbert's case*, after the jury were sworn, one of them fell down in a fit; in *The King v. Stevenson*, the prisoner himself became suddenly ill, and incapable of attending to his defence; in *The King v. Edwards*, one of the jury was taken ill, and became incapable of proceeding in the examination of the cause; in *The People v. Denton*, 2 Johns. Cas. 275, *The People v. Olcott*, and *The United States v. Perez*, the jury were discharged merely because they were unable to agree in a verdict. It is unnecessary, and indeed would be impossible, to enumerate all the circumstances which would justify the court in exercising this power. One general rule is deducible from all the cases; which is, that the court may discharge the jury whenever a necessity for so doing shall arise: but what facts and circumstances shall be considered as constituting such a necessity, cannot be reduced to any general rule. The power to discharge is a discretionary power, which the court, as in all other cases of judicial discretion, must exercise soundly, according to the circumstances of the case. The object of the law is to obtain a fair and just verdict, and whenever it shall appear to the court that the jury impanelled cannot render such a verdict, it ought to be discharged, and another jury impanelled. This is emphatically the case of necessity contemplated in

the authorities we have referred to; as where the prisoner \*became too sick to attend to his defence, or one of the jury was rendered physically unable to discharge his duty. There are other cases of necessity equally strong, one of which probably is, where a juror, from the peculiar condition

of his mind and feelings, is manifestly disqualified from bestowing on the case that attention and impartial consideration which is necessary to a just verdict. However this may be (and we do not mean to lay down any positive rule upon the subject) we are of opinion that the case before us is one in which the necessity for discharging the jury, contemplated in the authorities, is manifest and strong. The actual sickness of a juror, and his consequent inability to discharge his duty, is admitted on all hands to present such a case of necessity. In the case before us, the juror was not actually sick, but there was every reason to believe that he would become so through longer confinement. Was the court bound to wait till the case actually occurred? We think not. It is true, that the mere probability that confinement to the jury room would produce ill effects on the health of some member of the jury, would not in all cases justify the court in discharging the jury. It may be, that they will agree at once, or at all events in so short a time as not to render their confinement injurious to any one of them. But when they have been a long time in consultation; when they have frequently compared opinions, and found that they could not agree; when their confinement has already produced serious effects upon the health of one or more of them; when longer confinement would probably produce worse consequences; and when, from all the circumstances of the case, it is manifest that they cannot agree through any free action of their own minds, the attempt to compel a verdict by longer confinement would be equally opposed to humanity and the sound principles of law and justice. A necessity not less strong

619 was presented by the \*situation of the wife of another juror. If the object of the trial be, as it undoubtedly is, to obtain a fair, just and impartial verdict, there can be but little prospect of such a result from the constrained and reluctant action of minds wholly absorbed in the deep and peculiar interest of their domestic relations. Nor can we perceive any difference between the case of necessity which arises when the longer confinement of the jury is likely to produce serious effects upon the health of one of their own body, and that which arises when the health of any other person would be equally endangered from the same cause.

It has been supposed that the conclusion to which we have arrived is forbidden by that clause of the 5th article of the amendments of the constitution, which provides that no person shall be subject to be twice put in jeopardy of life or limb for the same offence. To this we reply, that this provision of the constitution is no more than the adoption, in that instrument, of a well established principle of the common law; a principle which was present to the minds of the English judges when they decided various cases before cited. Their judgments were not affected by that principle, for the reason that it was not involved in the cases. The prisoner cannot be said to be twice put in jeopardy, unless he has been already once tried; that is, unless a jury has once passed

upon his case. If this be not so, the prisoner would be entitled to his discharge when a juror, after being sworn, and before verdict, dies, or becomes incurably deranged, or escapes from his fellows and does not return; or where the term of the court expires by operation of law, before verdict. In all these cases, and others of like kind, it is not doubted that a new jury may be impanelled; and yet this could not be done, if the clause of the constitution above cited should receive the construction which is contended for.

620 \*Upon the whole, we are of opinion, that in capital cases, and consequently in all other criminal cases, it is in the power of the court, for good cause, to discharge the jury, and to put the prisoner upon his trial before a new jury. It is, however, a power which cannot be too cautiously exercised. The prisoner is entitled to be tried by the jury elected, tried and sworn in the first instance; and to deprive him of that right, except in a case of obvious and strong necessity and propriety, might work great injustice and oppression to him, and endanger the pure administration of criminal justice.

A majority of the court is of opinion, and doth advise, that in the case before us, it would not have been right or proper in the court below to discharge the prisoner, taking into consideration the facts and circumstances which existed in the case, as disclosed by the record.

#### Commonwealth v. Coe.

June, 1838.

**Ardent Spirits—Sale without License\*—Indictment—Surplusage.**—Where a defendant is indicted upon the statute of March 7, 1834 (Acts of 1833-4, ch. 3.) for retailing ardent spirits without license, the charge that the spirits were to be drunk at the place where sold, shews that the indictment is upon the 17th, not the 3d section of that statute, and such charge cannot be rejected as surplusage, but must be proved.

The defendant Thomas J. Coe was indicted in the circuit superior court of law and chancery for Wood county, for selling ardent spirits by retail, "to be drunk at the place where sold," without having a license therefor. At the trial the commonwealth adduced evidence that the defendant had sold whiskey by retail at the place mentioned in the indictment, and within twelve months previous to the finding of the same; but

621 \*whether the whiskey was sold to be drunk at the place, or to be carried away by the purchaser, did not appear. The attorney for the commonwealth contended, that the words "to be drunk at the place where sold" might be regarded as surplusage, and the defendant convicted under the 3d section of the act of the 7th March 1834, prohibiting the sale of ardent spirits, not to be drunk at or in the place where the same

**\*Ardent Spirits—Sale without License—Writ of Error for Commonwealth.**—See principal case cited in *Com. v. Scott*, 10 Gratt. 749, 754, and *foot-note*; *State v. Church*, 4 W. Va. 746. See generally, monographic *note* on "Intoxicating Liquors" appended to *Thon v. Com.*, 31 Gratt. 887.

may be sold: but the court instructed the jury, that the defendant ought not to be convicted under that indictment, without proof satisfying their minds, not only of the selling, but that the spirits were sold to be drunk in or at the place where the same were sold, or in some booth, arbour or stall appendant or contiguous thereto. To which opinion and instruction of the court, the attorney for the commonwealth excepted. The jury found a verdict for the defendant, and the court rendered judgment of acquittal.

And now the attorney general, on behalf of the commonwealth, petitioned this court for a writ of error to the judgment.

FRY, J., delivered the opinion of the court. —According to *Tefft v. Commonwealth*, 8 Leigh 721, the present is a case in which a writ of error may be awarded to the commonwealth. The attorney general has asked for one; and the enquiry is, what error the record presents?

The indictment alleges that the defendant, without having a license therefor according to law, did sell by retail wine, brandy &c. to be drunk at the place where sold, contrary to the form of the statute in such case made &c. It is evidently founded on the 17th section of the act passed March 7, 1834. That the spirits were to be drunk at the place where sold, is necessary to constitute the offence within that section. But failing to prove this, the attorney for the commonwealth con-

622 tended \*that the words describing that part of the offence might be rejected as surplusage, and the defendant convicted under the 3d section of the act aforesaid. The court below decided otherwise; and, we think, with good reason.

Without deciding what would be a good indictment under the 3d section, it is sufficient to say, that the offences described by the 3d and 17th sections are wholly different. Under the 17th section, an ordinary license and certificate are required; under the 3d, a retail merchant's license and certificate. Under the 17th, the spirits must be sold to be drunk at the place of sale; under the 3d, not to be drunk at such place. Under the 17th, the fine is 30 dollars; while that under the 3d is twice the tax upon a retail merchant's license for the time.

The offences being thus different, to allow one to be described and the other proved, would be contrary to the plainest principles of justice, and opposed to the end of all pleading—that the defendant may have sufficient notice of the charge against him, and that a verdict and judgment upon it may be a bar to any future proceeding. To allow it, he might not only be entrapped, but twice harassed. Suppose, on the ground claimed by the commonwealth, the jury had found the defendant guilty; what judgment could the court have rendered? Manifestly, a judgment for 30 dollars fine, under the 17th section. The record could have warranted no other. Yet the verdict would have been founded upon evidence of an offence to which a different penalty is attached. And should the defendant be again charged with the latter offence, he

could not (contrary to the very terms of the record) aver it to be the same for which he had already suffered.

We are all of opinion to deny the writ.

623 \*DECEMBER TERM, 1838.

JUDGES PRESENT.

<i>Smith,</i>	<i>Christian,</i>
<i>Daniel,</i>	<i>Allen,</i>
<i>Lomax,</i>	<i>Mason,</i>
<i>Scott,</i>	<i>Douglass,</i>
<i>Leigh,</i>	<i>Nicholas,</i>
	<i>Clopton.</i>

Sperry v. Commonwealth.

December, 1838.

[38 Am. Dec. 261.]

**Criminal Law—Felony—Presence of Accused—Record.\***

—In a prosecution for felony, the accused must be arraigned and plead in person, and in all the subsequent proceedings he must appear in person, not by attorney; and such appearance in person must be shewn by the record.

**\*Criminal Law—Felony—Presence of Accused—Record.**

—It has been uniformly held in Virginia and West Virginia that, in a trial for felony, it is absolutely necessary to a valid conviction that the prisoner shall be present in court whenever anything is done in his case in any way affecting his interest. Thus, it is the well established practice that a prisoner accused of felony must be arraigned in person, and must plead in person; and, in all the subsequent proceedings, he must appear in person, not by attorney; and such appearance in person must be shown by the record. *Hooker v. Com.*, 13 Gratt. 764, 766, and *foot-note*; *foot-note* to *Jackson v. Com.*, 19 Gratt. 656; *Lawrence v. Com.*, 30 Gratt. 850, 852; *Bond v. Com.*, 83 Va. 586, 8 S. E. Rep. 149; *Shelton v. Com.*, 89 Va. 458, 16 S. E. Rep. 856; *Snodgrass v. Com.*, 89 Va. 688, 17 S. E. Rep. 228; *Coleman v. Com.*, 90 Va. 636, 19 S. E. Rep. 161; *Gilligan's Case*, 99 Va. 828, 37 S. E. Rep. 962; *State v. Strauder*, 8 W. Va. 601; *State v. Conkle*, 16 W. Va. 745, 748, 749, 754; *State v. Conners*, 20 W. Va. 6; *State v. Sutfin*, 22 W. Va. 778; *State v. Greer*, 22 W. Va. 811; *State v. Parsons*, 39 W. Va. 466, 19 S. E. Rep. 877. All these cases cite the principal case as authority on this subject.

The record must show affirmatively, not only that the prisoner was present in person, but that he, in person, put in the plea of not guilty. *State v. Allen*, 45 W. Va. 60, 30 S. E. Rep. 211, citing the principal case.

But the whole record may be looked to, and, if anything appears in it from which the prisoner's presence must be necessarily inferred, it is all that the law requires. *Benton's Case*, 91 Va. 794, 21 S. E. Rep. 496, citing the principal case. See, also, cases collected in *foot-note* to *Lawrence v. Com.*, 30 Gratt. 846.

For a collection of cases holding that the fact that the accused was present was shown by the record, see *foot-note* to *Hooker v. Com.*, 13 Gratt. 763.

Before the prisoner's arraignment, an order may be made in his absence. *Boswell v. Com.*, 30 Gratt. 860, 865.

In *Gilligan's Case*, 99 Va. 816, 37 S. E. Rep. 962, it was held that, after judgment, it is not error to hear the statement of counsel for the prisoner in his absence that he has no bills of exception to offer.



Writ of error to a judgment of the circuit superior court of law and chancery for Cabell county, rendered against the plaintiff in error at April term 1838, upon an indictment for stealing an iron gray mare of the value of 60 dollars, the property of Lewis Bench. The accused being found guilty by the jury, was sentenced to imprisonment for five years in the penitentiary.

The indictment was found at September term 1837; and at that term the prisoner was led to the bar in custody, was arraigned, and pleaded not guilty. Whereupon, on his motion, the cause was continued till the next term.

The record then states, that at a circuit court continued and held for Cabell county on Friday the 27th of \*April 1838, "came as well the attorney for the commonwealth, as the prisoner by his attorney, and thereupon came a jury," &c. who, having heard the testimony and arguments of counsel, retired to consider of their verdict, and not agreeing on that day, were adjourned until the next, when they again appeared in court and rendered their verdict; "whereupon the prisoner was remanded to jail."

When brought into court, on a subsequent day of the term, to receive his sentence, the prisoner moved the court to grant him a new trial, on the ground that the verdict was contrary to the evidence; which motion being overruled, he excepted, and set out in his bill of exceptions all the material facts and circumstances proved on the trial. But the cause was decided in this court without reference to the evidence.

In his petition to the general court, the prisoner assigned for error the refusal of the circuit court to grant a new trial; insisting that the whole evidence only shewed him to have been guilty of a fraud, and did not warrant a conviction of felony. For this "and other errors apparent on the face of the record," he prayed a writ of error; which was awarded.

The cause was submitted by P. R. Grattan for the plaintiff in error, and the attorney general for the commonwealth, without argument.

LOMAX, J., delivered the opinion of the court.—The first error relied upon in the petition in this case, the refusal of the court below to grant a new trial, this court has deemed it unnecessary to consider, because it discovers in the record another error, which supercedes the necessity of considering the first.

The well established practice in England and in this state is, that a prisoner accused of felony must be arraigned in person, and must plead in person; and in

625 \*all the subsequent proceedings, it is required that he shall appear in person. This practice is stated in 1 Chit. Crim. Law, 411, 414. It is there laid down, that the accused in capital felonies cannot be found guilty in his absence; that it is necessary he should personally attend; and that the fact of such attendance should appear on the record. The rules applicable in England to trials for capital felonies are believed, in the general, to be equally applicable in this state

to all felonies punishable by confinement in the penitentiary. In looking into the english forms of entries, it will be found that the appearance of the accused is carefully stated upon the record to have been in his proper person. 4 Chitt. Cr. Law, 268.

The principles on which this practice is founded are supposed to be too obvious to need explanation or illustration.

In this record it is stated, that on the 29th of September 1837, the accused was led to the bar in custody of the keeper of the jail, and thereupon was arraigned, and pleaded; and on his motion the cause was continued till the first day of the next term, and thereupon he was remanded to jail. And afterwards, at a circuit court &c. held on the 27th of April 1838, "came as well the attorney for the commonwealth, as the prisoner by his attorney, and thereupon came a jury," &c. The jury not agreeing upon their verdict on that day, were adjourned over until the next day; and afterwards, on Saturday the 28th April 1838, the record proceeds to state that "the venire impanelled upon the trial of this cause on yesterday, again this day appeared in court, and retired to consider of their verdict, and after some time returned into court, and on their oath do say, 'We of the jury find the prisoner, Allen M. Sperry, guilty of the felony charged, and do ascertain the period of his confinement in the public jail and penitentiary house to be five years; and we further find that the mare stolen

626 \*has been restored to the owner thereof.' Whereupon the prisoner was remanded to jail.

If it can be inferred, from the circumstance that the prisoner was remanded to jail, that he was personally present during the proceedings on the 28th of April, when the verdict of conviction was found, there is no such circumstance stated in the proceedings of the preceding day. The only statement in regard to the appearance of the prisoner on that day, is, that he appeared by his attorney; without any circumstance stated from which it can necessarily be inferred that he was personally present. An appearance by attorney cannot imply that the prisoner was personally present in court: and therefore the record is deficient in what the law regards as essential to be stated in such a case.

For this error, therefore, the court is of opinion that the judgment must be reversed, and a venire facias de novo awarded.

627 \*Kirk v. Commonwealth.

December, 1838.

Indictment—Defective Counts—Effect.—The defect of

\*Indictment—Defective Counts—Effect.—The common-law rule of practice in criminal cases, that one good count in an indictment is sufficient to sustain a general verdict of guilty, however defective the other counts may be, is applicable to offences punishable by confinement in the penitentiary. As so holding, the principal case is cited in Shiffet v. Com., 14 Gratt. 673.

But in Mowbray's Case, 11 Leigh 643, contrary to the principal case, it was held that this rule of practice is not applicable to cases of penitentiary crimes

some of the counts in an indictment does not affect the validity of the rest, and if any count is good, judgment may be given against the accused.

in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict. The court, in this case, speaking through GHOLSON, J., said that, while it did not question the soundness of the broad general rule that one good count in an indictment is sufficient to sustain a general verdict of *guilty*, however defective the others may be, it did not think it applicable to cases of general verdicts under our law, which not only declare the *guilt* but ascertain the *punishment* of the accused; or, in other words, that, while the rule holds good where the verdict is limited to the simple issue of guilty or not guilty, it does not apply to cases in which the jury is required not only to pass on the guilt of the accused, but also to ascertain the amount of punishment; and where, from the finding, it cannot be known in what manner the jury intended to apportion the punishment. Three of the judges, FRY, LEE, and NICHOLAS, dissented from the opinion of the majority of the court. To the dissenting opinion of FRY, J., is appended a note in which he says: "When this case was decided, I had not seen *Kirk's Case*, 9 Leigh 627, nor was it adverted to in the discussion of the present case. It may be referred to, I think, as strongly supporting the views I have taken in this opinion."

In *Clere v. Com.*, 3 Gratt. 615, 618, it was said that, while *Page's Case*, 9 Leigh 687, can be distinguished from the principal case, the conflict between *Mowbray's Case*, 11 Leigh 643, and the principal case, is necessary and irreconcilable. In this case (*Clere v. Com.*) the decision of the court in *Mowbray's Case*, 11 Leigh 643, is approved as sound law, the court holding that the common-law rule, that a good count in the indictment, where there are other counts which are bad, will support a general verdict of guilty, is overruled in Virginia as to offences which are punishable by confinement in the penitentiary.

Thus stood the law and adjudications upon it when the Act of March 14, 1848, was passed, containing a provision (Sess. Acts, p. 152, sec. 43), which has since been substantially embodied in the Code 1849, p. 778, § 34; Va. Code 1887, § 4045, in these words: "When there are several counts in an indictment or information, and a general verdict of guilty is found, judgment shall be entered against the accused, if any count be good, though others be faulty. But on the trial, the court, on the motion of the accused, may instruct the jury to disregard any count that is faulty." The effect of this provision is to make the common-law rule applicable to all criminal cases, whatever may be the mode of punishment, and however the measure of it may be ascertained. But the accused is effectually protected from injury, by the right which is given him to have the faulty counts excluded from the consideration of the jury. If he does not avail himself of that right he cannot complain of injury. *Shimet v. Com.*, 14 Gratt. 672; *Rand v. Com.*, 9 Gratt. 749. In this last case, the cases and statute on this subject are reviewed in the opinion of the court, but the court did not consider it necessary to express any opinion as to how far the question decided in the cases above mentioned was affected by the statute, further than to say that one of its manifest designs is to furnish a prisoner arraigned on an indictment containing various counts, some of which are faulty, a means of protecting

**Criminal Law—Passing Counterfeit Coin—Evidence—Production of Coin—When Excused.**—In a prosecution for passing a counterfeit coin to a person who resides in another state, if a subpoena for such person as a witness has been issued and returned not found, the fact of the passing, and the counterfeit character of the coin, may be proved without producing the coin at the trial.

**Same—Same—Same—Necessity of Producing Coin.**—

It seems, that in a prosecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character of the coin, without either producing the coin, or accounting for its nonproduction.

**Indictment—Verdict of Guilty on Some Counts—Effect as to Others.**—Where a verdict finds a prisoner guilty upon some of the counts in an indictment, saying nothing of others, judgment of acquittal should be entered upon those counts of which the verdict takes no notice.

Writ of error to a judgment of the circuit superiour court of law and chancery for Cabell county, rendered against the plaintiff in error at April term 1838, upon an indictment for counterfeiting and passing base coin.

The indictment contained three counts. The first stated, "that James Kirk, on the 10th of March 1838, at the county of Cabell, feloniously did pass to one Aly Williams a

himself against any prejudice or injury that might arise from such faulty counts, to wit, by a motion, on his trial, to the court, to instruct the jury to disregard them; and that if the court should refuse, to the prejudice of the prisoner, to give such instruction, it would be an error which he would have a right to have redressed by an appeal. In this case it was held that a motion to exclude evidence which could only be applicable to a faulty count is in effect a motion to disregard that count. See also, *foot-note* to *Clere v. Com.*, 3 Gratt. 615; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

**Passing Counterfeit Coin—Evidence.**—See monographic note on "Forgery and Counterfeiting" appended to *Coleman v. Com.*, 26 Gratt. 865.

**Indictments—Verdict of Guilty on Some Counts—Effect as to Others.**—In *State v. Cross*, 44 W. Va. 321, 20 S. E. Rep. 529, it is said: "It is clear, by authority imperatively binding this court, that where there are different counts in an indictment, and the verdict finds the party guilty on one or more, though silent as to the others, it operates as an acquittal on the others by inevitable implication, because all the counts were the subjects of decision before the jury, and, by selecting those counts on which the party is guilty, the jury necessarily found him not guilty on others. The court should render judgment of acquittal on the counts on which he is not found guilty, though the verdict is silent as to them, and, if the court omits such judgment, the law enters it. *Lithgow's Case*, 2 Va. Cas. 297; *Bennet's Case*, 2 Va. Cas. 235; *Kirk's Case*, 9 Leigh 627; *Stuart's Case*, 28 Gratt. 950, 953." To the same effect, see the principal case cited in *Livingston v. Com.*, 14 Gratt. 606; *Page v. Com.*, 26 Gratt. 946; *Richards v. Com.*, 81 Va. 116; *Briggs v. Com.*, 82 Va. 558; *foot-note* to *Com. v. Bennet*, 2 Va. Cas. 235. See also, *foot-note* to *Page v. Com.*, 9 Leigh 683; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

certain counterfeit, forged and base coin, of the likeness and similitude of the mexican coin and money called a dollar, current within the commonwealth of Virginia, as and for a dollar, with intention to injure and defraud the said Aly Williams, he the said James Kirk, at the time he so as aforesaid passed the said base coin, well knowing the same to be false, forged and counterfeited, contrary to the form of the statute &c."—The second count charged a passing and offering to pass to Aly Williams, with intent to injure and defraud the persons inhabiting the commonwealth of Virginia.—The third count charged the said Kirk with forging and counterfeiting two base coins of the likeness and similitude of the mexican dollar, with intent to injure and defraud the persons inhabiting the commonwealth of Virginia.

The prisoner moved to quash each count in the indictment; which motion was overruled. He then pleaded not guilty, and the jury impanelled for his trial rendered a verdict in these words: "We the jury find the prisoner, James Kirk, guilty of the felony charged in the two first counts in the indictment, which passing and offering to pass was committed on the first day of March 1838; and we do ascertain the period of his confinement in the public jail and penitentiary house to be ten years, if from the law that is the least period prescribed; but if five years be the minimum, then we ascertain the period of his confinement in the public jail and penitentiary house to be five years." The verdict took no notice of the third count.

On the trial the prisoner filed two bills of exceptions. The first bill set forth, that at the trial the attorney for the commonwealth offered to give evidence and proof that the prisoner, at his residence in Cabell county, had passed to a certain Aly Williams a counterfeit dollar of the likeness and similitude of a mexican dollar, current in this commonwealth, knowing the same to be forged and counterfeited; but without producing the coin so alleged to have been passed, and for passing which the prisoner was then on trial. That it had also appeared in evidence that the said Aly Williams resided in Kentucky at the time of the trial, and that a subpoena had been issued for him, returnable to that term of the court, which subpoena had been returned not found. Whereupon the prisoner objected to the admissibility of any evidence going to prove the passing of such counterfeit dollar as aforesaid, or that the same was forged and counterfeit, unless the attorney for the commonwealth first produced in court the same coin so alleged to be forged and counterfeit, and to have

been \*passed as aforesaid. This objection was overruled, and the attorney for the commonwealth permitted to give evidence of the passing aforesaid, and that the dollar so passed was forged and counterfeit, and passed by the prisoner with full knowledge thereof; without the production of the said forged and counterfeit dollar, and without any other preliminary proof than as aforesaid. To which opinion of the court the prisoner excepted.

The second bill of exceptions was taken to an opinion of the court refusing a new trial, which was moved for by the prisoner, on the ground that the evidence did not warrant the verdict. This bill set out all the facts proved in the cause. It is unnecessary to state them, since, by the unanimous opinion of the general court, they fully sustained the conviction.

The circuit court rendered judgment that Kirk be imprisoned in the penitentiary for ten years, "the period by the jurors in their verdict ascertained."

P. R. Grattan for the plaintiff in error, and the attorney general for the commonwealth, submitted the case without argument.

ALLEN, J., delivered the opinion of the general court.—The first question for the consideration of this court grows out of the motion to quash each of the counts in the indictment. A majority of the court are of opinion, that it is not necessary to decide upon the sufficiency of each count. The first count is free from objection, and the verdict finds the prisoner guilty of the felony charged in the first and second counts, and ascertains the term of his imprisonment at the lowest period allowed by law. Every separate count is in the nature of a distinct indictment; and though in civil actions, before the law was changed by our statute, where the declaration contained several counts, some of which \*were good and others defective, and the jury gave entire damages, judgment could not be given, this rule did not apply to criminal cases. The defect of some of the counts does not affect the validity of the rest, and if any count is good, judgment may be given. 1 Chit. Crim. Law, 249; Id. 640. It is not perceived that the prisoner is subjected to any inconvenience, or liable to be taken by surprise, by the operation of this rule. He is apprized by the indictment of the charges against him, and should be prepared to meet them; and if upon the trial he supposes that the evidence does not justify a conviction upon any of the counts, he can save the point by spreading the facts proved upon the record, and moving in arrest of judgment or for a new trial.

On his trial the prisoner objected to the admission of any testimony to prove the passing of the coin, or that the same was forged or counterfeit, without the production of the piece of money alleged to be forged and passed; and that if, under any circumstances, such evidence would be admissible, a proper ground for its introduction had not been laid here. The absence of the forged pieces may increase the difficulty of proving the prisoner's guilt; but there seems to be no good reason for rejecting evidence tending to satisfy the jury of the fact of the felonious passing, and that the pieces passed were counterfeit. If the rule were as contended for, then secondary evidence could never be received in a prosecution for forgery; for the objection covers the whole ground, that the production of the forged piece was essential, and that all testimony to prove its counterfeit character and the felonious passing was inadmissible unless

the coin was produced. The contrary has been repeatedly established by the courts in this country and in England. Pendleton's case, 4 Leigh 694; 2 Russell 674. In the case before us, the attorney for the commonwealth had proved the passing to

Aly Williams; that Williams then 631 resided in the state of \*Kentucky; and that a subpoena for him had been issued, and returned not found. Without deciding that the case of counterfeit coin falls within the rule that the best evidence is to be produced, or its loss or absence accounted for, and conceding, for the sake of argument, that it does, it would seem that a sufficient ground for the introduction of such testimony was laid here. The coin had been passed to a person living without the commonwealth; there was no mode of enforcing his attendance; and the commonwealth had done all that was in her power to do. The ground of the rule is a suspicion of fraud. For if it appear that there is better evidence of the fact, which is withheld, a presumption arises that the party has some sinister motive for not producing it. No such presumption can arise here. The coin in question was never in the custody of the officers of the commonwealth, or under their control. Nor would inquiry of Williams have aided them. His statements not under oath could not have been used, and unless he appeared and proved the identity of the coin, the inquiry would have been vain. Some of the court, however, are of opinion that the rule referred to does not apply to the case in question. Where a forged instrument is set out in the indictment, it may be more necessary to produce the instrument to compare it with the instrument described; but the fact of its counterfeit character is still to be established by proof, and though an inspection of the instrument may tend to facilitate the proof, the fact may also be established by the testimony of witnesses who have examined it, or by the confessions of the accused. In Moore's case, 2 Leigh 705, the defendant was indicted for the larceny of bank notes. It was objected that the notes should have been produced, to ascertain their identity, and whether they were genuine and of value. The court decided that it was unnecessary to produce them; that it was the province 632 of the jury to judge of their genuineness by the \*evidence. If not produced, that circumstance weakens the proof, but does not destroy the competency of the other evidence to prove them to be of value. It is conceived by some of the court that the same principle applies to the case in question. The coin alleged to be forged is not set out in the indictment by its tenor or purport, as in the case of forged instruments. Whether the piece, if produced, was the one passed and is counterfeit, would depend at last upon the evidence; and the question is one which relates to the measure and quantity of evidence, of which the jury are the judges, and not to the quality of the evidence when compared with some other evidence of a superior degree.

It is unnecessary to set out the facts de-

tailed in the second bill of exceptions; the court being unanimously of opinion, that the finding of the jury was well warranted by the facts and circumstances proved on the trial.

There is error, however, in the judgment of the court sentencing the prisoner to ten years confinement in the penitentiary. The conviction took place after the passage of the act of March 17, 1838. This law took effect from its passage, and provides that if any persons shall be convicted of any of the offences mentioned in the first section of the act to punish forgeries, 1 Rev. Code, ch. 154, p. 578, it shall be lawful to sentence such person to confinement in the penitentiary for a term not less than five years. From the verdict it appears that the offence in this case was committed before the passage of the act. But the law is general in its terms, and applies to all cases of convictions after its passage. The trial in this case occurred shortly after the law was passed, and though a rumor of its passage had reached the county where the trial took place, it is manifest from the finding, that the precise terms of the law were not known, or whether it was general, or was confined to cases which might occur thereafter. The 633 \*verdict was intended to give the prisoner the benefit of the law if it applied to his case; and the court acting on the law then before it, sentenced him to ten years confinement. This error can be corrected by this court reversing the judgment and entering such judgment as the circuit court should have entered.

The verdict takes no notice of the third count of the indictment. In such case it has been decided by this court (Commonwealth v. Bennet, 2 Va. Cas. 235,) that a judgment of acquittal should be entered on the count as to which the jury have not found. This can be done in the judgment to be entered here.

Judgment reversed; and this court proceeding &c. it is considered that the plaintiff in error be imprisoned in the public jail and penitentiary house for the term of five years, the lowest period by the jurors in their verdict ascertained, and that he be kept in a solitary cell on low and coarse diet, for the space of one twelfth part of the said term; and that he be acquitted of the charge contained in the third count of the indictment.

### Brown v. Commonwealth.

December, 1838.

Evidence—Confession—Jury May Disregard Part—

\*Evidence—Confession—Jury May Disregard Part.—The jury are to weigh confessions, like other evidence, and believe or disbelieve them, in whole or in part, as reason may decide; and if, from opposing evidence or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be rejected. Earhart's Case, 9 Leigh 676, citing the principal case as authority. See also, monographic note on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1026.

**Whole Must Go to Jury.**—Where the confession of a prisoner is given in evidence, the whole must go to the jury; but the whole is not necessarily to be taken as true; on the contrary, if, from opposing evidence or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be disregarded.

**Same—Same—Same.**—Case in which the exculpatory part of a prisoner's confession was properly discredited by the jury.

Petition for writ of error to a judgment of the circuit superior court of law and chancery for Washington county.

634 \*The petitioner, Shadrack Brown, was indicted and tried at October term 1838, for horsetealing. The jury having found him guilty of the charge, and ascertained his term of imprisonment in the penitentiary to be five years, he thereupon moved the court to set aside the verdict and grant him a new trial, on the ground that the evidence did not warrant the finding; and the court having overruled the motion and rendered judgment according to the verdict, he excepted to its opinion, and set forth in his bill of exceptions the facts proved on the trial. They will be found sufficiently stated in the opinion of this court, which was delivered by

SCOTT, J. The question in this case is, whether the jury were warranted in taking as true that part of the confession of the petitioner which tended to prove his guilt, and rejecting that which exculpated him? A majority of the court are of opinion that they were.

When the confession of a party, either in a civil or criminal case (for the rule is the same in both) is given in evidence, the whole, as well as that part which makes for him as that which is against him, must be taken together and go to the jury as evidence in the case. But, like other evidence, it must be weighed, and believed or disbelieved, in whole or in part, as reason may decide. The jury cannot, by a mere arbitrary exercise of the will, take a part to be true, and reject the residue. If, therefore, there be nothing in the case warranting such a discrimination, the whole must be taken to be true. But if, from opposing evidence, or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be rejected. 1 Phil-  
lip's Evi. 3d american edi. p. 85; Rex v. Jones, 2 Carr., and Payne 29; Rex v. Higgins, 3 Id. 603; Rex v. Clewes, 4 Id. 221. When tried by this rule, we think the exculpatory statement of the petitioner

635 \*was properly disbelieved by the jury.

It was highly improbable, contradictory, and its whole character tended rather to prove guilt than innocence. He was met by an acquaintance, about sunset in the evening preceding the night in which the

horse in question was stolen, six or seven miles from the residence of the prosecutor, but passed on at the distance of fifteen or twenty yards without speaking, seemingly wishing to avoid being recognized. According to his own account, he purchased the horse in the early part of the night, after the usual preliminary chaffering, for one fourth of his value, in the lane of the prosecutor, and within sight of his house, from a man whom he did not know, and who, although his name is given, seems to be equally unknown to every body else, for we hear no more of him. It suddenly occurred to him, from the smallness of the price, that the horse was either unsound or had been stolen; and thereupon, instead of pursuing the supposed swindler or felon, he abandoned his previous intention of spending the night at a neighbouring house, resolved to turn a penny by a speedy sale, turned in an opposite direction, and by breakfast time next morning had ridden this probably unsound horse a distance of thirty-eight miles over a rugged country, to the house of a Mr. Cass in Tennessee, with whom he exchanged him for a watch of about half his value. He then passed into North Carolina, the place of his birth. From the evidence of the prosecutor it appears that the horse was traced by his footprints from the field out of which he was taken, into a road leading to Tennessee, along which he rapidly passed in that direction, and was found in the possession of Cass; from whose description of the petitioner, the prosecutor was enabled to pursue and arrest him. When arrested, he protested his innocence, and declared his ability to prove an alibi. Upon second thought he abandoned that position, and gave the account  
636 above stated. He \*was armed with a brace of pistols, a breast dirk, and a dirk knife. He drew both pistols upon the constable, and threatened to shoot him if he laid hands on him. After being taken, he attempted to escape. The watch was found concealed in the shoe of his saddle bags; and the reason he gave for the concealment was, that he had heard that the prosecutor was in pursuit of a horsethief, and it occurred to him that he had bought and sold the horse that had been stolen. And this device, and resistance, and attempt to escape, were resorted to by a man who was arrested in the county in which he was born, and (with the exception of two years spent in the west) had passed his life, and within fifteen miles of the residence of his father.

Writ of error refused—SMITH, DANIEL, CLOPTON, CHRISTIAN and ALLEN, judges, dissenting.

#### Morris v. Commonwealth.

December, 1838.

**Criminal Law—Refusal of Examining Court to Grant Continuance—How Advantage Taken.**—The refusal of the examining court to grant the prisoner a continuance of the case, is no ground for arresting judgment in the circuit court; but, if available there at all, it should be taken advantage of by plea in abatement or motion to quash the indictment.

†Same—Same—Whole Must Go to Jury.—If a prosecutor uses the declaration of a prisoner, he must take the whole together and cannot select one part and leave another; and if there be either no evidence in the case or no other evidence incompatible with it, the declaration so adduced in evidence must be taken to be true. Parrish v. Com., 81 Va. 15, citing the principal case.

Petition for writ of error to a judgment of the circuit superior court of law and chancery for Chesterfield county.

The petitioner, being indicted at October term 1838 for larceny, was tried, convicted, and sentenced to imprisonment for two years in the penitentiary. After the verdict was rendered, he moved the court to arrest the judgment against him, on the ground

that in the examining court, an application which he made for a \*continuance of the cause had been improperly refused. The bill of exceptions taken to the opinion of the examining court was set out in *hæc verba* in the record of the circuit court. On argument of the motion to arrest the judgment, the circuit court held that the examining court did not err in refusing the continuance, and therefore overruled the said motion.

SMITH, J., delivered the resolution of the general court.—It is deemed unnecessary to decide whether the examining court erred in refusing to continue the case on the motion of the prisoner, or whether such an error, if committed, could in any way avail the prisoner in the circuit court; this court being unanimously of opinion that the plea of errors in arrest of judgment could not be sustained, inasmuch as it suggests matter making no part of the record, but matter which, if the prisoner could have availed himself of it at all, should have been taken advantage of by a plea in abatement, or a motion to quash. *Cohen's case*, 2 Va. Cas. 158; *William Angel's case*, Id. 231.

Writ of error refused.

### 638 \*Commonwealth v. Young.

December, 1838.

**Criminal Law—Case Adjourned—What Record Must Show.**—The record of a case adjourned by a circuit court to the general court must show that such adjournment was with the consent of the accused.

Upon an indictment against Young in the circuit superior court of law and chancery for Dinwiddie county, that court adjourned to the general court, for novelty and difficulty, two questions arising in the cause; but the record did not state that the questions were adjourned with the consent of the defendant.

SMITH, J., delivered the resolution of the general court.—The court is unanimously of opinion that it has no jurisdiction to decide the questions adjourned to it, because it does not appear by the record that the adjournment was with the consent of the defendant. See *Garth's case*, 3 Leigh 761.

### 639 \*Moore v. Commonwealth.

December, 1838.

**Grand Juror—Qualification—Freeholder\*—Case at Bar.**—To indictment found in S. county in September 1838, prisoner pleads in abatement that J. R. one

\***Grand Juror—Qualification—Freeholder.**—Mortgagors, or grantors in deeds of trust made to secure debts, while in possession and entitled to the equity of redemption, are good grand jurors in Virginia.

of the grand jurors was not a freeholder. On the trial of the issue joined on this plea, it appears that the only land to which J. R. at the time of finding the indictment, had title, was a parcel in S. containing 691 acres, formerly part of a large tract lying mostly in S. but partly in W. county; in which latter county the whole tract was offered for sale in 1815, for arrears of taxes, but was not sold, and those taxes remained unpaid on the 1st July 1838; that in 1834, the owner conveyed the whole tract to a trustee, upon trust that if certain debts specified in the deed should not be paid within 6 months, the trustee should sell the land and pay those debts; but under this deed, no sale was ever made: that in 1837, the grantor in the trust deed sold and conveyed to J. R. the 691 acres, of which J. R. immediately received possession, and remained in possession at the time he was sworn as a grand juror. Verdict for commonwealth; and motion to set the verdict aside held to have been properly overruled.

**Bigamy—Evidence—Proof of Marriage—What Certificate of Marriage Admissible.**—On a trial for bigamy, a certificate, stating that prisoner was married to J. F. by the person whose name is subscribed thereto, and appearing to have been returned by him to the county court, but nowise shewing that he was a person authorized to celebrate marriage, is offered in evidence by the prosecutor, "for the purpose" (as a bill of exceptions filed by the prisoner states) "of proving, in connexion with other evidence, a marriage between the prisoner and J. F."—and though objected to by the prisoner, is admitted by the court. On this ground, prisoner applies to the general court for a writ of error; which is refused.

**Same—Same—Same—License Need Not Be Produced.**—

On a trial for bigamy, evidence may be given of prisoner's marriage under a license purporting to have been issued by the clerk of the proper court, and of the fact that such a license was issued to the prisoner, without producing the license itself, though it be within the power of the commonwealth.

**Continuance—Absence of Witness.**†—Case in which

*Burcher's Case*, 2 Rob. 828, Com. v. *Helmondollar*, 4 Gratt. 540, both citing the principal case. So the legal title in the person is clearly not necessary to constitute him a freeholder. *State v. McAllister*, 38 W. Va. 509, 18 S. E. Rep. 779, citing the principal case; *Burcher's Case*, 2 Rob. 827. See further, on this subject, Com. v. *Carter*, 2 Va. Cas. 319, and *foot-note*; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

**Same—Want of Qualification—How Objection Made.**

—See *foot-note* to Com. v. *Cherry*, 2 Va. Cas. 20; *Eastham v. Holt*, 43 W. Va. 619, 27 S. E. Rep. 890, citing the principal case; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

**Pleas in Abatement—On What Founded.**—Pleas in abatement are either founded on some defect apparent on the face of the record, or upon some matter of fact extrinsic of the record, which renders it insufficient. *Tilley v. Com.*, 39 Va. 153, 15 S. E. Rep. 536, citing the principal case; *Day v. Com.*, 2 Gratt. 562, and Com. v. *Long*, 2 Va. Cas. 318. On the general subject of pleas in abatement, see monographic note on "Abatement. Pleas in" appended to *Warren v. Saunders*, 27 Gratt. 259.

†**Continuance—Absence of Witness.**—See mono-

prisoner's motion for a continuance on the ground of the absence of a witness, was held to have been properly overruled.

Petition for writ of error to a judgment of the circuit superiour court of law and chancery for Scott county, rendered against the petitioner at September term 1838, upon an indictment for bigamy, in marrying  
640 \*Martha M'Henry, while his wife Joanna M. (formerly Joanna M. Fleming) was alive. He was indicted by the name of William P. Moore, alias James A. Robertson. The grand jury was impanelled, and the indictment found, on the 10th day of September 1838.

On his arraignment, the prisoner pleaded in abatement, that John Rust, one of the grand jury who found the indictment, was not, at the time of the finding, a freeholder in the commonwealth of Virginia. Issue in fact being joined on this plea, it was found for the commonwealth. The prisoner moved to set aside the verdict, as contrary to the evidence; but the court overruled the motion, and the prisoner thereupon excepted, setting forth in his bill of exceptions the facts proved on the trial of the said issue. They were as follows—

By a patent dated January 7, 1796, a tract of land containing 12,903 acres, lying in what was then Washington county, was granted to John Fleming. After intermediate conveyances to and from various persons, (the deeds, which were set out in hæc verba, all appearing to have been regularly executed and duly recorded,) the whole tract came, by like conveyance, dated and recorded on the 22nd of November 1834, into the possession of John Vaughan; who, by deed dated the 28th of November 1834, and recorded on the following day, conveyed the same to Jonathan Draper, upon trust, that if the grantor should not, within six months, pay certain debts due from him to individuals who were named in the deed, Draper should proceed to advertise and sell the land, or so much as might be necessary, and pay the debts aforesaid out of the proceeds. Afterwards, by deed dated the 16th of November 1837, and recorded on the 21st of the same month, Vaughan and his wife bargained, sold and conveyed to John Rust, the grand juror aforesaid, for the consideration of 550 dollars, 691 acres lying in Scott county, parcel of the same land which had been conveyed to  
641 Draper \*in trust. Rust was forthwith put in actual possession of the land sold him, and continued in such possession at the time he was sworn as a member of the grand jury; and he had title to no other land. The tract of 12,903 acres had never been sold under the trust deed aforesaid. It was proved by a printed list transmitted to the clerk of Washington county by the auditor of public accounts, and duly certified by him pursuant to law, that the said tract of 12,903 acres, including the land conveyed as aforesaid to Rust, was delinquent for the nonpayment of taxes due thereon for the years 1807, 1809, 1811 and 1814, in the name of the then

owner, and had been offered for sale in Washington county in the year 1815; and not being sold, it appeared to him (the auditor) that the same had become vested in the president and directors of the literary fund. It was also proved that at the time the said tract of 12,903 acres was offered for sale as aforesaid in Washington county, the county of Scott was in existence, in which last mentioned county the greater part of the said tract was; that the said tract was not at any time offered for sale in the said county of Scott, for such delinquency; and that the same was not redeemed by the payment of the said taxes, prior to the first day of July 1838. And these were certified to be all the facts proved on the trial of the said issue.

The plea in abatement being disposed of the prisoner pleaded not guilty to the indictment; and the jury impanelled to try the issue on that plea having found him guilty, and ascertained the term of his imprisonment in the penitentiary to be four years, the circuit court pronounced sentence accordingly.

At the trial on the plea of not guilty, the prisoner filed three other bills of exceptions to opinions of the court given against him.

The first bill states, that on the trial the attorney for the commonwealth offered  
642 to give in evidence (for the \*purpose of proving, in connection with other evidence, a marriage between Moore and Joanna M. Fleming) the following copy, with the certificate thereto annexed, viz. "December 2, 1829. The following persons have been united together in holy matrimony by me in the past year, within the limits of Nottoway county, viz. Wm. P. Moore and Joanna M. Fleming." [Six other persons were named in the list.] (Signed) "Thos. Richardson."—"The foregoing is a copy of the return of marriages made to this office for 1829, by Thos. Richardson according to law, and of record in this office. Given under my hand as clerk of Nottoway county court, the 19th day of September 1837. (Signed) "F. Fitzgerald."—To the introduction of which paper the prisoner objected, as not being legal evidence; but the court overruled the objection and permitted the said paper to be read to the jury; and the prisoner excepted.

The 2d bill of exceptions states, that on the trial the commonwealth introduced James Kerr, a preacher of the methodist episcopal church, as a witness, who deposed, that by virtue of a marriage license, purporting to have been issued by the clerk of Scott county, presented to him by the prisoner, he married, according to the forms of his church, the prisoner and Martha M'Henry, the persons mentioned in said license, using, in the celebration of said marriage, the words, You, James A. Robertson, do take this woman standing by you to be your lawfully wedded wife? To which he answered, Yes. And You, Martha M'Henry, do take this man standing by you to be your lawfully wedded husband? To which she answered, Yes. On being required to produce the license aforesaid, the witness said he had left it at home, where it then was, within his power to produce, if he had time to go for it. An attested copy of the certifi-

cate of the said witness Kerr, in the words and figures following, viz. "A list of marriages solemnized by James Kerr in 643 \*the year 1836—James A. Robertson and Martha M'Henry, Oct. 20th." [Four other persons were named in this list.] (Signed) James Kerr."—"A copy from the records of Scott county court. Teste John S. Martin, C. S. C."—was also produced and read to the jury, together with the bond of the prisoner and his surety, taken by the clerk on granting the said marriage license. John S. Martin, the clerk aforesaid, was likewise introduced as a witness for the commonwealth, and deposed, that he recollected to have issued to the prisoner, on his application, a marriage license, authorizing any licensed minister of the gospel to join together in marriage the prisoner, by the name of James A. Robertson, and Martha M'Henry, a female known to him to be, at the time of issuing such license, above the age of twelve years. To the introduction of all which evidence, except the aforesaid certificate of the preacher Kerr, the prisoner objected, upon the ground that the said marriage license, being within the power of the commonwealth ought to be produced, and that no evidence aliunde could supply the absence of the paper; and that, therefore, the evidence objected to was illegal and improper to be submitted to the jury. But the court, without giving any opinion on the weight of said evidence, but deeming and deciding that it was admissible, overruled the objection, and permitted the statements of the two witnesses aforesaid, and the papers above mentioned, to go to the jury as evidence. To which opinion of the court the prisoner excepted.

The 3d bill of exceptions states, that on the calling of the cause the prisoner moved the court for a continuance thereof, upon a special affidavit made by him in open court; in which he stated, That he was not then ready for trial on account of the absence of his father, whom he deemed a material witness for him, without whose testimony he could not safely go to trial. That he could not prove, by any other witness known

644 to him, \*the facts he expected to prove by his father. That he expected to procure his attendance at the next term. That since the last term, he had taken out two subpoenas for him, one of which he had enclosed to him in a letter, which he caused to be put into the post office at Scott courthouse four or five weeks before the commencement of the term. That he expected to prove by the witness, that before the marriage for which the affiant was indicted, he (the witness) had written to the affiant letters informing him that his wife was dead, and particularly a letter dated Manchester, 19th September 1837 (set out in hæc verba in the affidavit) wherein the writer assigned a reason for having untruly informed the affiant, by a previous letter, that his wife was dead; and said in concluding, "If your lawyer thinks I can be of any service to you, you can let me know by letter, and send a subpoena." And that he further expected the witness to prove, that at the time of affiant's

marriage with his wife she was under the age of 21 years; and to bring with him papers, which affiant deemed important to his defence. But the affidavit did not state that the witness was expected to prove, that the wife of the affiant was under the age of twelve years at the time of her marriage; nor did it state the contents or character of the papers which the witness was expected to bring with him. The letter set out in the affidavit bore the postmark "Richmond," and appeared to have been mailed there. The counsel for the prisoner proved that he enclosed one of the subpoenas for the witness, taken out as aforesaid, in a letter addressed to the sheriff of Chesterfield, which he put into the post office in time to have procured the attendance of the witness. Neither subpoena had been returned to the court, nor was it known what had become of them after they were mailed. The only witnesses who identified, or (so far as was known) could identify the prisoner, were one

Freeman and his wife, the brother in 645 \*law and sister of the prisoner, who gave other very important testimony for the commonwealth. These witnesses resided in Smyth county, 60 miles from Scott courthouse, and were brought to court by attachments; when Freeman assigned as a reason for not obeying the summons of the court, that he was a very poor man, and had not the means of travelling to the same. He further stated his intention of leaving the commonwealth a year thereafter. It appeared that the commonwealth was prevented by the absence of Freeman and his wife at the previous term, from laying the indictment before the grand jury, and could not have safely gone to trial without their testimony. The circuit court, "not perceiving the importance or even admissibility of the testimony expected to be given by the prisoner's father, for any other purpose than as tending to diminish his punishment, if it could legally have that effect, and doubting whether the commonwealth could ever be as well prepared at a future time for the trial of the case, and above all whether the prisoner, who had been confined in Scott jail on this charge for nearly 12 months, had used such diligence in endeavouring to procure the attendance of his witness, as, under the circumstances of the case, entitled him to the continuance asked for,"—overruled his motion and refused to continue the case. To which opinion he excepted.

R. G. Scott, for the petitioner, submitted, 1. That the issue on the plea in abatement ought to have been found for the prisoner, as the grand juror Rust was not a freeholder at the time he was sworn, the land claimed by him being vested, by forfeiture, in the commonwealth for the president and directors of the literary fund. 2. He contended that the circuit court erred in admitting the certificate of Thomas Richardson as evidence against the prisoner. That although, by the 14th section of the act to regulate 646 the solemnization of marriages, \*1 Rev. Code, ch. 106, p. 398, the proper and regular certificate, made in conformity with that section, is declared to be evidence



of all such marriages," yet it never was the design of the legislature that in a criminal prosecution, the same should, of itself, be received as evidence of that fact, or as evidence tending to prove that fact. Such an interpretation of the clause would be to substitute the ex parte certificate of a private and irresponsible person, for legal proof given in open court on oath, and to produce the conviction of one charged with crime without his being able to cross-examine or contradict, or having the privilege of confronting his accuser. But, even if this view of the section referred to were wrong, yet the paper permitted to go as evidence against the prisoner was not such as the act of assembly required. Evidence of Richardson's authority to make such certificate should have appeared, either on the face of the certificate, or by testimony aliunde. Whenever, by statute, persons filling particular stations in life are authorized to do certain acts, and they undertake to act under the statute, and furnish evidence that they are so acting, it must clearly appear that they are the persons described by the statute, and are performing their functions by virtue of the same. The certificate here does not shew, and no other evidence in the case shews, that Richardson was one of the persons authorized by law to solemnize marriages, or to grant the certificate in question. He does not describe himself as a minister of the gospel, nor does he claim for himself any other character that would invest him with legal authority to solemnize marriages. It is a simple certificate that he has solemnized marriages in the year 1829, between certain persons named in the certificate; and there was no proof to supply this omission.

3. That the circuit court erred in admitting secondary proof of a license to marry the prisoner and Martha M'Henry, not only without evidence that the license

647 \*had been lost or destroyed, but in the face of positive testimony that it existed and could be produced by the commonwealth. 4. He submitted, that the continuance asked for by the prisoner ought to have been granted.

PER CURIAM, Writ of error refused.

648

\*JUNE TERM 1839.

JUDGES PRESENT.

<i>Saunders,</i>	<i>Thompson,</i>
<i>Daniel,</i>	<i>Brown,</i>
<i>Summers,</i>	<i>Duncan,</i>
<i>Upshur,</i>	<i>Fry,</i>
<i>Field,</i>	<i>Clopton,</i>
<i>Lomax,</i>	<i>Christian,</i>
<i>Scott,</i>	<i>Mason,</i>

*Leigh.*

Commonwealth v. Wilson.

June, 1839.

**Gaming—Racefield.**—What shall be deemed a racefield, within the meaning of the act to prevent unlawful gaming.

Adjourned case from the circuit superior court of law and chancery for Smyth county.

\*See generally, monographic note on "Gaming" appended to Neal v. Com., 22 Gratt. 917.

At October term 1838, the defendant, David Wilson, was indicted for unlawful gaming at cards, on the 15th of September preceding, "at the racefield at the seven mile ford in the said county of Smyth, the said racefield being then and there a public place," contrary to the act of assembly &c. At May term 1839, he was tried, and the jury found him guilty of the offence charged: whereupon he moved the court to set aside the verdict and grant him a new trial; but the court, having difficulty as to its judgment to be rendered on the said motion, adjourned to the general court, with the consent of the defendant, the following statement and questions:

649 \*It was proved on the trial, that the ground described in the indictment as a racefield was a slip of land, lying between the middle fork of Holston river on the south, and the line of fence of a cultivated field on the north, the breadth from the river to the fence being 40 or 50 yards, and the length about half a mile. This space was entirely clear, except that a few trees were left near the water's edge for the preservation of the bank; and it was open at each end, and communicated with a public road running on the north side of the cultivated field. That field formerly extended to the river bank; but many years ago, the southern fence was removed back from the river, so to leave the space in question open for a public highway; while the road on the north side of the field was also left open, and used. The road along the river was used for years, but was finally discontinued; and it being a suitable place for quarter racing, quarter paths were made thereon by tacit permission of the owner, and used occasionally for such racing, though not frequently. No company, club, or other person had the right to race there without the owner's permission. The defendant played cards in the open space between the race paths and the river, at a time when two or more horses were exercised in training on the track, and several persons had assembled to see the training. Bets were made on the running of the horses upon that occasion, though the race, for which the said training was preparatory, took place some days afterwards. These were all the material facts proved; and the court, defining a field to be cleared land, for cultivation or other purposes, whether enclosed or not, left it to the jury to determine whether the ground above described was, on the day of the playing, a racefield or not. The jury found that it was a racefield.—The questions submitted were, 1. Is the ground above described a racefield, within the meaning of the act of assembly prohibiting unlawful gaming? \*or is it a field in any sense of the word? 2. What disposition ought the court to make of the motion for a new trial? 3. Ought the court to render judgment on the verdict aforesaid?

The general court decided, 1. That the place mentioned in the indictment, at which the gaming took place, was, at the time, a racefield within the meaning of the act of assembly to prevent unlawful gaming.

2. That the circuit court ought to give judgment against the defendant, for the fine imposed by law, and the costs of the prosecution.

651 \*Moran v. Commonwealth.

June, 1839.

**Criminal Law—Grand Juror a Mill Owner—Sufficiency of Plea.**—To indictment in Petersburg circuit court, defendant pleads, 1. that one of the grand jury which found the same, was, at the time he was summoned and sworn, the owner of a water grist mill situated in Chesterfield; 2. that one of the grand jury was, at the time of finding the indictment, the owner of a water grist mill (without saying where the mill is situated). On demurrer to the pleas, **Held**, neither of them is sufficient.

**Jurors—Competency—Preconceived Opinions—Case at Bar.**—On a trial for murder, two jurors are severally examined on voir dire. 1. One states, that he was not present at the examination of the prisoner before the hustings court, and has heard no statement of the evidence from any witness or any person who was present; that he has heard the case spoken of in the town, and rumours in regard to its circumstances, upon which he has expressed no opinion, though he believes those rumours to be true, and if they should turn out upon the trial to be true, he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumours he has heard; that the opinion he had formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. 2. The other juror states, that he has made up no decided opinion; that he has heard a part of the evidence of one witness, and formed an impression, and if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence went, he has a decided opinion, if the rest should not run against it; but that he has no prejudice, has not expressed any opinion, and is prepared to decide the case according to the evidence which may be given in, uninfluenced by the portion of evidence he has heard. **Held**, both the jurors are competent.

Petition for writ of error to a judgment of the circuit superior court of law and chancery for the town of Petersburg.

At June term 1839, the petitioner, Peter Moran, was indicted for the murder of Daniel Jones Beasley; and the jury having found him guilty of manslaughter, and ascertained the term of his imprisonment in the peniten-

\***Grand Jurors—Qualification—Mill Owner.**—As holding that the disqualification of owners and occupiers of water grist mills, though general in its terms, is limited to the jurisdiction within which their mills are situated, the principal case is cited in Booth v. Com., 16 Gratt. 527.

\***Jurors—Competency—Preconceived Opinions.**—On this subject, the principal case is cited with approval in Clore's Case, 8 Gratt. 623 (see also, *foot-note* to this case); *foot-note* to Com. v. Hallstock, 3 Gratt. 564; Jackson v. Com., 28 Gratt. 919, 930, 933, and *foot-note*; State v. Baker, 33 W. Va. 324, 10 S. E. Rep. 641. For further information on this subject, see monographic note on "Jurors" appended to Chahoon v. Com., 20 Gratt. 733.

tiary to be five years, the court pronounced sentence accordingly.

652 \*Before pleading in bar of the indictment, the prisoner filed two pleas in abatement. The first plea alleged that Francis Follet, a member of the grand jury which found the indictment, was not, at the time he was summoned and sworn, duly qualified to serve as a grand juror, because he was then and there the owner and occupier of a water grist mill situated in the county of Chesterfield and commonwealth of Virginia. The second plea alleged that Francis Follet, a member of the grand jury which found the indictment, was, at the time of finding the same, the owner and occupier of a water grist mill;—without stating where the mill was situated. The attorney for the commonwealth demurred to each of the said pleas, and the court, on argument, sustained the demurrers.

On the trial of the cause, a juror, A. S. Holderby, being sworn on his voir dire, stated that he was not present at the examination of the prisoner before the hustings court, nor had he heard a statement of the evidence from any witness, or from any person who had heard the testimony; that he had heard the case spoken of in the town, and rumours in regard to its circumstances, upon which he had expressed no opinion; and he was now prepared, without prejudice, to give the prisoner a fair trial. But upon his cross examination he stated, that he believed the rumours which he had thus heard, to be true, and if they should turn out upon the trial to be true, he had a decided opinion in regard to the case. He added, that he felt satisfied he should be able to decide the case upon the evidence which should be now given in, uninfluenced by the rumours he had heard; and that the hypothetical opinion formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. Another juror, Abraham Tucker, being examined on his voir dire, stated that he had made up no decided opinion; that he had heard a part of the

653 \*evidence of one witness, and formed an impression; that if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence went, he had a decided opinion, if the rest did not run against it; that he had no prejudice, had not expressed any opinion, and was prepared to decide the case according to the evidence which might be given, uninfluenced by the portion of evidence which he had heard. Whereupon the prisoner challenged each of the said jurors for cause; but the court overruled the challenges, decided that each of the jurors was competent, and put the prisoner to his election, to accept or peremptorily challenge them. To which opinion of the court the prisoner accepted.

The cause was argued in the general court by Macfarland and Rhodes for the petitioner, and the attorney general for the commonwealth.

SUMMERS, J., delivered the opinion of the court.—The principal questions in this

case arise upon the pleas in abatement, demurred to by the attorney for the commonwealth.

The sufficiency of those pleas depends on the proper construction to be given to the act of assembly defining the qualification of grand jurors, 1 Rev. Code, ch. 75, § 1, p. 264, by which it is directed "that the sheriff shall summon twenty-four of the most discreet freeholders of the county, being citizens of this commonwealth, and not constables, nor ordinary keepers, nor surveyors of highways, nor owners or occupiers of a mill;" and the act of March 28, 1836, Sess. Acts of 1835-6, ch. 61, p. 42, restricting the term mill to water grist mills, in conformity to the uniform decisions of the courts.

On the part of the petitioner it is contended, that the disqualification of a mill owner is personal, applying \*to an entire class, without regard to the place or county in which the water grist mill may be situated. On the part of the commonwealth it is insisted, that the true construction of the act restricts both the qualifications and disqualifications to the limits of the jurisdictions of the court in which the grand juror is called to serve.

Statutes, whether remedial or penal, ought to be construed in reference to the principles of the common law; for it is not to be presumed that the legislature intended to make any innovations upon the common law, further than the case absolutely required. 1 Kent's Comm. 433, 4, Heydon's case, 3 Rep. 7. This rule of construction is entitled to peculiar weight in relation to statutes abridging the rights or capacities of the citizen. The privilege of a freeholder residing in the county to serve on grand juries is inherent by the common law, and sanctioned by our act of assembly, except so far as the latter may have taken it away on principles of public policy: therefore, in construing the latter, we deem it proper to adopt the interpretation which will least abridge the general privilege, and confine the exception to the necessity and reason of the enactment.

The legislature in 1748 (5 Hen. Stat. at large, ch. 11, p. 523,) disqualified the owner or occupier of a mill from serving in the office of a grand juror; and by another act passed at the same session (6 Hen. Stat. at large, ch. 26, p. 55,) imposed penalties on mill owners, and authorized the grand juries to present offences against that act. The mischief to be remedied was the influence of millers, when members of the accusing body having jurisdiction of their peculiar cases; but prosecutions under the penal laws being local, and offences only punishable within the county where committed, all the purposes of the law are attained by limiting the disqualification of the mill owner to the jurisdiction within which his mill is situated.

655 \*This court has heretofore decided that residence, as well as freehold, within the county, is a necessary qualification of a grand juror; and the peculiar functions and duties of grand juries, as well as the structure of the clause of the act under consideration, would warrant, if necessary,

the reading of it with the words "of the county," at the end of each disqualification. The broad disqualification contended for would extend the remedy beyond the mischief, and wantonly innovate on the principles of the common law giving equal rights, duties and privileges to the citizens who are freeholders.

It is argued that if the first plea is bad in setting out the mill owned by Follet to be in Chesterfield, the second ought to be construed as intending a mill within the town of Petersburg; on the ground that the plea is in the words of the statute, and that the principles of construction which restrict the general words of the act ought to govern in relation to the plea. Without entering into an analysis of those pleas, or adverting to the strictness of the rules by which pleas in abatement are governed, it will suffice to remark that every plea, whether in bar or abatement, must shew matter which, if confessed by demurrer or found by a jury, will authorize the judgment prayed by the plea; and although the plea may be in the words of the statute relied on, yet if the averments be omitted which are necessary to shew that the matter of the plea, under such statute, forms a full defence, or warrants the judgment prayed for, such omission is fatal. Had an issue been made up on the facts alleged in the second plea, the only enquiry before the jury would have been as to the ownership and occupancy by Follet of a water grist mill; and the plea would have been as fully sustained by proof in relation to a mill on the Kanawha or the Muskingum river, as on the Appomattox within the town of Petersburg.

Upon full consideration of this branch of the case, nine of the judges concur in 656 the opinion that the demurrer \*to each plea was properly sustained; but from this opinion judges Thompson, Clopton and Christian dissent.

This court is unanimous in the opinion that the prisoner's challenges for cause, to the jurors Holderby and Tucker, were properly overruled. Those jurors entertained no ill will towards the prisoner, or prejudices by which their minds might have been influenced in trying his cause. They had heard the reports of the occurrence, and one of them a part of the evidence. Their minds had necessarily come to some conclusions, dependent, however, on the accuracy and fulness of the reports and statements which had reached them; and they were each satisfied that they could pass fairly and impartially between the prisoner and the commonwealth. This, we think, was all that the most scrupulous regard to public justice, and the rights and safety of the prisoner, required. When atrocious acts are committed, they necessarily become the subjects of conversation and remark, leading to impressions and opinions favourable or unfavourable to the party accused: but when such opinions have not impressed the mind with strong and decided convictions, by which the justice and fairness of the juror's decision upon the evidence may be influenced, we think that no disqualification is produced. Sustaining challenges to jurors for favour on slight grounds, tends to

place the administration of public justice in the hands of the most ignorant and least discriminating portion of the community, by which the safety of the accused may be endangered, and the proper administration of the laws put to hazard; and we are therefore not disposed to enlarge the grounds of challenge beyond those properly deducible from the cases heretofore decided.

Writ of error refused.

657 \*Commonwealth v. Piper.

June, 1830.

**Criminal Law—Surveyor of Road—When Liable to Prosecution.**—Though the assignment of tithables to work on a public road has been made, not by the county court itself, but by one of the justices, designated for that purpose by the court, and has not been returned to the court or ratified by it, yet if the tithables so assigned do not refuse to work on the road, the surveyor is indictable for failing to keep the same in repair.

Adjourned case from the circuit superiour court of law and chancery for Washington county.

The defendant, Samuel Piper, surveyor of the precinct of the public road in said county, leading from &c. was indicted for failing to keep the said precinct in legal repair, contrary to the act of assembly. It appeared in evidence on the trial, that the county court, at the time of appointing the defendant surveyor as aforesaid, ordered that William Davis, a justice of the peace of the county, should assign him a list of tithables, by whose labour he was required to keep the road in legal order, and that Davis did accordingly assign a sufficient number of tithables to keep the said road in order, though such assignment was not returned to the court, or sanctioned by it: that, at the time specified in the indictment, the road was in such bad order as to be dangerous to passengers having occasion to use it: that the tithables so assigned to the defendant as surveyor did not refuse to work on the road, on account of the irregularity of the assignment, or for any other reason: and that shortly after the finding of the indictment, the defendant, by the labour of the tithables so assigned, did put his said road in proper order. The defendant moved the court to instruct the jury, that on such assignment as aforesaid, he had no power by law to coerce the said tithables to work on the road, and was therefore without legal means to perform his duty as surveyor of the same. The court

658 proper \*interpretation of the statute, it was made the duty of the county court to assign to the surveyor a list of tithables, and that on the assignment by William Davis, the surveyor possessed no authority to coerce the tithables to work on the road, in case they had refused; but the court left it to the jury to determine from the evidence, whether the defendant was prevented by the irregularity of the assignment, or otherwise, from performing his duty as surveyor; giving it as the opinion of the court, that if the tithables were willing to work on the road

under the assignment by Davis, the surveyor was just as much bound to keep the road in legal repair by their labour, as if they had been regularly assigned. The jury found the defendant guilty, and assessed upon him a fine of ten dollars. Whereupon he moved for a new trial, "on the grounds aforesaid;" and the court, with the consent of the defendant, adjourned to this court, for novelty and difficulty, the following questions: 1. Is the order of the county court directing William Davis to assign to the defendant, surveyor as aforesaid, a list of tithables, legal? 2. If not, was the direction of the court to the jury, that the surveyor was not to be excused from performing his duty unless he was obstructed therein by the irregularity of the assignment of hands, proper? 3. What disposition ought the court to make of said motion for a new trial?

The opinion of the general court was delivered by

MASON, J. By the 4th section of the act to reduce into one the several acts concerning public roads and for establishing public landings, passed February 2, 1819, (2 Rev. Code, ch. 236, p. 234,) the several county courts are directed to divide the roads into precincts, "and appoint a surveyor over every precinct, whose duty it shall be to superintend the road in his precinct, and see that the same be cleared, and kept in good repair."

659 \*To enable him to perform this public duty, a portion of the tithables are to labour under his superintendence. If such tithables fail to work, they are liable to a fine, to be ascertained by any justice of the peace. To enable the surveyor to enforce this penalty of the law, the same act requires of the county court to make an appointment of all male labouring persons over sixteen years of age, except such as are masters of two or more male labouring slaves of that age, to work on some public road. The failure of the county court to make such appointment, or to ratify and approve the assignment which may be made by their order, may protect the tithables from the penalty of a refusal to work; but their refusal cannot be ascertained until the surveyor attempts to perform his duty. But this contingent defence of the tithables is no excuse for the surveyor, for a failure to perform his duty. In this case it appears that they did not refuse to work before the finding of the indictment, and that, without a new assignment, they did work and put the road in repair, shortly after that occurrence.

Upon the whole case, a majority of the court are of opinion, in answer to the 3d question, that the defendant's motion for a new trial ought to be overruled, and judgment entered on the verdict; and they deem it unnecessary to decide the other questions.

CHRISTIAN, J. I dissent from the opinion of the court pronounced in this case. The court below, it seems, instructed the jury that there was no legal assignment of hands to work on the road over which the defendant was the surveyor; and also that it was the duty of the county court to make such

assignment. From the evidence it appears that, in point of fact, no such assignment was made by the county court. This being so, to give a judgment against the defendant upon the finding of the jury, would be to impose a fine \*upon him for not keeping his road in repair, when he had no means legally to enable him to do so. No hands having been assigned to work on the road, there were of course none which he could compel (in the way designated by the statute) to work on it; and if he could not compel them, he ought not to be liable for failing to do what he was only required to do by reason of the law which gave him authority to compel the hands to work. I hold it to be sound in principle, that if the law impose a public duty upon any one, and require the court to furnish him certain prescribed means of performing that duty, he is not liable to be punished for not performing it, if the court has not furnished the means prescribed, although it may appear that he might have performed the duty notwithstanding. The decision in this case, in my opinion goes the length of requiring a man to whom a particular duty is by law assigned, and the means of performing it designated, to execute that duty although the means have not been furnished, if it shall appear that he might otherwise have performed it. I think therefore, that the verdict should be set aside, and a new trial awarded the defendant.

661 \*DECEMBER TERM 1839.

JUDGES PRESENT.

<i>Smith,</i>	<i>Brown,</i>
<i>Upshur,</i>	<i>Duncan,</i>
<i>Field,</i>	<i>Fry,</i>
<i>Lomax,</i>	<i>Clopton,</i>
<i>Leigh,</i>	<i>Christian,</i>
<i>Estill,</i>	<i>Nicholas.</i>

**Maile v. Commonwealth.**

December, 1839.

**Murder—Indictment—Sufficiency of.**—Indictment for murder charges that the prisoner of his malice aforethought, did make the assault; but the striking and wounding, and the killing and murder, are respectively charged to have been done "of his malice aforesaid." HELD a good indictment for murder.

**Jurors—Competency—Preconceived Opinions—Case at Bar.**—On a trial for felony, a juror, being examined on his voir dire, states, that he was not present at the examining court, but has heard a report of

\***Murder—Indictment—Sufficiency of.**—See principal case cited in *State v. Yates*, 21 W. Va. 764. For further information on this subject, see monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

†**Jurors—Competency—Preconceived Opinions.**—On this subject, the principal case was cited in *Armistead's Case*, 11 Leigh 664; *Jackson v. Com.*, 23 Gratt. 931, 933; *Foot-note* to *Shinn v. Com.*, 32 Gratt. 901; *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641. See further, *foot-note* to *Moran v. Com.*, 9 Leigh 651, and notes there referred to; monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

some of the circumstances of the case; that he does not know that the report came from any one who heard the evidence at the examining court, nor does he believe it to be a full detail of all the circumstances, but he believes it to be true, and upon that belief has formed and expressed a decided opinion, which is still abiding on his mind; but he believes, that notwithstanding what he has heard, his mind is open to conviction, and he has no doubt that if the facts should turn out to be different from what they have been represented to him, his opinion would be changed. HELD, he is a competent juror.

Isham Maile was indicted in the circuit superiour court of Chesterfield, for the murder of Archer Maile. The indictment charges, that Isham Maile, on &c. in the \*county of Chesterfield, feloniously &c. and of his malice aforethought, did make an assault upon Archer Maile, and did then and there, feloniously &c. and of his malice aforesaid, shoot off and discharge to, upon and against the said Archer Maile a certain shot gun charged with gunpowder and shot, and did then and there, with the shot aforesaid, feloniously &c. and of his malice aforesaid, strike, penetrate and wound the said Archer Maile, giving him then and there, with the shot aforesaid, one mortal wound, of which he then and there instantly died; and so the jurors said that Isham Maile him the said Archer Maile, feloniously &c. and of his malice aforesaid, did kill and murder, against the form of the act of assembly.

On the trial of the case, Thomas Gibbs, being called as a juror and sworn on the voir dire, stated "that he was not present at the examining court, but that he has heard a report of some of the circumstances of this case, which report he believes to be true, and upon which he has formed and expressed a decided opinion as to the guilt or innocence of the prisoner. He believes, however, that notwithstanding what he has heard, his mind is open to conviction; and he has no doubt that if the facts should turn out to be different from what they have been represented to him, his opinion would be changed. He does not know that what he has heard came from any one who heard the evidence at the examining court, nor does he believe that what he heard was a full detail of all the circumstances, but he believes it to be true, and upon that belief he has formed and expressed a decided opinion, which opinion is still abiding on his mind." The prisoner then challenged the said Thomas Gibbs for cause; but the court overruled the challenge, and put the prisoner upon his election; to which opinion of the court he excepted.

The jury found the prisoner guilty of voluntary manslaughter, and ascertained his term of imprisonment in the penitentiary to be five years.

663 \*When brought up to receive his sentence, he moved the court to arrest the judgment, "because of the insufficiency of the indictment in not charging him with the crime of murder, for which he was arraigned and tried before the jury." The court overruled the motion, and pronounced judgment according to the verdict; and the prisoner

excepted to the opinion overruling his said motion.

At the last term of the general court, he applied for and obtained a writ of error to the judgment, upon a petition assigning for error, 1. That the circuit court improperly overruled his challenge of the juror Thomas Gibbs. 2. That the said court improperly overruled his motion in arrest of judgment; the indictment being "insufficient to charge the crime of murder, because it does not allege that the prisoner, of his malice aforethought, murdered the deceased, but substitutes an entirely different phrase; whereas the words malice aforethought are absolutely indispensable, and admit of no substitute."

And now the cause was argued by N. Harrison for the plaintiff in error, and the attorney general for the commonwealth, upon the assignment of errors contained in the plaintiff's petition.

CLOPTON, J., delivered the opinion of the court.—From the statement made by Thomas Gibbs when called as a juror in this case, it does not appear that he had any prejudice against the prisoner. The opinion which he had formed and expressed, although called by him a decided opinion upon the report which he had heard, did not involve the full question of the guilt or innocence of the prisoner; because the mind of the juror was satisfied that what he had heard was not a full detail of all the circumstances. What he had heard, therefore, could not afford materials for such an opinion. The

664 \*opinion formed was evidently, in its character, merely hypothetical, depending upon the truth of what he had heard, and the addition of other and fuller proof, and could not influence the mind of a juror otherwise unbiased and impartial. The court is therefore of opinion that the juror was competent, and that the prisoner's challenge for cause was properly overruled. On this point, however, judges Estill, Brown, Duncan and Fry dissent.

The court is of opinion that the indictment is a good indictment for murder, the term "aforesaid" referring with sufficient certainty to the malice previously charged as malice aforethought; and although it is the most usual course to repeat the terms malice aforethought, it is well settled that the substitution of aforesaid for aforethought is not error. In Heydon's case, 4 Rep. 41, the words "felonie et ex malitia præcogitata" were omitted in that part of the indictment which charged the blow, which was connected with the felony and malice previously charged, by a copulative; and the court decided that the conjunction coupled all the sentences together, and referred the felony and malice charged in the first part of the indictment to all the subsequent verbs. And in 2 Hawk. P. C. 314, it is laid down, that the law will not admit of too great nicety, and that if, in the first part of an indictment of death, the assault be laid with malice pre-pense, there is no need to repeat it in the clause which shews the giving the wound, that being joined by a copulative to the pre-

cedent sentence, and laid at the same time and place with the assault.

The court doth therefore decide that there is no error in the judgment, and that it be affirmed.

Judgment affirmed.

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**\*Commonwealth v. Barrett.**

December, 1839.

**Criminal Law—Statute Suppressing Circulation of Incendiary Publications—Construction.**—To sustain a prosecution for the offence created by the first section of the act to suppress the circulation of incendiary publications, passed March 28, 1836 (Acts of 1835-6, ch. 66,) the person accused must be a member or agent of an abolition or antislavery society.

**Felonies—Informations.**—A felony cannot be prosecuted by information.

Adjourned case from the circuit superiour court of Lewis county.

At September term 1839, the attorney prosecuting for the commonwealth in the said court moved for rules against Lysander Barrett and ten other persons, to shew cause why criminal informations should not be filed against them respectively, for violations of the "act to suppress the circulation of incendiary publications, and for other purposes," passed March 23, 1836. (Sess. Acts of 1835-6, ch. 66, p. 44.) In support of the motion, the attorney for the commonwealth produced affidavits of several witnesses, proving that the said Lysander Barrett had caused to be circulated in the county of Lewis, for the purpose of procuring signatures, and that the ten other persons aforesaid had signed, a memorial to congress, which prayed the abolition of slavery in the district of Columbia, and contained the following expressions: "In the opinion of your petitioners, slavery and the slave trade, as at present existing in the district of Columbia, where congress has sole jurisdiction, ought not so to be,—as a sin against God, a foul stain upon our national character, and contrary to the spirit of our republican institutions." Lysander Barrett appeared, and contested the motion for the said rule against him: whereupon, with his consent, the circuit court adjourned to this court, for novelty and difficulty, the following questions: 1. Is circulating the aforesaid

666 memorial to congress, and procuring subscribers \*thereto, an offence under the provisions of the aforesaid act to suppress the circulation of incendiary publications, and for other purposes, passed March 23, 1836? 2. Is the signing of the said memorial an offence by the signers thereof, under the said statute? 3. Is it necessary, in order to furnish the foundation of a rule for a criminal information against the said Lysander Barrett for the causes aforesaid, that there should be proof that he was a member or agent of an abolition or antislavery society?

The response of the general court was as follows:

\*See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

"This court is unanimously of opinion and doth decide, in answer to the 3d question adjourned, that to sustain a prosecution for the offence created by the first section of the act to suppress the circulation of incendiary publications, and for other purposes, passed March 23, 1836, the person accused must be a member or agent of an abolition or antislavery society.

"This court is also of opinion that the offence created by the 2d section of the aforesaid statute, being a felony, cannot be prosecuted by information; and that consequently the 1st and 2d questions adjourned by the circuit court to this court do not properly arise in this case."

### Commonwealth v. Collins.

December, 1839.

**Criminal Law—Selling Goods without License—Information.**—Upon presentment and information in a circuit court, judgment given for the forfeiture inflicted by the second section of the act passed February 24, 1823, for the offence of selling goods, wares and merchandise without a license.

An information was filed against Jerome B. Collins in the circuit superior court 667 of Orange county, at April term 1832, for selling by retail goods, wares and merchandise of foreign and domestic growth and manufacture, without a lawful license<sup>\*</sup> for so doing. The information was filed upon a presentment made by the grand jury at the previous term, "upon the evidence of J. Cave, commissioner of the revenue, sworn in open court to give evidence before the grand jury." Issue being joined on the plea of not guilty, the cause was continued in court until September term 1836; when a jury being impanelled to try the issue, returned a verdict finding the defendant guilty. He thereupon moved the court to arrest the judgment, "because the remedy given by the act of assembly is a remedy by motion, and no information or indictment will lie against the defendant in this case; the offence with which he is charged being created by statute, and not being an offence at common law, and there being no provision in the law for its prosecution by such mode as has been pursued here." The circuit court, with the consent of the defendant, adjourned to this court the questions, 1. What judgment ought to be rendered upon the errors filed in arrest of judgment? 2. What judgment ought to be rendered upon the verdict?

The general court responded as follows—"This court is of opinion and doth decide, that the errors filed by the defendant in arrest of judgment ought to be overruled, and judgment entered for the commonwealth, for the penalty prescribed by the 2d section of the act passed the 24th day of February 1823, entitled 'an act to amend the several laws imposing a tax on licenses to merchants and others, and for other purposes'—and for the costs of the prosecution."

<sup>\*</sup>See monographic note on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 647.

By the 1st section of the abovementioned act of February 24, 1823 (Supplement to Rev. Code, ch. 270, p. 326.) it is declared, "that hereafter it shall not be lawful for any merchant to carry on his trade or occupation, until he shall have paid the tax 668 imposed by law, and obtained a license or commission, agreeably to the provisions of this act." The 2d section, after prescribing the mode of obtaining a license to sell goods, wares and merchandise of foreign and domestic growth and manufacture, by wholesale or retail, or by retail only, proceeds to enact that "if any person or persons shall sell such goods, wares and merchandise, either by wholesale or retail, without having first obtained such license, such person or persons shall, for every such offence, forfeit and pay the sum of one hundred dollars, one half thereof to the use of the informer, and the other half to the use of the literary fund; to be recovered by motion in any court of record, on ten days previous notice."

By the 3d section of an act passed February 20, 1828, amended by the 1st section of an act passed February 28, 1829 (Supplement to Rev. Code, ch. 274, § 2, ch. 275, § 1, pp. 332, 333.) it is declared that it shall be the duty of the commissioners of the revenue, annually, at some quarterly term of the court holden for each county and corporation, "to render to the court a list of all such merchants, within their respective precincts, whom they shall have just cause to believe have failed to take out license as required by law; and also a list of such witnesses as, in their opinion, may give information of any such failure. And the court shall thereupon order process to bring such witnesses in, who shall be sworn, and forthwith sent to the grand jury, to give evidence touching any of said offences. And upon any presentment being made by such grand jury, it shall be the duty of the attorney for the commonwealth to file an information or indictment against such person or persons presented, and the court shall give judgment, upon conviction, for the penalty or penalties now imposed by law upon any such offenders." This act, it will be observed, applies in terms to the county and corporation courts only.—Note in Original Edition.

### 669 \*Commonwealth v. Woodson.

December, 1839.

**Criminal Law—Stabbing—Indictment—Allegations.**—

An indictment charging that prisoner, "at the county and within the jurisdiction of the court, feloniously and maliciously did stab one P. T. with intention to maim &c. and kill him," will not be quashed, upon objection that it does not allege any assault, striking or wounding, nor that P. T. was within the county or jurisdiction, nor that the intent was felonious or malicious.

Richard Woodson was indicted in the circuit superior court for the county of Henrico and city of Richmond, for felonious stabbing. The indictment contained two counts. The first count alleged that Richard Woodson, on &c. "with force and arms, at the said county and city, and within the jurisdiction of the said court, one Park Talley, in the peace of God and the commonwealth, in and upon the left side of the belly of him the said Park

<sup>\*</sup>Criminal Law—Stabbing—Indictment—Allegations.—See monographic note on "Assault and Battery" appended to Roadcap v. Sipe, 6 Gratt. 213; monographic note on "Indictments, Informations and

Talley, and also in and upon the left arm of him the said Park Talley, then and there feloniously, voluntarily, maliciously and of purpose did stab, with intention, in so doing, him the said Park Talley thereby then and there to maim, disfigure, disable and kill, against the form of the statute," &c. The second count alleged that the said Richard Woodson, afterwards to wit, on &c. "at the said county and city, and within the jurisdiction aforesaid, with force and arms, one Park Talley, in and upon the left side of the belly of him the said Park Talley, and also in and upon the left arm of him the said Park Talley, then and there feloniously and unlawfully did stab, with intention, in committing the said acts, him the said Park Talley thereby then and there to maim, disfigure, disable and kill, against the form of the statute," &c. On his arraignment, Woodson moved the court to quash the indictment, upon the following grounds: 1. Because no assault is alleged. 2. Because it is not alleged that the accused struck Talley, in the  
670 \*indictment named, or that he gave him any wound. 3. Because it is not alleged that the said Talley was in the county of Henrico or city of Richmond, or within the jurisdiction of the court, when the stab was given, and it does not therefore appear that the blow, if stricken, took effect within the jurisdiction of this court. 4. Because it is not alleged that there was a felonious, malicious or unlawful intent to maim, disfigure, disable or kill the said Talley. Whereupon the court, with the consent of the accused, adjourned to the general court the question, whether the indictment ought to be quashed on any of the grounds alleged for quashing the same?

Lyons, for the accused.

The general court decided, that the indictment ought not to be quashed on any of the grounds alleged for quashing the same.

#### 671 \*Earhart v. Commonwealth.

December, 1839.

**Criminal Law—Burning Woods—Indictment—Record of Finding—Sufficiency.**—Indictment for unlawfully, wilfully and maliciously setting fire to the woods near the plantation of A. M. and burning said woods and a fence belonging to said A. M. is described, in the record of the finding, as an indictment "for setting fire to the woods and burning the same:" HELD a sufficient record of the finding.

**Same—Confessions—Admissibility as Evidence for Ac-**

**Presentments**" appended to Boyle v. Com., 14 Gratt. 674.

**Same—Indictments—Statutory Offence—Allegations.**—In alleging a statutory offence, it is generally necessary to describe the offence in the very language of the statute. State v. Meadows, 18 W. Va. 669, citing principal case, Howel v. Com., 5 Gratt. 664, and Derieux v. Com., 2 Va. Cas. 379. See also, *foot-note* to Com. v. Peas, 2 Gratt. 629, where the notes in this series of reports, considering this subject, are collected.

\***Indictment—Record of Finding.**—See *foot-note* to Vance v. Com., 2 Va. Cas. 162.

**cused**—**Case at Bar**—On the trial of a criminal cause, a witness for the commonwealth proves, that having, in a conversation with the accused, expressed his entire conviction of a particular fact, the accused admitted the fact (which, in its nature strongly tends to establish his guilt) but made an explanatory statement (which, if taken as true, will exculpate him). The accused then offers to prove, that he had previously, and under different circumstances, made the same declaration to another person: HELD, such evidence is inadmissible.

**Misdemeanour—Limitation of Prosecution—Presumption in Appellate Court.**—After a verdict of conviction for misdemeanour, an appellate court will presume that the offence was proved to have been within the period of limitation, where the record does not shew the contrary.

Writ of error to a judgment of the circuit superior court of law and chancery for Wythe county.

The record of the case (as certified to this court) commences by stating that on the 10th day of April 1838, the grand jury appeared in court according to their adjournment, were sent out of court, and after some time returned, and presented "an indictment against John Earhart for setting fire to the woods and burning the same, a true bill." The indictment was as follows: "Virginia, Wythe county to wit: The grand jurors impanelled in the circuit superior court of law and chancery held for said county the 9th day of April 1838, upon their oath present that John Earhart late of the county aforesaid, on the 19th day of April 1837, at the county aforesaid and within the jurisdiction of the circuit court aforesaid, did unlawfully, wilfully and maliciously set fire to the woods near the plantation of Alfred C. Moore, which woods and plantation are in the  
672 \*county aforesaid and within the jurisdiction of the circuit court aforesaid,

which fire so set to said woods did burn said woods and a fence belonging to the said Alfred C. Moore; which act of the said John Earhart in setting fire to the said woods in manner and form aforesaid, and burning said woods, is against the form of the act of assembly" &c. Neither the fact that the grand jury was sworn, nor the adjournment referred to in the entry of the 10th April, is anywhere expressly stated in the record.

The defendant pleaded not guilty to the indictment; and at September term 1838, a jury being impanelled for the trial of the case, returned a verdict finding him guilty, and assessing his fine at 80 dollars. He moved the court to set aside the verdict and grant him a new trial; which motion was overruled. He then moved to arrest the judgment, "for the following reasons: 1. It does not appear that a grand jury ever found an indictment against him for unlawfully, wilfully and maliciously setting fire to the woods. 2. It does not appear by the record, that a grand jury ever found an indictment against him for unlawfully, wilfully and maliciously setting fire to the woods. 3. It does not appear by the record, that the

\***Confessions**—See monographic *note* on "Confessions" appended to Schwartz v. Com., 27 Gratt. 1025.



defendant was ever indicted for the offence for which he has been tried and convicted, neither does it appear that he was indicted for any offence against the penal laws of the commonwealth." The court overruled this motion also, and gave judgment against the defendant, for the fine assessed by the jury, and the costs of prosecution, and that he be imprisoned in the jail of the county for the term of two months.

To the opinion of the court overruling his motion for a new trial, the defendant excepted, and set forth in his bill of exceptions all the facts proved before the jury. The conclusions drawn by the jury and the circuit court from the evidence (which was wholly circumstantial) were sustained, as will

673 be seen, by the opinion of \*this court: and it is deemed unnecessary to detail the contents of the bill of exceptions, farther than may suffice to explain the other points decided in the cause.

The bill of exceptions states that "on the — day of — 1837," the woods were discovered to be on fire near Alfred C. Moore's plantation: the time is nowhere, in the statement of the evidence, fixed to a particular day, or even month. Immediately upon the discovery of the fire, and near the spot where it was supposed to have been communicated to the woods, a fresh track of human feet was observed. This track, it was found, entered a wagon road at the defendant's fence, within 50 or 60 yards of his dwelling house, and proceeded along that road and an old path, to the point at which the fire was supposed to have been communicated, and thence, along the same path and wagon road, back to the defendant's fence, near the place from which the track leading in the direction of the fire had been traced. After giving, at great length, the evidence of Moore and several other witnesses, the bill of exceptions proceeds in the following terms:

"Another witness stated that the defendant was at his the witness's house, and they had a conversation about the burning of the woods. The witness had also seen the track before spoken of. He asked the defendant to clear himself about the track. The defendant, at the time, was sitting in such a position that the witness could see the soles of his shoes. The witness said to the defendant, 'Earhart, I will swear point blank that these shoes made those tracks;' meaning the shoes then on the defendant's feet. The defendant then said, that he had seen smoke rising from the place where the fire broke out, and went up to see where it was; that he had gone to the fire, and returned from it, along the wagon road and path spoken of; that he had returned with an intention of getting his horse and going to Moore's

674 house, to inform him of the fire; that immediately \*after his return from the fire, and before he had caught his horse, Moore passed along his lane." (In the testimony given by Moore, he had stated, that immediately after his arrival at the fire, he left it for the purpose of obtaining the aid of his neighbours, and passed through the defendant's lane near his house; that

the defendant was in a passage or porch of his house, and called aloud to Moore, two or three times, "Where are you going in such a hurry?" to which Moore made no answer, although he distinctly heard him.)

"The defendant offered to prove by a witness, that he had, the day after the fire took place, and at a different time from that of the conversation aforesaid, told him the same thing that was proved by the last named witness: not for the purpose of proving the facts disclosed by the defendant, but to shew that the defendant had been consistent in all he had said in relation to the matter. The court refused to permit the evidence to go to the jury: to which opinion no exception was taken.

"The defendant asked a new trial, for the following reasons: 1. The verdict is not sustained by the evidence. 2. The court ought not to have rejected the evidence offered by the defendant as aforesaid. 3. If the evidence was not proper for the purpose for which it was offered, yet as the counsel for the commonwealth had contended before the jury, that the first time the defendant had acknowledged that he was at the fire, and that he had gone and returned along the wagon road and path before mentioned, was after he had been informed by a witness that he would swear that the tracks heretofore spoken of were made by the defendant's shoes,—and that the acknowledgment of the defendant was a shift to destroy the force of the supposed evidence; the rejected evidence was proper, for the purpose of rebutting and destroying the inference which

675 \*might be drawn from the supposed fact, by shewing that the defendant had said the same thing before, and under different circumstances."

At December term 1838, the defendant applied by petition to this court for a writ of error to the judgment; which was awarded. And now the cause was argued by R. C. Stanard for the plaintiff in error, and the attorney general for the commonwealth. In addition to the points noticed in the opinion of this court, Stanard took the objection, that the record does not shew that the grand jury which found the indictment was sworn.

FRY, J., delivered the opinion of the court. —Considering, first, the motion in arrest of judgment; the indictment to which the defendant pleaded, follows the act of assembly on which it is founded, and sufficiently set forth an offence within the same. The motion is directed against the record of its finding; and the question is, whether that record sufficiently shews that it was found? We think it does. The party to the indictment, and the subject of it, are expressly found and recorded; nor was it necessary, in describing the indictment, to use the technical terms in which the offence is charged. *Tefft v. Commonwealth*, 8 Leigh 721; *Myers v. Commonwealth*, 2 Va. Cas. 160.

As to the motion for a new trial, the court below did not err. The evidence, though circumstantial, warranted the finding, in the opinion of the jury and of the judge who presided. It was for the jury, not the court, to weigh the evidence; nor should the latter

disturb the verdict unless in a case of clear departure from it. *Bennet's case*, 2 Va. Cas. 238. We cannot say there was any such departure here. Even though a court should think that a different verdict might have been rendered, and, as a juror, might have rendered such, it does not \*follow that it must grant a new trial. To do so would transfer the functions of the jury to the judge, giving an appeal to him, in all cases, upon the facts.

We do not think there was any thing in the confession of the defendant which required, of necessity his acquittal. If it was inconsistent with the supposition of his guilt, there was enough in the other evidence to warrant the jury in disregarding it in part; and this they might do under the position taken by the plaintiff's counsel, that a confession must be taken to be true in all its parts, unless there be something in the terms of it, or the circumstances attending it, or the other evidence, to discredit it in part. And according to the case of *Shadrack Brown*,\* decided by this court at December term 1838 (3 Rob. Pract. 207,) the jury are to weigh confessions, like other evidence, and believe or disbelieve them, in whole or in part, as reason may decide; and if, from opposing evidence, or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be rejected.

As to the rejection of the evidence, we think there was no error in refusing a new trial on that ground. There was no exception to the opinion excluding it. And when asked for a new trial on account of such evidence, the court is at liberty to consider its value or importance. In this case, we do not think the rejected evidence is of such weight, that a new trial ought to be granted for the purpose of letting it in. Besides, a majority of the court are of opinion that the evidence was not admissible for the purpose for which it was offered; namely, to prove the defendant's consistency in what he had related. There was no attempt to prove any inconsistency in his relations of the matter.

And though we are not prepared to say that the previous declarations \*of a party, to the same purport with subsequent ones proved against him, may not be given in evidence to repel any just inference which might be urged against him from the time only at which the latter were made, we do not perceive that such declarations were necessary or proper for such purpose in this case.

It was said in argument, that a new trial should be granted because it does not appear that the offence was committed within twelve months before the indictment was found. Apparently, this objection is made for the first time here. It does not appear to have been made below, either before the jury or the court. The time laid in the indictment is within the period limited for the prosecution; there is a verdict of guilty; and it does not appear from the evidence, that the time of the act was without the period of limita-

tion. We cannot say, therefore, that there was error. We cannot say that the indictment was not within twelve months from the time of the offence. Doubtless it was shown to be within the twelve months, and the blank in the bill of exceptions was merely accidental. In a case like the present, we think the party should in some manner have relied on the statute, or claimed the benefit of it.

Judgment affirmed, with costs.

678 \*Gwatkin v. Commonwealth.

December, 1839.

[33 Am. Dec. 264.]

**Criminal Law—Instruction as to the Law—Time of Giving.**—It is the right and the duty of a judge sitting in a criminal trial, to instruct the jury as to the law, if he think it proper to do so; and no law prescribes any particular time at which the instruction shall be given.

**Murder—Instruction—Sufficiency and Weight of Evidence.**—On a trial for murder, the court instructs the jury that though they "should believe the prisoner committed the homicide under the influence of immediate intoxication, or the effects of a previous habit of intoxication upon his temper, yet if the intoxication or the effects were not such, or to such a degree, as wholly to negative the legal inference of malice, implied by law from the character and circumstances of the act, and absence of or slightness of the provocation," they should find him guilty of murder in the second degree: HELD, an instruction upon the sufficiency and weight of evidence, and error for which judgment against the prisoner must be reversed.

Richard C. Gwatkin was indicted in the circuit superiour court of Greenbrier, for the murder of Frederick M. Pitman. After ineffectual attempts to impanel a jury in that county, the cause was transferred to the circuit superiour court of Rockbridge; where, at September term 1839, the trial was had. The jury found the prisoner guilty of murder in the second degree, and ascertained his term of imprisonment in the penitentiary to be eighteen years; and the court pronounced sentence accordingly.

The examination of the testimony in the cause was commenced on thursday, and the argument was concluded in the evening of the following monday. The jury were then adjourned over until tuesday morning; at which time they came into court, and were asked by the court whether they had yet agreed upon their verdict? to which they replied in the negative. The jury thereupon propounded to the court this question—whether they had the power, if they should agree to do so, to find the prisoner guilty of murder in the second degree? The court said, it had prepared a brief instruction

\*Instructions—Time of Giving.—The law does not absolutely fix any time for giving instructions. *State v. Cobbs*, 40 W. Va. 722, 22 S. E. Rep. 311, citing principal case. See also, monographic note on "Instructions" appended to *Womack v. Circle*, 29 Gratt. 192.

The principal case was also cited in *Stuart v. Com.*, 28 Gratt. 957, 958.

\*Reported ante, p. 638.

679 \*to the jury, to be given in the event the jury should appeal to the court for instructions; and then read to the jury an instruction in the following words:

"If you shall be satisfied that the prisoner committed the homicide of which he is indicted, and was, at the time of its commission, neither non compos mentis nor under the artificial excitement of drunkenness, then, according to the testimony of Hurlbut, Suber, Littlepage and Gwinn, if true, he was guilty of murder in the first degree.

"But if, believing him sane or compos mentis, legally and morally responsible for his acts, you should believe he committed the homicide under the influence of immediate intoxication, or the effects of a previous habit of intoxication upon his temper, yet if the intoxication or the effects were not such, or to such a degree, as wholly to negative the legal inference of malice, implied by law from the character and circumstances of the act, and absence of or slowness of the provocation, you should find him guilty of murder in the second degree.

"If you shall believe the condition of the prisoner, from drunkenness or its effects, and the circumstances of the homicide, were such as wholly to negative the presumption of malice aforethought, you should find the prisoner guilty of manslaughter.

"In order to sustain the defence of insanity set up by the prisoner, and exempt him from responsibility, legal and moral, for the homicide with which he is charged, you must be satisfied from the evidence, that when he committed the act he was incapable, in consequence of insanity either partial or general, of judging between right and wrong or good and evil, and that at the time he committed the act he did not consider it a crime, an act evil in itself or forbidden by the laws of the land.

"To make partial insanity, or monomania, a good defence, you must be satisfied  
680 that the prisoner, at the \*time of the act, was labouring under an insane delusion, and that the act committed was traceable to, connected with, and was the effect and consequence of that delusion, and moreover that the delusion was such as to satisfy the prisoner's mind that the act, as to him, was justifiable."

After the paper containing the instruction had been read to the jury, it was carried away by them into the jury room, with the permission of the court. No instruction had been given by the court to the jury at any previous period of the trial, nor had any been asked for on the part of the commonwealth or the prisoner; neither had any instruction or information been requested by the jury, except the enquiry made by them of the court as above stated.

The prisoner excepted to the instruction so given by the court, as well on account of the matter thereof, as of the circumstances under which it was given: and at the present term of the general court, he applied for a writ of error to the judgment, assigning in his petition the following grounds: "1. The court erred in its instruction on the subject of murder in the first degree; invading the province

of the jury, by deciding on the weight of the testimony of certain witnesses, and declaring that their testimony, if true, proved the petitioner guilty of murder in the first degree.

2. The court erred in its instruction on the subject of murder in the second degree, and manslaughter. 3. The court erred in its instruction on the subject of insanity, by declaring that, to sustain that plea, the petitioner must have been unable to distinguish between right and wrong, good and evil; and that, if he was partially insane, the act must be traceable to, connected with, and be the effect of the delusion. 4. The court erred in giving the instruction it did, at the time and under the circumstances." The writ of error was awarded.

681 \*The cause was argued by Edward Johnston for the plaintiff in error, and the attorney general for the commonwealth.

CHRISTIAN, J., delivered the opinion of the court.—It is contended here by the counsel for the prisoner, that after the testimony had been fully heard in the court below, and the case fully argued and submitted to the jury, without any instructions being asked either by the commonwealth or the prisoner, and the jury had retired, the court had no right to give any instructions upon the law of the case, unless asked for by the jury, and then only to the extent thus asked for. This court, however, after having deliberately weighed all the arguments of counsel against this power thus exercised, has come to the conclusion that in this there was no error of law. This court thinks it is the right and the duty of a judge sitting in a criminal trial, to instruct the jury as to the law, if he think it proper so to instruct them, and that there is no law prescribing any particular time at which such instructions shall be given.

We will now consider the instructions themselves, or such of them as we have deemed it necessary to consider in arriving at the conclusion to which the court has come. The jury found the prisoner guilty of murder in the second degree. It is the second branch of the instructions, in which the court has laid down what it considered to be the law in regard to what constitutes murder in the second degree, and what would warrant the jury in finding the prisoner guilty of murder in the second degree, in giving which, it is contended by the counsel for the prisoner, the court erred. The instruction is clothed in some ambiguity, and there is some difficulty in putting a proper interpretation upon it; but so far as it is necessary to consider it in reference to the question we mean to decide, we consider the substance of the instruction

to be this: If you believe the prisoner  
682 \*committed the homicide, and that he was not so drunk or so insane as that his drunkenness or insanity should exempt him from the inference of malice, which otherwise would be "implied by law from the character and circumstances of the act," you should find him guilty of murder in the second degree.

In the first place, it may be asked if this instruction does not preclude the jury entirely from enquiry into "the character and circumstances of the act," from which the law does

imply malice? under this instruction, was not the jury bound to find the prisoner guilty, without enquiry into any other "character and circumstances of the act," except to ascertain whether, under the law as propounded by the court, the drunkenness or insanity of the prisoner were such as to excuse the malice? A majority of this court so thinks. But suppose it could be shewn that this is not so, and that the jury had nothing to do with ascertaining the facts and circumstances from which the law implies malice; still we think it must be conceded that the prisoner ought to have been allowed to shew, if he could, that the killing was by accident or in selfdefence; all of which, it seems to the court, he was precluded from shewing, by the instruction of the court below. According to that instruction, if the jury were satisfied that the prisoner committed the homicide, and that there was nothing either of drunkenness or insanity to excuse him, they were to find him guilty of murder in the second degree. It is asked, find him guilty upon what? But one answer can be given—find him guilty upon the testimony in the cause. If this be so, then the court has undertaken to instruct the jury as to the sufficiency and the weight of the testimony, which we think it had no right to do, that being the exclusive province of the jury.

A majority of the court thinks that the court below erred in giving this instruction, and that it is error for which the judgment should be reversed. And as the  
683 "judgment is to be reversed for this error, we deem it prudent at this time not to decide any other points which have been raised and argued upon the other branches of the instructions of the judge below; some of them being, in the opinion of the court, both novel and important.

JUDGES LEIGH, BROWN, DUNCAN and FRY dissent from so much of the opinion of the court as determines that there was error in the second branch of the instructions which the circuit court gave to the jury.

□ Judgment reversed, verdict set aside, and cause remanded for a new trial.

### Page v. Commonwealth.

December, 1839.

**Forgery—Examination—Indictment—Case at Bar.**—A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit:" HELD, an indictment for forging the note is not warranted by the examination, and must be quashed.

\***Forgery—Examination—Indictment.**—See principal case cited in *Mowbray's Case*, 11 Leigh 649; *Scott v. Com.*, 14 Gratt. 690.

**Same—Uttering Forged Instrument—Distinct Offences.**—To the point that the forging of an instrument and the uttering of such forged instrument are distinct and substantive offences, the principal case is cited in *Mowbray's Case*, 11 Leigh 645; *Dowdy v. Com.*, 9 Gratt. 732.

In *Scott v. Com.*, 14 Gratt. 690, DANIEL, J., after setting forth the decisions in the principal case, and

### Same—Indictment—Conviction on One Count—Effect.

—An indictment (described in the record of the finding, and in the entry of the arraignment, as an indictment for forgery) contains, 1. a count for forging and counterfeiting a note, and 2. a count for feloniously using and employing as true a counterfeit note; verdict finds the prisoner guilty of forgery, as alleged in the indictment: HELD, an acquittal must be entered on the second count.

In the circuit superiour court of law and chancery for the county of Henrico and city of Richmond, at the term held in October 1839 for the trial of criminal causes, the grand jury presented "an indictment against William H. Page for forgery, a true bill." The indictment thus described as an indictment for forgery contained \*six counts.

The first charged that William H. Page did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged and counterfeited, and willingly act and assist in falsely making, forging and counterfeiting, a certain promissory note, with intention to injure and defraud one Henry Miller. The second count charged that the said W. H. Page did knowingly utter and publish as true, and attempt to use and employ as true, for his own benefit, a certain other false, forged and counterfeited promissory note, with intention to injure and defraud one Henry Miller. The third count charged that the said W. H. Page did knowingly use and employ as true, for his own benefit, a certain other false, forged and counterfeited promissory note, with intention to injure and defraud one Henry Miller. The fourth count charged that the said W. H. Page did falsely make, forge and counterfeit, and cause and procure to be falsely made, forged

*Com. v. Mowbray*, 11 Leigh 648, said: "To my mind, the features which mark the felonious possession of forged coin as an offence different from that of the forgery of the same, are as distinct as those which have been thus declared to distinguish forgery from uttering and publishing."

**Criminal Law—Trial for Felony—Examination by Examining Court.**—On this subject, the principal case is cited in *Buskirk v. Judge*, 7 W. Va. 103; *foot-note* to *Com. v. McCaul*, 1 Va. Cas. 271.

**Indictment—Defective Count—Effect.**—On this subject, see *foot-note* to *Kirk v. Com.*, 9 Leigh 627, where the question is discussed at some length. The principal case was distinguished from *Kirk's Case*, 9 Leigh 627 in *Clere v. Com.*, 3 Gratt. 618.

**Indictment—Conviction on One Count—Effect.**—It is well-settled law in this state, that where there are several counts in an indictment and the jury find the accused guilty upon one of the counts, saying nothing as to the others, the verdict operates as an acquittal upon the counts of which the verdict takes no notice, and the court should enter a judgment accordingly. *Stewart v. Com.*, 28 Gratt. 930, citing the principal case, *Lithgow v. Com.*, 2 Va. Cas. 297, *Canada's Case*, 22 Gratt. 899, and *Page's Case*, 26 Gratt. 943. To the same effect, see the principal case cited in *Livingston v. Com.*, 14 Gratt. 606; *Page's Case*, 26 Gratt. 946; *Richards v. Com.*, 81 Va. 116; *Briggs v. Com.*, 82 Va. 558. See also, *foot-note* to *Kirk v. Com.*, 9 Leigh 627; monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

and counterfeited, and willingly act and assist in falsely making, forging and counterfeiting, a certain other promissory note, with intention to injure and defraud one George K. Crutchfield. The fifth count charged that the said W. H. Page did knowingly utter and publish as true, and attempt to use and employ as true, for his own benefit, a certain other false, forged and counterfeited promissory note, with intent to injure and defraud one George K. Crutchfield. The sixth count charged that the said W. H. Page did knowingly utter and publish as true, for his own benefit, a certain other false, forged and counterfeited note, with intention to injure and defraud one Henry Miller. The instrument alleged to be counterfeit was set out in each count, in the following terms: "August 31st 1839, \$55. I promise to pay to Henry Miller for William H. Page, in three months from above date, for value received." (Signed) "George K. Kryhfield."

The indictment was found on the 28th of October. The record of the proceedings  
685 next had in the cause, \*which were on the 31st of October, states that "the said William H. Page, who stands indicted of forgery, was set to the bar in custody, and being arraigned of the said forgery, moved the court to quash the first, second, fourth, fifth and sixth counts of the indictment;" which motion being overruled, he tendered a bill of exceptions, which was received and made a part of the record. In this bill it is stated, that the motion to quash the several counts aforesaid was made for the reason and upon the ground that the prisoner had not been, according to law, examined by a court of examination for the facts and offences set out in the said counts, and remanded to the said circuit court for trial for the same; and for other errors apparent on the face of the said counts; in support of which motion the prisoner offered to the court a copy of the record of his examination, under which he had been remanded to the said circuit court for trial: but the circuit court overruled the said motion and refused to quash all or any one of the said counts, being of opinion that it sufficiently appeared, from the record aforesaid, that the prisoner had been, according to law, examined by a court of examination, and remanded to the said circuit court for trial, for the facts and offences of which he stood indicted in the said several counts, and that there were no errors in the said counts for which they or any of them ought to be quashed. The record of the examining court (consisting of the warrant for summoning the justices, the proceedings and judgment of the court, and the depositions of the witnesses for the commonwealth) was set out in hæc verba in the bill of exceptions. The warrant was under the hand and seal of F. Wicker, recorder of the city of Richmond; reciting that William H. Page had been committed to the jail of said city for a felony by him committed in said city on the 31st of August 1839," in then and there feloniously using and employing as true, for his own benefit, a certain false,  
686 forged \*and counterfeit note and writ-

ing," (set out in precisely the same terms as in the indictment) "with intention to injure and defraud one Henry Miller in said note and writing mentioned, he the said William H. Page then and there well knowing the said note and writing to be false, forged and counterfeited;"—and, therefore, requiring the serjeant to summon at least eight of the justices of said city to meet at the courthouse thereof, on &c. to hold a court for the examination of the fact with which the said William H. Page stood charged. In the proceedings of the examining court, the offence was described, verbatim, as in the warrant for summoning the court; and then it was stated that "the court, having heard the evidence, are of opinion that the said William H. Page ought to be tried for the said offence before the circuit superiour court of law and chancery for the county of Henrico and city of Richmond."

The circuit court having overruled the motion to quash the said several counts, the prisoner thereupon pleaded not guilty to the indictment. And in the entry made on the following day, it is stated that "the said William H. Page, who stands indicted of forgery, was again set to the bar in custody, and thereupon came a jury &c. who being elected &c. and having heard the evidence, upon their oath do say that the said William H. Page is guilty of the forgery aforesaid, in manner and form as in the indictment against him is alleged, and they do ascertain the term of his imprisonment in the public jail and penitentiary house to be two years." The circuit court rendered judgment against the prisoner according to the verdict.

On the application of the prisoner, the general court awarded a writ of error to the judgment.

R. G. Scott and R. T. Daniel for the plaintiff in error, and the attorney general for the commonwealth, submitted the case without argument.

687 \*The judgment of the general court was as follows: "It seems to the court here that the judgment of the said circuit superiour court is erroneous in this, that it does not acquit the said prisoner of the charges contained in the second, third, fifth and sixth counts of the indictment, as to which the verdict says nothing; and also in this, that the said circuit superiour court refused to quash the first and fourth counts of the said indictment, charging an offence (to wit, the offence of forgery) as to which the said prisoner had not undergone any examination by an examining court as the law directs: Therefore it is considered by the court that the judgment aforesaid be reversed and annulled; and this court proceeding to enter such judgment as the said circuit superiour court ought to have rendered, it is further considered that the said William H. Page be acquitted of the charges contained in the said second, third, fifth and sixth counts of the indictment, and go thereof without day; that the said first and fourth counts be quashed; and that the said William H. Page be discharged out of custody."

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3. In an action of assumpsit, the damages laid in the writ are \$500 dollars; the declaration is in blank as to the sums assumed and as to the damages; all matters in difference in the cause are referred to arbitrators; the arbitrators award to the plaintiff 443 dollars; and judgment is given according to the award: HELD, the award is good, though the amount awarded exceeds the damages claimed. S. C., 142

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9. Upon a plea by the assignor that the action against him did not accrue within five years, it is found that though the debt originally due from the obligor has been discharged by payments to and set-offs against the assignor, yet the assignee did not know, until after judgment in his suit against the obligor, that nothing was due; and it is also found that five years have not elapsed since the judgment: HELD, that as part of the debt was discharged by a set-off, it was only the judgment which established the set-off as a payment, and until that judgment was rendered, the action did not accrue against the assignor. S. C., 473

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2. On a trial for bigamy, a certificate, stating that prisoner was married to J. F. by the person whose name is subscribed thereto, and appearing to have been returned by him to the county court, but nowise shewing that he was a person authorized to celebrate marriage, is offered in evidence by the prosecutor, "for the purpose" (as a bill of exceptions filed by the prisoner states) "of proving, in connexion with other evidence, a marriage between the prisoner and J. F."—and though objected to by the prisoner, is admitted by the court. On this ground, prisoner applies to the general court for a writ of error; which is refused. S. C., 639

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2. Decree for costs between codefendants to bill of interpleader. See Interpleader, and Beers &c. v. Spooner and another, 153

## COMMUTATION.

What revolutionary officers were entitled to commutation of five years full pay with interest, in lieu of half pay for life. See Revolutionary officers No. 5, and Commonwealth v. Marston's adm'r, 36

## COMPENSATION.

For land condemned by the James and Kanawha company. See Internal improvement, and James River and Kanawha company v. Turner, 313

## CONFESSION.

I. Effect as evidence.

1. Where the confession of a prisoner is given in evidence, the whole must go to the jury; but the whole is not necessarily to be taken as true; on the contrary, if, from opposing evidence or the confession itself, facts appear which are sufficient to satisfy a rational mind that a part is not true, it ought to be disregarded. Brown v. Commonwealth, 633

2. Case in which the exculpatory part of a prisoner's confession was properly discredited by the jury. S. C., 633

II. Incompetency as evidence for accused.

3. On the trial of a criminal cause, a witness for the commonwealth proves, that having, in a conversation with the accused, expressed his entire conviction of a particular fact, the accused admitted the fact (which, in its nature, strongly tends to establish his guilt) but made an explanatory state-



ment (which, if taken as true, will exculpate him). The accused then offers to prove, that he had previously, and under different circumstances, made the same declaration to another person: *Held*, such evidence is inadmissible.

*Earhart v. Commonwealth*, 671

#### CONGRESS.

Grant by congress of money to administrator of revolutionary officer, with provision that he shall pay a part to the widow. See *Money had and received*, and

*Walden ex'or &c. v. Winston adm'r &c.*, 160

#### CONSTITUTIONALITY OF STATUTE.

1. See *Internal improvement No. 2*, and *James River and Kanawha company v. Turner*, 313

2. See *Judiciary*, and *Commonwealth v. Clopton*, 109

#### CONTINUANCE.

I. What is no ground of continuance for adm'r.

1. Is a summary motion against administrators for money paid by plaintiff for defendants' estate, it is no sufficient "ground for a continuance" that defendants had qualified only some seven or eight months before, and so had not had time to settle their accounts of administration, and that they desired to defend themselves on the ground of want of assets to pay the debt, without offering any plea, or affidavit, that the assets were insufficient. *Clements v. Powell's adm'rs*, 1

II. Judgment on reversing for refusal of continuance.

2. But, if it had been error in the county court, to refuse a continuance for defendants, in such case, and to proceed to judgment for plaintiff, yet it was error in the circuit court, reversing the judgment, for that cause only, to give final judgment for defendants, instead of sending the cause back to the county court for a new hearing. *S. C.*, 1

III. Effect of improper refusal by examining court.

3. The refusal of the examining court to grant the prisoner a continuance of the case, is no ground for arresting judgment in the circuit court, but, if available there at all, it should be taken advantage of by plea in abatement or motion to quash the indictment. *Morris v. Commonwealth*, 636

IV. When continuance for prisoner will be refused.

4. Case in which prisoner's motion for a continuance on the ground of the absence of a witness, was held to have been properly overruled. *Moore v. Commonwealth*, 630

#### CONTRACT.

I. Construction.

1. Covenant between a carrier and a manufacturer of salt, whereby the carrier agrees to transport from 1200 to 5000 barrels of salt, annually for three years, from the manufacturer's salt works to certain specified places, for a stipulated reward per barrel transported: *Held*, that the manufacturer, not the carrier, had the right to elect what quantity of salt, not less than 1200 nor more than 5000 barrels, should be transported by the carrier annually. *White v. Toncray*, 347

2. When words of leasing do not amount to a covenant for quiet enjoyment. See *Lease*, and *Black v. Gilmore*, 446

3. What constitutes a partnership, and for what contracts made by a partner the firm is liable. *Weaver v. Tapscott*, 424

4. When shipowner is entitled to freight, on construction of charter party. See *Charter party*, and *Brown & Rives v. Ralston & Pleasants*, 532

5. What contract is not usurious. See *Usury*, and *Long's ex'or &c. v. Israel and others*, 556

II. Validity.

6. Validity of contract for sale of land made by an agent. See *Land No. 1, 2*, and *Yerby v. Grigsby*, 397

7. What contract of guarantee does not bind. See *Guarantee*, and *Beers &c. v. Spooner and another*, 153

8. When assignor is not liable to assignee. See *Assignment No. 6, 7*, and *Wood's adm'r v. Duval*, 6

9. Necessity of proving joint contract of all the defendants in a joint action. See *Joint action No. 1*, and *Rohr v. Davis and others*, 30

10. Measure of damages for breach of covenant to convey land. See *Vendor and vendee No. 5*, and *Thompson's ex'or v. Guthrie's adm'r*, 101

11. When defect of title to land sold is no ground for vendee's coming into equity. See *Vendor and vendee No. 6*, and *Long's ex'or &c. v. Israel and others*, 556

#### CONVEYANCE.

Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.

*Long's ex'or &c. v. Israel and others*, 556

#### CORPORATION.

I. Proof of corporate character.

1. A bank brings a suit in Virginia, declaring that it is a corporate company by act of the legislature of Ohio; plea, the general issue; at the trial, defendant demurs to plaintiff's evidence; the demurrer contains no direct proof of the legal incorporation of the bank, nor can the fact be fairly inferred from the evidence stated in the demurrer: *Held*, this defect of evidence is fatal to the plaintiff's case. *Jackson's adm'r v. Bank of Marietta*, 240

2. Nor can the want, in the demurrer to evidence, of this necessary proof to entitle the bank to recover, be supplied by resort to a demurrer to the declaration, which was overruled, whereby the averment therein contained, of the legal incorporation of the bank, was admitted. *S. C.*, 240

\*II. Internal improvement company.  
3. Construction and constitutionality of statute authorizing corporation to condemn private property. See *Internal improvement*, and *James River and Kanawha company v. Turner*, 313

#### COSTS.

1. On dismissing a bill filed by the heir and the executor of vendee, to have a title made for the land purchased, and meanwhile to injoin vendor from collecting the purchase money, decree for costs should not be against the plaintiffs jointly, nor against the executor de bonis propriis. *Long's ex'or &c. v. Israel and others*, 556

2. Decree for costs between codefendants to bill of interpleader. See *Interpleader*, and *Beers &c. v. Spooner and another*, 153

3. Affirmance with costs, of decree for legatees against executor, which omitted to require refunding bond. See *Legacy and legatee No. 10*, and *Handly v. Snodgrass and others*, 494

4. When prosecutor's insolvency and failure to give security for costs is no ground for dismissing indictment. See *Prosecutor*, and *Commonwealth v. Hill and others*, 601

#### COUNTERFEITING AND PASSING.

See *Forging and uttering*.

#### COUNTY AND CORPORATION COURTS.

1. What grant of administration by such court is voidable only, not void. See *Administration No. 1*, and *Fisher v. Bassett and others*, 119

2. Quere as to the effect of voidable grant of administration by county or corporation court, in precluding new grant by general court? See *Administration No. 2*, and *S. C.*, 119

#### COURT OF APPEALS.

Whether, in case of decree entered but not certified, cause may be reheard at subsequent term? See *Rehearing*, and *Towner v. Lane's adm'r*, 203

#### COVENANT.

1. When words of leasing do not amount to a covenant for quiet enjoyment. See *Lease*, and *Black v. Gilmore*, 446

2. Construction of covenant between carrier and manufacturer. See *Contract No. 1*, and *White v. Toncray*, 347

3. Measure of damages for breach of covenant to convey land. See *Vendor and vendee No. 5*, and *Thompson's ex'or v. Guthrie's adm'r*, 101

#### COVERTURE.

See *Disability No. 1, 2*. Feme covert No. 2, and *Hansford &c. v. Elliott &c.*, 79  
*Parsons v. McCracken and wife*, 496  
*Lee and others v. Bank of U. States*, 300

#### CURATOR.

1. A curator of a decedent's estate appointed under the 24th section of the statute 1 Rev. Code, ch. 104, is not liable to suit of the decedent's creditors in chancery; and though a curator appointed under the

42d section is liable to be sued in like manner as an administrator, it must be shewn by the record, in a suit against a curator, that he is such a curator as is in law liable to be sued, and capable of defending the decedent's estate.

- Wilson's curator v. Shelton's adm'r. 343  
2. See Receiver, and  
Boyle v. Townes. 158

#### DAMAGES.

1. Award in pending action of assumpsit may exceed the damages claimed. See Arbitration and award No. 3, and  
Sutton v. Dickinson. 142  
2. Measure of damages for breach of covenant to convey land. See Vendor and vendee No. 5, and  
Thompson's ex'or v. Guthrie's adm'r. 101  
3. The damages which a creditor sustains by the sheriff's suffering a debtor in execution to escape, are not necessarily equal to the amount of the debt.  
Perkins and others v. Giles governor. 397  
4. What damages are recoverable in action against sheriff and his sureties, on sheriff's official bond. See Sheriffs and sergeants No. 6, and S. C. 397  
5. How value of land condemned for use of the James and Kanawha company is to be estimated. See Internal Improvement No. 1, and  
James River and Kanawha company v. Turner. 818

#### DEBT.

##### On judgment.

1. A Maryland judgment is rendered for the debt, the damages, and costs, with a memorandum at foot that the plaintiff shall release the damages on payment of the interest due on the debt; in debt on this judgment in Virginia, the declaration demands the debt and the interest, not the damages; an held good.  
Kemp v. Mundell and Chaplin. 12  
2. The plea of nil debet is not a good plea to an action of debt on a judgment of another state of the union. S. C. 12

#### DECEDENTS' ESTATES.

1. The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an ex'or or adm'r of the decedent.  
Hansford and wife and others v. Elliott and wife and others. 79  
2. See Curator No. 1, and  
Wilson's curator v. Shelton's adm'r. 343  
3. See Executors and administrators.

#### DECLARATION.

1. What description of the plaintiff may be rejected as surplusage. See Receiver, and  
Boyle v. Townes. 158  
2. Declaration in debt on judgment. See Debt No. 1, and  
Kemp v. Mundell and Chaplin. 12  
3. What is a count against executor in his representative character. See Legacy and legatee No. 5, and  
Kayser ex'or &c. v. Disher. 357  
4. Declaration for legacy must be against executor individually. See Legacy and legatee No. 4, and S. C. 357  
5. What is a misjoinder of counts in declaration against executor. See Misjoinder No. 1, and S. C. 357  
6. What is no misjoinder of counts in detinue. See Detinue No. 3, and  
Boyle v. Townes. 158

#### DECREE.

Construction of decree allowing credit to administrator for debts paid by him. See Executors and administrators No. 19, and  
Shearman adm'r v. Christian and others. 571

#### DEED.

1. Effect of scroll by way of seal. See Seal, and  
Parks v. Hewlett &c. 511  
2. Deed of one partner does not in equity extinguish partnership debt. See Partnership No. 3, and  
Weaver v. Tapscott. 424  
3. Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.  
Long's ex'or &c. v. Israel and others. 556

#### DEFAULT.

Invalidity of verdict for defendant where no plea is filed to set aside office judgment. See Office judgment, and  
M'Millon v. Dobbins. 422

#### DEFENDANTS.

- Concerning decree between codefendants, see Codefendants No. 1, Interpleader, and  
Verby v. Grigsby. 887  
Beers &c. v. Spooner and another. 153

#### DEMURRER.

##### I. To declaration.

1. What is a misjoinder of counts, fatal on general demurrer. See Misjoinder No. 1, and  
Kayser ex'or &c. v. Disher. 357

##### II. To evidence.

2. In the trial of actions at law, either party has a right to demur to the evidence of the other, and the other party ought to be compelled to join in the demurrer, unless the case is plainly against the demurrant, and his object appears to be merely to delay the decision.  
Rohr v. Davis and others. 30  
3. Where a demurrer to evidence is tendered in a case in which the party may properly demur, if the court refuse to compel the other party to join in the demurrer, this is error for which the judgment shall be reversed. S. C. 30  
4. What defect of evidence is fatal to the case of a corporation plaintiff. See Corporation No. 1, 2, and  
Jackson's adm'r v. Bank of Marietta. 240

#### DETINUE.

##### I. Who may maintain.

1. A bailee of chattels may maintain detinue for them upon his right of possession as bailee.  
Boyle v. Townes. 158

##### II. Declaration.

2. What may be rejected as surplusage. See Receiver, and S. C. 158  
3. Two counts in a declaration in detinue; one counting on a right of property in the plaintiff, and the other on a right of possession in him as a bailee: HELD, here is no misjoinder of actions. S. C. 158

##### \*III. Detinue against administrator.

4. Upon the death of a defendant in detinue, if his administrator consent that the cause shall stand revived against him, such consent places the cause in the same situation that it would be in after the service of a scire facias against the administrator, alleging that the property had come to his possession and was detained by him.  
Greenlee's adm'r v. Bailey. 526  
5. In such a case, if the administrator, instead of pleading de novo, go to trial upon the plea put in by his intestate, he cannot, after verdict against him, arrest the judgment because of his own failure to plead anew. S. C. 526  
6. The judgment against the administrator, in such a case, is personal against him for the property or its alternative value; but it provides, as to the damages and costs, that the same are to be levied of the goods and chattels of the intestate, in the hands of the administrator. S. C. 526

#### DEVASTAVIT.

1. Administrator de bonis non cannot maintain suit to recover assets converted by his predecessor. See Executors and administrators No. 2, 3, and  
Cheatham adm'r v. Friend's adm'r. 580  
2. Concerning administrator's right to retain his simple contract demand against decedent, see Executors and administrators No. 19, and  
Shearman adm'r v. Christian and others. 571

#### DEVISE.

1. Capacity of alien to take by devise. See Alien, and  
Stephen's heirs v. Swann. 404  
2. See Will.

#### DISABILITY.

1. Persons claiming rights of personal property, being under disability of infancy or coverture when their rights accrue, may prosecute any remedy in equity they are entitled to, by prochein amy, at any time while the disability continues, no matter how long; or, in their proper persons, within five years after the disability removed; the right to such remedy being within the saving of the statute of limitations, 1 Rev. Code, ch. 128, § 12.  
Hansford and wife and others v. Elliott and wife and others. 79  
2. It seems, if a party claim the benefit of the saving for infants and females covert in an act of limitations, no other disability is available than the one which existed when the right of action accrued.  
Parsons v. M'Cracken and wife. 495

3. See Legacy and legatee No. 6. 7, and  
Parsons v. McCracken and wife, 495  
Handly v. Snodgrass and others, 484
- DISCHARGE.**
1. Partnership is not discharged in equity by bond of one partner. See Partnership No. 3, and  
Weaver v. Tapscott, 424
2. What is a discharge of surety. See Principal and surety No. 1, and  
Ashby's adm'r v. Smith's ex'r, 164
- DISMISSION.**
- When prosecutor's insolvency and failure to give security for costs is no ground for dismissing indictment. See Prosecutor, and  
Commonwealth v. Hill and others, 601
- DISTRIBUTEÉ AND DISTRIBUTION.**
1. Ex'ors in their own wrong are liable to account for the property of the decedent to his distributees or legatees, like other ex'ors, and cannot rely on the statute of limitations to protect them from such accountability.  
Hansford and wife and others v. Elliott and wife and others, 79
2. Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the ex'or or adm'r of the decedent before the court as a party in the cause. S. C., 79
- DUE DILIGENCE.**
- What is necessary to entitle equitable assignee to a recovery against assignor. See Assignment No. 7, and  
Wood's adm'r v. Duval, 6
- DUELLING.**
- An indictment at common law, charging that the defendant did fight a duel with pistols, is bad on demurrer.  
Commonwealth v. Lambert, 608
- ELECTION.**
1. Concerning the right to elect the quantity, upon contract between manufacturer and carrier, see Contract No. 1, and  
White v. Toncray, 347
2. Assignment of trees passes assignor's right to elect. See Trees, and  
McCoy v. Herbert, 548
- EMANCIPATION.**
- I. Proof that deed was sealed.**
1. What is sufficient proof that a deed of emancipation was sealed by the grantor. See Seal No. 2, and  
Parks v. Hewlett &c., 511
- II. When afterborn issue is emancipated.**
2. Though a slave emancipated by the owner is liable to be taken by execution to satisfy a debt contracted by the owner before making the emancipation, yet if the slave be a female, and have children after the emancipation, the children who are born while the mother is enjoying freedom are not liable to be taken for any such debt.  
Parks v. Hewlett &c., 511
3. Testator devises and bequeaths all his estate, real and personal, to R. C. for her life, and at her death, all his negroes to be free; and again, bequeaths at her death to T. & G. F. all his personal estate, except his negroes who are then to be free: **Held**, the increase of the negroes, born during the life of the legatee for life, are hereby emancipated.  
Erskine v. Henry and wife and others, 188
- ENDORSER.**
- When not liable on the money counts.
- Though, in general, indebitatus assumpsit for money lent, or money paid and expended, or money had and received, lies for the holders of a promissory note against an endorser, and the endorsement is prima facie evidence to support those money counts; yet if it be found by special verdict, that the defendant endorsed the note, and the holders discounted it, for accommodation of the maker, and that the defendant received no part of the proceeds of the note so discounted, in such case the holders cannot recover against the defendant on the money counts.  
Bank of the U. States v. Jackson's adm'r, 221
- ENQUIRY.**
- Verdict for defendant, where no plea is filed to set aside office judgment and writ of enquiry, is erroneous. See Office judgment, and  
M'Million v. Dobbins, 423
- EQUITABLE JURISDICTION.**
1. Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.  
Long's ex'or &c. v. Israel and others, 556
2. When defect of title to land sold is no ground for vendee's coming into equity. See Vendor and vendee No. 6, and  
S. C., 556
3. See Laches and Lapse of time.
4. See Rehearing, and  
Towner v. Lane's adm'r, 302
- ESCAPE.**
- The damages which a creditor sustains by the sheriff's suffering a debtor in execution to escape, are not necessarily equal to the amount of the debt.  
Perkins and others v. Giles governor, 397
- ESTOPPEL.**
1. How far a judgment that paupers suing for freedom are slaves is conclusive. See Freedom No. 2, and  
Erskine v. Henry and wife and others, 188
2. Vendor is not estopped by a receipt from claiming the purchase money in equity. See Receipt No. 2, and  
Wilson's curator v. Shelton's adm'r, 342
- EVIDENCE.**
- I. What must be proved.**
1. Concerning the onus probandi, see Assignment No. 5. Executors and administrators No. 23, and  
Wilcox v. Pearman, 144
- Fisher v. Bassett and others, 119
2. Necessity of proving joint contract of all the defendants in a joint action. See Joint action No. 1, and  
Rohr v. Davis and others, 30
3. What must be proved by a corporation plaintiff, on the general issue. See Corporation No. 1, 2, and  
Jackson's adm'r v. Bank of Marietta, 240
4. What averment in indictment for retailing ardent spirits is material and must be proved. See Retailing ardent spirits, and  
Commonwealth v. Coe, 630
- 700 **\*II. Competency.**
5. When secondary evidence is admissible. See Bigamy No. 1. Forging and uttering No. 2, 3, and  
Moore v. Commonwealth, 639
- Kirk v. Commonwealth, 637
6. No admission made, directly or by inference, in one part of a party's pleading, can be referred to in aid of another plea, or to supply evidence necessary to be given under it.  
Jackson's adm'r v. Bank of Marietta, 240
7. Incompetency of deputy sheriff who took indemnifying bond, as witness for defendants in action thereon. See Indemnifying bond, and  
Wilson and others v. Alexander sheriff, 469
8. Whether parol evidence is admissible to restrict generality of residuary bequest. See Will No. 6, and  
Miars and others v. Bedgood ex'or, 361
9. What acknowledgment of assignor is no evidence against assignee. See Assignment No. 4, 5, and  
Wilcox v. Pearman, 144
10. Incompetency of prisoner's confession as evidence on his own behalf. See Confession No. 3, and  
Earhart v. Commonwealth, 671
11. What certificate of marriage is admissible on trial for bigamy. See Bigamy No. 2, and  
Moore v. Commonwealth, 639
12. What is no variance between execution and recital thereof in forthcoming bond. See Forthcoming bond, and  
Hairston v. Woods, 308
- III. Effect and sufficiency.**
13. The endorsement of a promissory note is prima facie evidence to support the money counts in assumpsit against the endorser.  
Bank of U. States v. Jackson's adm'r, 221
14. What settlement of administration account is prima facie evidence in favour of administrator. See Executors and administrators No. 20, and  
Shearman adm'r v. Christian and others, 571
15. Effect of judgment that paupers suing for freedom are slaves. See Freedom No. 2, 3, and  
Erskine v. Henry and wife and others, 188

16. Effect, as against assignor of bond, of judgment for obligor rendered on award. See Assignment No. 8, and

Scates v. Wilson & Edmunds, 473

17. Vendor is not concluded in equity by a receipt for the purchase money. See Receipt No. 2, and Wilson's curator v. Shelton's adm'r, 342

18. Whether, as between parent and child, a gift or a loan of slave is to be inferred from mere possession by the child? See Parent and child, and Cross v. Cross's adm'r and others, 245

19. What defect of evidence is fatal to case of corporation plaintiff. See Corporation No. 1, 2, and Jackson's adm'r v. Bank of Marietta, 240

20. What will not sustain money counts in assumption against an endorser. See Endorser, and Bank of U. States v. Jackson's adm'r, 221

21. What is sufficient proof that deed was sealed by the maker. See Seal No. 2, and Parks v. Hewlett &c., 511

22. Effect of prisoner's confession as evidence. See Confession No. 1, 2, and Brown v. Commonwealth, 633

23. What shall be deemed a racefield, within the meaning of the act to prevent unlawful gaming. Commonwealth v. Wilson, 648

#### IV. Demurrer to evidence.

24. When joinder in demurrer to evidence should be compelled—and effect of refusal to compel. See Demurrer No. 2, 3, and

Rohr v. Davis and others, 30

#### V. Exceptions to refusal of new trial.

25. When bill of exceptions to opinion refusing new trial may state evidence, instead of facts proved. See New trial No. 3, and S. C., 30

#### EXAMINING COURT.

1. A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for "feloniously using and employing as true, for his own benefit, a certain counterfeit note, well knowing the same to be counterfeit:" *Held*, an indictment for forging the note is not warranted by the examination, and must be quashed. Page v. Commonwealth, 633

2. How refusal of examining court to grant prisoner a continuance is to be taken advantage of in circuit court. See Continuance No. 3, and Morris v. Commonwealth, 636

#### EXCEPTIONS.

Concerning bill of exceptions to opinion refusing new trial, see New trial No. 3, 3, and

Rohr v. Davis and others, 30

Fisher v. Vanmeter, 18

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#### \*EXECUTION.

1. What delivery of *f. fa.* to officer will bind goods of debtor. See *Fieri facias* No. 1, and Pegram v. May, 176

2. Concerning postponement of sale under execution, see *Fieri facias* No. 2, 3, 4, and Fisher v. Vanmeter, 18

3. What is no variance between execution and recital thereof in forthcoming bond. See Forthcoming bond, and

Hairston v. Woods, 308

4. Motion against sheriff and his sureties, for nonpayment of money received under execution. See Sheriffs and serjeants No. 3, 4, 5, and Chapman v. Chevis, 297

5. The damages which a creditor sustains by the sheriff's suffering a debtor in execution to escape, are not necessarily equal to the amount of the debt. Perkins and others v. Giles governor, 307

#### EXECUTORS AND ADMINISTRATORS.

##### I. Qualification.

1. What grant of administration by a county or corporation court is voidable only, not void—and effect thereof in precluding new grant by general court. See Administration No. 1, 2, and Fisher v. Bassett and others, 119

##### II. Suits by ex'ors or adm'rs.

2. An administrator *de bonis non* can maintain no suit for the recovery of assets converted by his predecessor in the administration. Cheatham adm'r v. Friend's adm'r, 580

3. If such suit be instituted by the administrator *de bonis non* against the representatives of his predecessor, a party who is sole legatee of the original decedent, and has also qualified as the successor administrator *de bonis non*, cannot revive and prosecute the suit, either in the character of legatee, or in that of personal representative. S. C., 580

4. The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an executor or administrator of the decedent.

Hansford &c. v. Elliott &c., 79

#### III. Suits against ex'ors or adm'rs.

5. What is no ground of continuance for administrator. See Continuance No. 1, and Clements v. Powell's adm'rs, 1

6. Ex'ors in their own wrong are liable to account for the property of the decedent to his distributees or legatees, like other ex'ors, and cannot rely on the statute of limitations to protect them from such accountability.

Hansford &c. v. Elliott &c., 79

7. What is a misjoinder of counts in declaration against an executor. See Misjoinder No. 1, and Kayser ex'or &c. v. Disher, 357

8. Action at law by legatee against executor for legacy. See Legacy and legatee No. 4, 5, and S. C., 357

9. Effect of revival by consent against administrator of defendant in detinue. See Detinue No. 4, and Greenlee's adm'r v. Bailey, 526

10. Consequence of administrator's failure to plead *de novo* after revival against him. See Detinue No. 5, and S. C., 526

11. Judgment in detinue against administrator. See Detinue No. 6, and S. C., 526

12. What acknowledgment by decedent will not take open account out of 16th section of the statute of limitations. See Limitation No. 5, and Aylett's ex'or v. Robinson, 45

13. What is money received by administrator to the use of the widow. See Money had and received, and

Walden ex'or &c. v. Winston adm'r &c., 160

14. Liability of deceased partner's administrator to separate creditors, for partnership effects received. See Partnership No. 4, and

Wayt and others v. Peck and others, 434

15. Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the ex'or or adm'r of the decedent before the court as a party in the cause.

Hansford &c. v. Elliott &c., 79

16. Suit in chancery by legatees against executor, and decree for plaintiffs therein. See Legacy and legatee No. 7, 9, 10, and

Handly v. Snodgrass and others, 484

17. The principle established in Garrett &c. v. Carr &c., 3 Leigh 407, applied where the will directed the estate to be put out at interest. The executor not having chosen to do so, he is to be considered as a borrower, and annually charged with interest; and such interest, and not the principal, is to be applied to the disbursements. S. C., 484

18. The proper mode of stating an executor's account after a reasonable time has been allowed for payment of debts, "laid down in the opinion of the court delivered by the president. S. C., 484

19. On appeal by an administrator from a decree in favour of a creditor of decedent, the court of appeals declared, "that in the accounts of the administration of the appellant, a credit ought to have been allowed him for the proper debts of his testator paid by him, so as not to subject him to a devastavit, and that so much of the decree as denied him those credits was erroneous;" therefore it reversed the decree, *pro tanto*. Of the debts of the testator which had been paid by the administrator, a large portion were simple contracts. *Held*, the claim of the appellee creditor of decedent was, by the decree aforesaid of the court of appeals, determined to be a debt by simple contract only; and therefore, as against such creditor, the administrator has a right to retain the amount of his own simple contract demand against the testator.

Shearman adm'r v. Christian and others, 571

20. The settlement of an administration account under an *ex parte* order of the court which granted administration, is *prima facie* evidence in favour of the administrator against creditors of decedent. S. C., 571

21. What decree against executor for costs *de bonis propriis* is erroneous. See Costs No. 1, and Long's ex'or &c. v. Israel and others, 556

22. What lapse of time, and acquiescence in executor's erroneous distribution of specific legacies, will bar suit by a specific legatee. See Legacy and legatee No. 6, and

Parsons v. M'Cracken and wife, 495

#### IV. What assignee of the assets will not be protected in equity.

23. An administrator takes a bond to himself individually for a debt due to his intestate's estate, payable at a distant day, and then sells this bond at a discount of 25 per cent. to an assignee, who knows that the consideration of the bond was a debt due to the intestate's estate, but is informed, and so informed as to justify him in believing, that the administrator has acquired the full property in the bond in his own right: **Held**, this is such a dealing with the assets of the intestate's estate, such a concurrence of the assignee with the administrator in his appropriation of the assets to his own use, as to throw the burden of proof of the fairness of the administrator's conduct on the assignee; and if the administrator had not purchased the claim from the next of kin, or had not made such advances as to justify him in appropriating it to himself, the assignee cannot, in equity, avail himself of the transfer.

Fisher v. Bassett and others, 119

#### EXECUTORY LIMITATION.

What is void as being too remote. See Will No. 4, and

Deane &c. v. Hansford &c., 263

#### EXTINGUISHMENT.

Individual partner's bond is not in equity an extinguishment of partnership debt. See Partnership No. 3, and

Weaver v. Tapscott, 494

#### FAIRFAX.

Concerning the title of lord Fairfax and his devisee to lands in the northern neck of Virginia, see Northern Neck, and

Stephen's heirs v. Swann, 404

#### FELONY.

1. A felony cannot be prosecuted by information.

Commonwealth v. Barrett, 606

2. What indictment will be quashed as not warranted by the examination in the county court. See Examining court No. 1, and

Page v. Commonwealth, 688

3. In a prosecution for felony, the accused must be arraigned and plead in person, and in all the subsequent proceedings he must appear in person, not by attorney; and such appearance in person must be shewn by the record.

Sperry v. Commonwealth, 623

#### FEME COVERT.

##### I. Disability.

1. See Disability No. 1, 2, and

Hansford &c. v. Elliott &c., 79

Parsons v. McCracken and wife, 406

##### II. Power to dispose of separate real estate.

2. By postnuptial deed of settlement (reciting that husband had sold his wife's estate, and she had joined him in conveyances thereof, under a promise from him to settle an equivalent on her, therefore) husband conveys real estate to a trustee, 1. to the separate use of wife for life, unless she should,

708 \*in writing under her hand, direct trustee to sell and convey the whole or any part of trust subject, in which case he should hold the proceeds of sale subject to the separate use and order of wife; 2. after wife's death, to the use of husband for life; and 3. after husband's death, to and for the use of the devisees or heirs of wife, to be divided and conveyed to them in such portions as she shall by will direct, or the law of the land in that case made and provided shall determine. By mortgage afterwards executed by husband and wife (the wife duly joining, but the trustee in the settlement nowise joining, in the same) the same real estate is mortgaged to creditors of husband to secure a just debt due from him—**Held**, 1. That under the deed of settlement, the wife has full power to dispose of the whole estate in the trust subject, by deed in her lifetime, duly executed by her husband and her according to the statute of conveyances, as well as by will; and, therefore, 2. That the mortgagees are entitled to have the whole estate in the trust subject sold for satisfaction of their debt.

Lee and others v. The Bank of the U. States, 200

#### FIERI FACIAS.

##### I. Lien on debtor's goods.

1. A creditor delivers a *f. fa.* to a deputy sheriff acting in a different district of the county from that

in which the debtor resides, in order by such delivery to bind the debtor's property, but with directions to the deputy to hold it till a future day, and then to transfer it to the deputy of the district in which the debtor resides, to be by him levied, unless the debt should be paid in the meantime, or unless the debtor should bring his property to the district of the first deputy to be sold, in which case the first deputy was to levy the execution upon it: **Held**, the execution binds the goods of the debtor from the date of its delivery to the first deputy—dissentiente **Brooks, J.**

Pegram v. May, 176

2. When goods have been taken in execution under a *f. fa.* a direction given by the creditor to the sheriff to restore the goods to the possession of the debtor, is fraudulent, and destroys the lien of the execution on the goods; but a mere order to postpone the sale, without collusion, does not affect the lien of the execution.

Fisher v. Vanmeter, 18

##### II. Liability of sheriff.

3. A sheriff having levied a *f. fa.* on goods of the debtor, receives an order to postpone the sale from an unauthorized person, and postpones the sale accordingly; and the sheriff relies on the acquiescence of the plaintiff in the order, to discharge him from liability for conforming with it: **Held**, it is incumbent on him to prove such acquiescence, and the time of it; for if it occurred after the sale day of the execution, it would be of little weight, since then all the mischief had been done.

S. C., 18

4. A deputy sheriff having levied a *f. fa.* on the goods of the debtor, receives an order from the creditor to postpone the sale for two months, holding the property subject to the sheriff's control to satisfy the debt; and the deputy sheriff postpones the sale, but instead of holding the property restores it to the debtor, whereby the lien of the execution is destroyed and the debt ultimately lost: **Held**, this is official misconduct in the deputy, for which the sheriff and his sureties are liable in an action on his official bond.

S. C., 18

#### FORGING AND UTTERING.

##### I. Indictment.

1. What indictment will be quashed as not warranted by the examination in the county court. See Examining court No. 1, and

Page v. Commonwealth, 688

##### II. Evidence.

2. It seems, that in a prosecution for passing a counterfeit coin, the prosecutor is at liberty to prove the fact of the passing, and the counterfeit character of the coin, without either producing the coin, or accounting for its nonproduction.

Kirk v. Commonwealth, 627

3. In a prosecution for passing a counterfeit coin to a person who resides in another state, if a subpoena for such person as a witness has been issued and returned not found, the fact of the passing, and the counterfeit character of the coin, may be proved without producing the coin at the trial. S. C., 627

#### FORTHCOMING BOND.

What is no variance from execution.

By a *fieri facias*, the sheriff is commanded to cause principal, interest and costs to be levied of the goods and chattels of J. W. deceased in the hands of S. H. his administrator, if so much thereof he hath, but if not, then out of the goods and chattels of S. H. There being no goods and chattels of J. W. in the hands of S. H. the sheriff levies the execution on the individual property of S. H. and takes a forthcoming bond, which recites the execution as being against the goods and chattels of S. H. administrator of J. W. deceased: **Held**, there is no substantial variance between the execution and the recital thereof in the forthcoming bond.

Hairston v. Woods, 306

#### FRAUDULENT ALIENATION.

1. It is a general rule, that an absolute sale of chattels not accompanied and followed by transfer of possession to the vendee, is per se fraudulent and void as against creditors of the vendor; and though there are exceptions to the rule, yet it is no ground of exception, that the possession at the time of the sale was in a third person, if, notwithstanding such possession, the vendor had a right, and it was in his power, to take the possession and deliver it to the vendee.

Mason v. Bond & co., 181

2. What loan is fraudulent as to creditors and purchasers of loanee. See Loan No. 8, and Lightfoot v. Strother. 451
3. What loan is not fraudulent as to purchaser from loanee. See Loan No. 4, 5, and S. C., 451
4. When administrator's assignee of the assets will not be protected in equity. See Executor and administrators No. 28, and Fisher v. Bassett and others. 119

## FREEDOM—Suits for.

1. See Emancipation No. 2, 3, and Parks v. Hewlett &c., 511
- Erskine v. Henry & wife & others. 188
2. In a suit in forma pauperis brought by negroes against Erskine to recover their freedom, it is adjudged, that the paupers are slaves; then Henry and others bring suit against Erskine to recover the same negroes as their property: HELD, the judgment in the pauper suit is not conclusive evidence for the plaintiffs in this suit, that the negroes are slaves, and if the court in this suit holds them to be free, the plaintiffs here cannot recover them. Erskine v. Henry & wife & others. 188
3. In a suit in forma pauperis brought by negroes to recover their freedom, judgment is given against them, that they are slaves; it seems, such judgment is not necessarily conclusive of the status of the negroes, in a new controversy between them and the same defendant; and, under peculiar circumstances, may be no bar to the recovery of their freedom. S. C., 188

## FREEHOLD.

1. In conveyance of a freehold estate, words of leasing do not amount to a covenant for quiet enjoyment. See Lease, and Black v. Gilmore. 446
2. Who is a freeholder qualified to serve as a grand juror. See Grand Jury No. 1, and Moore v. Commonwealth. 689

## FREIGHT.

- When shipowner is entitled to freight, on construction of charter party. See Charter party, and Brown & Rives v. Ralston & Pleasants. 532

## GAMING.

1. An indictment charging the defendant with unlawful gaming at the house of J. N. the same being a house of entertainment, is sufficient. Linkous v. Commonwealth. 608
2. What shall be deemed a racefield, within the meaning of the act to prevent unlawful gaming. Commonwealth v. Wilson. 648

## GENERAL COURT.

1. Whether it can grant administration, while a previous voidable grant by a county or corporation court is unrepealed. See Administration No. 2, and Fisher v. Bassett and others. 119
2. The record of a case adjourned by a circuit court to the general court must shew that such adjournment was with the consent of the accused. Commonwealth v. Young. 638

## GENERAL ISSUE.

- What must be proved on the general issue, by a corporation plaintiff. See Corporation No. 1, 2, and Jackson's adm'r v. Bank of Marietta. 240

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## \*GIFT.

1. Whether, as between parent and child, a gift or a loan of slave is to be inferred from mere possession by the child? See Parent and child, and Cross v. Cross's adm'r and others. 245
2. By the act of 1758 for preventing fraudulent gifts of slaves, though a parol gift of slaves may be given in evidence to shew the character of the possession held by the donee, yet the gift itself is void. S. C., 245

## GLEBE LAND.

- What suit for the proceeds is not maintainable. The glebe land in a parish having been sold by the overseers of the poor, under the provisions of the act, 1 Rev. Code, ch. 33 b. the proceeds of sale are paid over, by direction of the freeholders and housekeepers of the parish, to an agent by them appointed to invest the same in bank stock. The agent makes the investment, receives the dividends on the stock during his life, and dies without having accounted for such dividends. Then a bill is exhibited against his administrator, by one of the freeholders and housekeepers of the parish, suing as well for himself as on behalf of the others (of whom he states that he is the duly appointed agent), setting forth

the above facts, and praying that the defendant may be decreed to pay to the plaintiff the amount of dividends received by the decedent in his lifetime. On demurrer to the bill, HELD, the freeholders and housekeepers acquired no property in the proceeds of the glebe land, by the disposition thereof made as aforesaid, and this suit cannot be maintained.

Cheatham adm'r v. Burfoot, 580

## GOODS, WARES AND MERCHANDISE.

- Prosecution for selling goods &c. without license. See Merchants, and Commonwealth v. Collins. 666

## GRAND JURY.

- I. Who is a freeholder qualified as grand juror.

1. To indictment found in S. county in September 1838, prisoner pleads in abatement that J. R. one of the grand jurors was not a freeholder. On the trial of the issue joined on this plea, it appears that the only land to which J. R. at the time of finding the indictment, had title, was a parcel in S. containing 691 acres, formerly part of a large tract lying mostly in S. but partly in W. county; in which latter county the whole tract was offered for sale in 1816, for arrears of taxes, but was not sold, and those taxes remained unpaid on the 1st July 1838: that in 1834, the owner conveyed the whole tract to a trustee, upon trust that if certain debts specified in the deed should not be paid within six months, the trustee should sell the land and pay those debts; but under this deed, no sale was ever made: that in 1837, the grantor in the trust deed sold and conveyed to J. R. the 691 acres, of which J. R. immediately received possession, and remained in possession at the time he was sworn as a grand juror. Verdict for commonwealth; and motion to set the verdict aside held to have been properly overruled. Moore v. Commonwealth. 689

- II. What plea that grand juror was a mill owner is bad.

2. To indictment in Petersburg circuit court, defendant pleads, 1. that one of the grand jury which found the same, was, at the time he was summoned and sworn, the owner of a water grist mill situated in Chesterfield; 2. that one of the grand jury was, at the time of finding the indictment, the owner of a water grist mill (without saying where the mill is situated). On demurrer to the pleas, HELD, neither of them is sufficient. Moran v. Commonwealth. 651

## GRANT.

- Of money by congress to administrator of revolutionary officer, with provision that he shall pay a part to the widow. See Money had and received, and Walden ex'or &c. v. Winston adm'r &c., 160

## GUARANTEE.

- What contract does not bind. A. by a contract in writing not sealed, guaranties payment to B. of a debt due him from a third person; no consideration for the guaranty is expressed in the contract, and none is shewn in proof: HELD, A. is not bound by such guaranty. Beers &c. v. Spooner and another. 153

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## \*HALFPAY.

- See Revolutionary officers, and Commonwealth v. Marston's adm'r, 36
- Tatum's ex'or v. Commonwealth. 56

## HEIRS.

1. Nonjoinder of one of the heirs as plaintiff in writ of right is only available in abatement. See Writ of right, and Linton and others v. Bartly and others. 444
2. When decree against heir for costs is erroneous. See Costs No. 1, and Long's ex'or &c. v. Israel and others. 556

## HUSBAND AND WIFE.

- Power of wife to dispose of her separate real estate. See Feme covert No. 2, and Lee and others v. Bank of U. States. 200

## IGNORANCE OF LAW.

- Is no ground of relief in equity against judgment. See Laches No. 1, and Tapp's adm'r v. Rankin. 478

## IMPROVEMENT COMPANY.

- See Internal improvement, and James River and Kanawha company v. Turner. 313

## INCENDIARY PUBLICATIONS.

To sustain a prosecution for the offence created by the first section of the act to suppress the circulation of incendiary publications, passed March 23, 1886 (Acts of 1885-6, ch. 66.) the person accused must be a member or agent of an abolition or antislavery society.

Commonwealth v. Barrett, 665

## INDEBITATUS ASSUMPSIT.

1. Where the terms of a special contract for work and labour, not under seal, have been performed, the stipulated compensation, if payable in money, may be recovered in an action of general indebitatus assumpsit.

Brown & Rives v. Ralston & Pleasants, 582

2. When endorser is not liable on the money counts. See Endorser, and

Bank of U. States v. Jackson's adm'r, 221

## INDEMNIFYING BOND.

The decision in Carrington v. Anderson, 5 Munf. 32, approved, and the law now settled, that in an action upon an indemnifying bond, brought by a person claiming the property sold, the deputy sheriff who sold the property under the execution, and took the bond, is not a competent witness for the defendants, to prove that the property belonged to the person against whom the execution issued.

Wilson and others v. Alexander sheriff, 459

## INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

1. See Grand jury.

2. Indictment for unlawfully, wilfully and maliciously setting fire to the woods near the plantation of A. M. and burning said woods and a fence belonging to said A. M. is described, in the record of the finding, as an indictment "for setting fire to the woods and burning the same:" HELD a sufficient record of the finding.

Earhart v. Commonwealth, 671

3. A felony cannot be prosecuted by information.

Commonwealth v. Barrett, 665

4. What offence may be prosecuted by information. See Merchants, and

Commonwealth v. Collins, 666

5. What indictment is not warranted by the examination in the county court. See Examining court No. 1, and

Page v. Commonwealth, 668

6. In proceedings for felony, accused must appear in person. See Felony No. 3, and

Sperry v. Commonwealth, 623

7. When prosecutor's insolvency and failure to give security for costs is no ground for dismissing indictment. See Prosecutor, and

Commonwealth v. Hill and others, 601

8. An indictment at common law, charging that the defendant did fight a duel with pistols, is bad on demurrer.

Commonwealth v. Lambert, 608

9. An indictment charging the defendant with unlawful gaming at the house of J. N. the same being a house of entertainment, is sufficient.

Linkous v. Commonwealth, 608

\*10. What indictment for murder is sufficient. See Murder, and

Maile v. Commonwealth, 661

11. What indictment for stabbing is sufficient. See Stabbing, and

Commonwealth v. Woodson, 669

12. The defect of some of the counts in an indictment does not affect the validity of the rest, and if any count is good, judgment may be given against the accused.

Kirk v. Commonwealth, 627

13. Case in which prisoner's motion for a continuance on the ground of the absence of a witness, was held to have been properly overruled.

Moore v. Commonwealth, 639

14. Who is an impartial juror. See Jury No. 2, 3, and

Moran v. Commonwealth, 651

Maile v. Commonwealth, 661

15. Power of court to discharge jury. See Jury No. 5, 6, and

Commonwealth v. Fells, 613

16. What is competent evidence of marriage, on a trial for bigamy. See Bigamy, and

Moore v. Commonwealth, 639

17. What averment in indictment for retailing ardent spirits is material and must be proved. See Retailing ardent spirits, and

Commonwealth v. Coe, 620

18. When production of counterfeit coin may be dispensed with. See Forging and uttering No. 2, 3, and

Kirk v. Commonwealth, 627

19. What proof is necessary to sustain prosecution under 1st section of act of March 23, 1886, to suppress circulation of incendiary publications. See Incendiary publications, and

Commonwealth v. Barrett, 665

20. When surveyor of road is liable to prosecution. See Roads, and

Commonwealth v. Piper, 657

21. Effect of prisoner's confession as evidence. See Confession, and

Brown v. Commonwealth, 633

Earhart v. Commonwealth, 671

22. What shall be deemed a racefield, within the meaning of the act to prevent unlawful gaming.

Commonwealth v. Wilson, 648

23. Concerning instruction to jury upon the law, see Instruction to jury, and

Gwatin v. Commonwealth, 673

24. What is no ground for arrest of judgment. See Arrest of judgment, and

Morris v. Commonwealth, 686

25. What will be presumed after verdict. See Limitation No. 9, and

Earhart v. Commonwealth, 671

26. Acquittal on counts not noticed by verdict. See Acquittal, and

Kirk v. Commonwealth, 627

Page v. Commonwealth, 668

INDORSER. See Endorser.

## INFANT.

See Disability No. 1, 2, and

Hansford &c. v. Elliott &c., 79

Parsons v. McCracken and wife, 466

## INJUNCTION.

1. When defect of title is no ground for injoining collection of purchase money. See Vendor and vendee No. 6, and

Long's ex'or &c. v. Israel and others, 556

2. When relief against judgment at law will be refused, on the ground of laches. See Laches No. 1 and

Tapp's adm'r v. Rankin, 478

## INSTRUCTION TO JURY.

1. It is the right and the duty of a judge sitting in a criminal trial, to instruct the jury as to the law, if he think it proper to do so; and no law prescribes any particular time at which the instruction shall be given.

Gwatin v. Commonwealth, 673

2. On a trial for murder, the court instructs the jury, that though they "should believe the prisoner committed the homicide under the influence of immediate intoxication, or the effects of a previous habit of intoxication upon his temper, yet if the intoxication or the effects were not such, or to such a degree, as wholly to negative the legal inference of malice, implied by law from the character and circumstances of the act, and absence of or slightness of the provocation," they should find him guilty of murder in the second degree: HELD, an instruction upon the sufficiency and weight of evidence, and error for which judgment against the prisoner must be reversed. S. C., 678

## INTEREST.

1. When interest on money in executor's hands, and not the principal, is to be applied to the disbursements. See Executors and administrators No. 17, and

Handly v. Snodgrass and others, 484

2. Although a decree gives interest on a sum which, according to the mode of "stating the account, is itself interest, yet if it be manifest that a settlement upon proper principals would have made the balance larger, and that such balance would have been principal, the decree will not be reversed at the instance of the debtor. S. C., 484

## INTERNAL IMPROVEMENT.

1. Construction of law authorizing the condemnation of private property.

1. The charter of the J. R. & K. Company provides, that the assessors for ascertaining damages to proprietors of lands required for the company's canal and improvement, shall take into consideration the quantity and quality of the land to be condemned, the additional fencing that will be required thereby, and all other inconveniences that will result to the



proprietor from the condemnation thereof. "and shall combine therewith a just regard to the advantages which the owner of the land will derive from the improvement for the use of which his land is condemned." **HOLD**, that the advantages to be derived to the owner of the land condemned for the company's use, from the improvement, to which the charter requires the assessors to have regard, are such advantages as particularly and exclusively affect the particular tract or parcel of land whereof a portion is condemned—not advantages of a general character, which may be derived to the owner in common with the country at large from the improvement.

James River and Kanawha company v. Turner, 818

## II. Constitutionality of such law.

2. And it seems, that if the charter had provided, that advantages of a general character, which the owner of the land condemned may derive from the improvement in common with the country at large, should be set off against the actual value of the land condemned and the actual damages sustained by the owner, such a provision would have been unconstitutional. S. C., 818

## INTERPLEADER.

S. files a bill of interpleader against A. and B. in order that it may be litigated and determined between them which is entitled to a sum of money in S.'s hands; and the bill is filed in consequence of a demand made on S. by B. for the money: the court holding that A. was entitled to the money in question, decreed that B. should pay A. his costs of suit; and decree affirmed.

Beers &c. v. Spooner and another, 158

## ISSUE.

1. Setting aside issue on improper plea. See Practice in actions at law No. 2, and Kemp v. Mundell and Chaplin, 12

2. Setting aside verdict for defendant where no plea has been filed. See Office Judgment, and M'Million v. Dobbins, 422

3. What must be proved by a corporation plaintiff, on the general issue. See Corporation No. 1, 2, and Jackson's adm'r v. Bank of Marietta, 240

## JAMES RIVER AND KANAWHA COMPANY.

See Internal Improvement, and James River and Kanawha company v. Turner, 818

## JOINT ACTION.

1. In an action upon the joint contract of three defendants, the plaintiff, to sustain his action, must prove that all three joined in the alleged contract; for if it appear that one of the defendants was not a party to the contract, though the other two were, the plaintiff must fail in this joint action.

Rohr v. Davis and others, 30

2. Where there are two plaintiffs in a supersedeas, if one of them die, the cause will abate as to him, and proceed in the name of the surviving plaintiff. Hairston v. Woods, 308

## JUDGMENT.

1. Where no plea has been filed to set aside office judgment, a verdict for defendant is invalid. See Office Judgment, and M'Million v. Dobbins, 422

2. Judgment against administrator of defendant in detinue. See Detinue No. 6, and Greenlee's adm'r v. Bailey, 526

3. Judgment in appellate court on reversing for refusal of continuance. See Continuance No. 2, and Clements v. Powell's adm'r, 1

4. Effect of judgment that paupers suing for freedom are slaves. See Freedom No. 2, 3, and Erskine v. Henry and wife and others, 188

5. When relief in equity against judgment will be refused. See Laches No. 1, and Tapp's adm'r v. Rankin, 478

6. Effect, as against assignor of bond, of judgment for obligor rendered on award. See Assignment No. 8, and Scates v. Wilson & Edmunds, 473

7. Action of debt on judgment. See Debt, and Kemp v. Mundell and Chaplin, 13

8. What is no ground for arrest of judgment on indictment. See Continuance No. 3, and Morris v. Commonwealth, 636

## JUDICIARY.

Law creating new circuit.

A judge of the general court, elected for and as-

signed to the seventh judicial circuit, has an additional salary allowed him in consequence of the great mass of judicial business in one of the courts of his circuit; that court is afterwards severed from the seventh circuit and formed into a new circuit, and a new judge appointed for the same; the former judge yet remaining judge of the seventh circuit: **HOLD**, 1. That as the act establishing the new circuit makes no mention of the additional salary allowed to the former judge, and does not in terms or by necessary implication take it away, it was not the intention of the legislature to take it away; and 2. That if the legislature had intended to take the additional salary away, and had so enacted, such enactment would have been unconstitutional.

Commonwealth v. Clopton, 100

## JURISDICTION.

See titles Administration, General court, and Hearing.

## JURY.

### I. Grand jury.

1. See Grand jury, and Moore v. Commonwealth, 639  
Moran v. Commonwealth, 661

### II. Competency of petit jurors.

2. On a trial for murder, two jurors are severally examined on voir dire. 1. One states, that he was not present at the examination of the prisoner before the hustings court, and has heard no statement of the evidence from any witness or any person who was present; that he has heard the case spoken of in the town, and rumours in regard to its circumstances, upon which he has expressed no opinion, though he believes those rumours to be true, and if they should turn out upon the trial to be true, he has a decided opinion in regard to the case; but he feels no prejudice, and is satisfied he shall be able to decide the case upon the evidence which may be given in, uninfluenced by the rumours he has heard; that the opinion he had formed was, that if the prisoner had stabbed the deceased under the circumstances which he had heard, he ought to be punished. 2. The other juror states, that he has made up no decided opinion; that he has heard a part of the evidence of one witness, and formed an impression, and if the balance of the testimony should run in that way, that impression would be confirmed; that as far as the evidence went, he has a decided opinion, if the rest should not run against it; but that he has no prejudice, has not expressed any opinion, and is prepared to decide the case according to the evidence which may be given in, uninfluenced by the portion of evidence he has heard. **HOLD**, both the jurors are competent.

Moran v. Commonwealth, 661

3. On a trial for felony, a juror, being examined on his voir dire, states, that he was not present at the examining court, but has heard a report of some of the circumstances of the case; that he does not know that the report came from any one who heard the evidence at the examining court, nor does he believe it to be a full detail of all the circumstances, but he believes it to be true, and upon that belief has formed and expressed a decided opinion, which is still abiding on his mind; but he believes, that notwithstanding what he has heard, his mind is open to conviction, and he has no doubt that if the facts should turn out to be different from what they have been represented to him, his opinion would be changed. **HOLD**, he is a competent juror.

Malle v. Commonwealth, 661

### III. Instruction to jury in criminal case.

4. Concerning instruction to jury upon the law, see Instruction to jury, and Gwatkin v. Commonwealth, 678

### IV. Discharge of jury in criminal case.

5. In any criminal case, whether capital or other, the court has power, for good cause, to discharge the jury, and put the accused upon his trial before a new jury. Commonwealth v. Fells, 613

6. Such power held to have been properly exercised in a capital case, where the jury had been kept together for nine days without agreeing on a verdict, and the health of one of the jurors was suffering from confinement, while the personal attentions of another juror were required by the situation of his wife. S. C., 613

## LACHES.

1. Although it may be manifest that great injustice has been done a defendant at law, by the verdict



and judgment against him there, yet if this injustice has not been produced by any fraud or surprise on the part of the plaintiff, but is the result either of the defendant's own negligence, or of his counsel's ignorance or bad management, a court of equity can give him no relief.

1. Tapp's adm'r v. Rankin, 478
2. Discharge of surety by laches of creditor. See Principal and surety No. 1, and
3. Ashby's adm'r v. Smith's ex'x, 164
3. See Lapse of time.

#### LAND.

1. A person owning lands may by parol authorize another to make a contract for the sale thereof; and if a contract be made under such authority, the owner of the lands may be charged by virtue of the contract, provided there be a memorandum thereof in writing, signed by the person authorized to make it.

- Yerby v. Grigsby, 387
2. The signing by the agent of his own name is sufficient. The statute does not make it indispensable that he should sign the name of the party to be charged therewith. S. C., 387
3. When the owner of lands authorizes another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase money as is to be paid in hand, is a necessary incident to the power to sell. S. C., 387
4. What contract for sale and purchase of land is not usurious. See Usury, and
- Long's ex'or & c. v. Israel and others, 556
5. Measure of damages for breach of covenant to convey land. See Vendor and vendee No. 5, and
- Thompson's ex'or v. Guthrie's adm'r, 101
6. Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.
- Long's ex'or & c. v. Israel and others, 556
7. When defect of title is no ground for vendee's coming into equity. See Vendor and vendee No. 6, and S. C., 556
8. Concerning the title to lands in the northern neck of Virginia, see Northern Neck, and
- Stephen's heirs v. Swann, 404

#### LANDLORD AND TENANT.

##### I. Construction of lease.

1. When words of leasing do not amount to a covenant for quiet enjoyment. See Lease, and
- Black v. Gilmore, 446

##### II. Void attachment for rent not yet due.

2. Under the 9th section of the statute concerning rents, 1 Rev. Code, ch. 118, the lessor is not entitled to an attachment for rent not yet due, before the commencement of the term for which the rent is to be paid.
- Johnson v. Garland, 149
3. If such attachment for rent not yet due, be issued before the commencement of the term, and levied on the goods of the lessee; and the lessee thereupon enter into a recognizance to pay the rent; the lessee may, notwithstanding the recognizance, move the court to which the process is returned, to quash the attachment for irregularity; and on such motion, the court ought to quash the attachment, and the recognizance likewise which was founded upon it. S. C., 149

#### LAPSE OF TIME.

1. Every claimant who asks relief of a court of equity ought to exhibit his claim within a reasonable time, so that, in giving him a decree, the court may not do injustice to the defendant.
- Atkinson v. Robinson, 393
2. Bill in equity dismissed, because amount remaining due to complainant was uncertain, and could only be ascertained by a settlement of accounts in reference to transactions more than twenty-seven years old at the commencement of the suit. S. C., 393
3. See Legacy and legatee No. 6, and
- Parsons v. McCracken and wife, 496
4. What lapse of time will not bar suit by
- 711 legatees to surcharge and falsify executor's account. See Legacy and legatee No. 7, and
- Handly v. Snodgrass and others, 484

#### LEASE.

1. Where a conveyance is of a freehold estate, words of lease do not amount to a covenant for quiet enjoyment.
- Black v. Gilmore, 446
2. A declaration in covenant sets forth, that the defendant, by an indenture, did rent and lease to the plaintiff a tract of land, to have and to hold the

same so long as he the plaintiff should live; and it avers, as a breach of the covenant, that the defendant entered upon the possession of the plaintiff, and expelled and removed him. HELD, on general demurrer, that no covenant for quiet enjoyment is to be implied from the words set forth, and that the action cannot be maintained. S. C., 446

#### LEGACY AND LEGATEE.

##### I. Construction of will.

1. Construction of words of survivorship, in bequest to legatees in remainder after estate for life. See Will No. 1, 2, and
- Hansford & c. v. Elliott & c., 79
2. What passes by residuary bequest. See Will No. 5, 6, and
- Miers and others v. Bedgood ex'or, 79

##### II. Suits by legatees against ex'or or adm'r.

3. Ex'ors in their own wrong are liable to account for the property of the decedent to his distributees or legatees, like other ex'ors, and cannot rely on the statute of limitations to protect them from such accountability.
- Hansford & c. v. Elliott & c., 79
4. An action at law by a legatee against an executor for a legacy, on the executor's promise to pay it, must be brought against the executor in his individual, not in his representative, character; and the judgment in such case must be de bonis propriis.
- Kayser ex'or & c. v. Disber, 367
5. In assumpsit by a legatee against an executor for a legacy, one count in the declaration alleges a promise made by the defendant, as executor, to pay the legacy; HELD, this is a count against the executor in his representative character, upon which the judgment can only be de bonis testatoris. S. C., 367
6. A female slave is bequeathed by a father to his daughter, but the name of the slave having been altered after it was first written, it is doubtful whether the bequest is of Harriet or Helen. The executors, considering Harriet to have been the slave intended, deliver her to the daughter. She is of equal value with Helen, and indeed preferred by the daughter, who, though not of age, accepts her, and hires her out until Harriet dies. Helen is delivered to another legatee, and sold by him. After about twenty years from the time that the slaves were delivered to the legatees respectively, and more than five years from the time that the daughter attained full age, a bill in equity is brought by her husband and herself, to recover Helen and her children. HELD, the length of time, and the acquiescence of the daughter in the manner of executing the will, are sufficient grounds for dismissing the bill.
- Parsons v. McCracken and wife, 496

7. The delay of legatees for eight years to institute a suit to surcharge and falsify the settled accounts of an executor, is not sufficient ground for refusing relief, especially as one of the complainants was a female, and under age when the settlement was in progress, though probably of full age when it was returned to the court of probate and recorded.

- Handly v. Snodgrass and others, 484
8. Mode of stating executor's account. See Executors and administrators No. 17, 18, and S. C., 484

9. Where the decree for a sum due by an executor to legatees is in favour of all the legatees jointly for the whole sum, instead of being in favour of each legatee severally for his proper part, the error is not one by which the executor is aggrieved, and he has no right to have the decree reversed therefor. S. C., 484

10. The former decisions, that a decree in favour of a legatee against an executor, which omitted to require a refunding bond, would be considered erroneous, and for such error would be reversed with costs, reviewed by the court, and a different rule now established.

Where it is apparent that such omission was not intentional, but resulted entirely from inadvertence, an appellate court, if the decree be right in other respects, will affirm it so far as it has gone.

- 712 with costs to the appellee as the party substantially prevailing, and will then proceed to make such further decree in relation to a refunding bond, as the court below ought to have made. S. C., 484
11. Legatee qualifying as successor administrator de bonis non cannot revive and prosecute suit brought by first administrator de bonis non, to recover assets converted by original administrator. See Executors and administrators No. 3, and
- Cheatham adm'r v. Friend's adm'r, 580

## LEGISLATIVE GRANT.

Of money to administrator of revolutionary officer, with provision that he shall pay a part to the widow. See Money had and received, and  
Walden ex'or &c. v. Winston adm'r &c., 160

## LESSOR AND LESSEE.

See titles Landlord and tenant and Lease.

## LICENSE.

On trial for bigamy, production of marriage license may be dispensed with. See Bigamy No. 1, and  
Moore v. Commonwealth, 639

## LIEN.

1. What delivery of *f. fa.* to officer binds goods of debtor. See *Fieri facias* No. 1, and  
Pegram v. May, 176  
2. What is no discharge of the lien off. *f. fa.* See  
*Fieri facias* No. 2, and  
Fisher v. Vanmeter, 18  
3. Discharge of surety in bond not yet payable, by restoring attached effects of principal. See *Principal and surety* No. 1, and  
Ashby's adm'r v. Smith's ex'r, 164

## LIMITATION.

## I. When statute begins to run.

1. When assignee's right of action against assignor accrues. See *Assignment* No. 9, and  
Scates v. Wilson & Edmunds, 473  
2. The statute of limitations does not begin to run against a claim asserted for a decedent's estate, till a qualification of an ex'or or adm'r of the decedent.  
Hansford &c. v. Elliott &c., 79  
3. Saving to persons under disability. See *Disability* No. 1, 2, and  
Hansford &c. v. Elliott &c., 79  
Parsons v. M'Cracken and wife, 495  
II. Who is not protected by the statute.  
4. Ex'ors in their own wrong are liable to account for the property of the decedent to his distributees or legatees, like other ex'ors, and cannot rely on the statute of limitations to protect them from such accountability.  
Hansford &c. v. Elliott &c., 79

## III. What acknowledgment will not take claim out of the statute.

5. In assumpsit against an executor, for a debt of his testator on an open account, all the items of which appear to have been due more than five years before the testator's death, plaintiff proves, that within five years after the date of his account, he applied to the testator to settle the same, and testator said, "I am too unwell to do business now, but when I am better, I will settle your account." *Held*, these words import no such promise to pay or acknowledgment of the debt, as will take the case out of the 16th section of the statute of limitations, requiring the court, in such actions, to expunge from such account every item which shall appear to have been due more than five years before the testator's death.

Aylett's ex'or v. Robinson, 45

6. Such a promise to settle, would not amount to a promise to pay, or acknowledgment of debt, that would take the case out of the general statute of limitations in respect to such actions. S. C., 45

7. On a plea of non assumpsit within five years, it was proved that within five years the defendant acknowledged the items in the plaintiff's account to be just, but said that he had some offsets: and that at a subsequent time, the defendant promised the plaintiff that he would settle all their differences and accounts fairly, and would not avail himself of the act of limitations: *Held*, this proof is not sufficient to justify the jury in finding for the plaintiff.  
Sutton v. Burruss, 881

## IV. Effect of lapse of time in equity.

8. See *Lapse of time*. No. 1, 2. *Legacy and legatee* No. 4, 7, and  
Atkinson v. Robinson, 393  
Parsons v. M'Cracken and wife, 495  
Handly v. Snodgrass and others, 484

## V. Limitation of prosecution.

9. After a verdict of conviction for misdemeanour, an appellate court will presume that the offence was proved to have been within the period of limitation, where the record does not shew the contrary.  
Earhart v. Commonwealth, 671

## LIS PENDENS.

If, pending a suit in chancery for recovery of

slaves and their profits, one of the slaves is sold by the defendant, and the plaintiffs ask and obtain a decree against the defendant for the value of the slave sold, they thereby waive their claim against the purchaser pendente lite for the specific property.

Smith v. Browne's adm'r &c., 293

## LOAN.

## I. Title of loanee.

1. Whether, as between parent and child, a gift or a loan is to be inferred from mere possession by the child. See *Parent and child*, and  
Cross v. Cross's adm'r and others, 245  
2. A father in law puts slaves into the possession of his son in law on loan: no length of possession will give the loanee title against the lender, till such possession has become adverse by demand and refusal of the possession. S. C., 245

## II. Title of creditors and purchasers of loanee.

3. Under the act to prevent frauds and perjuries, a loan of goods and chattels made by parol, to a person with whom, or those claiming under him, possession remains five years, without demand made and pursued by due process of law on the part of the lender, is taken to be fraudulent as to the creditors and purchasers of the persons so remaining in possession.

Lightfoot v. Strother, 451

4. If the property be sold before possession shall have remained five years with the loanee or those claiming under him, the loan is not, under the statute, taken to be fraudulent as to the purchaser. S. C., 451

5. Where possession has not, at the time of a sale, remained five years with the loanee and those claiming under him, the purchaser can have no benefit of the statute of frauds, by reason of his own possession after the purchase. The circumstance that the possession by the loanee before the sale, and the possession by the purchaser after the sale, will together make five years, cannot avail to give a title to the purchaser. S. C., 451

## MARRIAGE.

What evidence of marriage is competent on a trial for bigamy. See *Bigamy* No. 1, 2, and  
Moore v. Commonwealth, 639

## MARRIAGE SETTLEMENT.

Power of feme covert to dispose of real property settled to her separate use. See *Feme covert* No. 2, and

Lee and others v. Bank of U. States, 200

## MERCHANTS.

Upon presentment and information in a circuit court, judgment given for the forfeiture inflicted by the second section of the act passed February 24, 1823, for the offence of selling goods, wares and merchandise without a license.

Commonwealth v. Collins, 666

## MERGER.

In equity, bond of one partner does not extinguish partnership debt. See *Partnership* No. 3, and  
Weaver v. Tapscott, 424

## MILLS.

What plea that a grand juror was owner of a mill is bad. See *Grand jury* No. 2, and  
Moran v. Commonwealth, 651

## MISDEMEANOUR.

What will be presumed after verdict of conviction. See *Limitation* No. 9, and  
Earhart v. Commonwealth, 671

## MISJOINDER.

1. If, in a declaration in assumpsit against an executor, there be one count against him in his representative, and others against him in his individual character; this is a misjoinder of action, fatal on general demurrer.

Kayser ex'or &c. v. Disher, 357

2. Two counts in a declaration in detinue; one counting on a right of property in the plaintiff, 714 and the other on a right of possession in him as a bailee: *Held*, here is no misjoinder of actions.

Boyle v. Townes, 158

## MISTAKE.

1. When executor's distribution of specific legacies to the wrong legatees will not be disturbed. See *Legacy and legatee* No. 6, and  
Parsons v. M'Cracken and wife, 495

2. Land sold being erroneously described in the conveyance executed by vendor, mistake corrected on bill in equity filed by vendee.

Long's ex'or &c. v. Israel and others, 566

#### MONEY COUNTS.

When endorser is not liable on the money counts in assumpsit. See Endorser, and

Bank of U. States v. Jackson's adm'r, 231

#### MONEY HAD AND RECEIVED.

By adm'r to use of widow.

The adm'r of a revolutionary officer of the Virginia line on continental establishment, who died in Virginia, applies to congress for commutation of five years full pay, due the decedent for military services; congress passes an act allowing the claim, and directing payment out of the treasury to the adm'r, but providing that he shall pay one fourth of the money to the widow of the decedent, who by the law of Virginia was entitled to no share of it; to which provision the adm'r gave his consent pending the bill before congress; and the adm'r receives the money from the treasury under the act: **Held**, he is bound to pay the widow one fourth of the money.

Walden ex'or &c. v. Winston adm'r &c., 160

#### MOTION.

Against sheriff and sureties for nonpayment of money received under execution. See Sheriffs and sergeants No. 3, 4, 5, and

Chapman v. Chevis, 297

#### MURDER.

Indictment for murder charges that the prisoner, of his malice aforethought, did make the assault; but the striking and wounding, and the killing and murder, are respectively charged to have been done "of his malice aforesaid." **Held** a good indictment for murder.

Maile v. Commonwealth, 661

#### NEGLIGENCE.

See Laches.

#### NEGOTIABLE NOTE.

When endorser is not liable on the money counts in assumpsit. See Endorser, and

Bank of U. States v. Jackson's adm'r, 231

#### NEW TRIAL.

1. Where verdict is rendered for defendant without any plea filed to set aside office judgment. See Office judgment, and

M'Million v. Dobbins, 423

Exceptions to refusal of new trial.

2. A bill of exceptions to an opinion of a court overruling a motion for a new trial, instead of stating the facts proved, states the evidence adduced at the trial; but the evidence thus set forth shews that the evidence for the party for whom the verdict was found, supposing it true, and disregarding the evidence for the other party, is not sufficient to warrant the verdict: **Held**, such exceptions, in such case, are well taken, to enable an appellate court to review and reverse the judgment overruling the motion for a new trial.

Rohr v. Davis and others, 30

3. Exceptions to an opinion of a court refusing a new trial are not analogous to a demurrer to evidence; and in reviewing such an opinion, upon a bill of exceptions setting forth the facts proved at the trial, where there appears no conflict of evidence and no dispute concerning the credit of witnesses, the appellate court inquires, whether the verdict conforms with the fair inferences of fact from the facts stated; and if it sees that it does not, reverses the judgment, and directs the new trial.

Fisher v. Vanmeter, 18

#### NEXT FRIEND.

See Disability No. 1, and

Hansford &c. v. Elliott &c., 79

715 \*NIL DEBET.

The plea of nil debet is not a good plea to an action of debt on a judgment of another state of the union.

Kemp v. Mundell and Chapin, 13

#### NORTHERN NECK.

I. Title of lord Fairfax.

1. Lord Fairfax had a good title in fee to the soil of The Northern Neck, as admitted by the act of 1736, 1 Rev. Code, ch. 89, and recognized in adjudged cases by the court of appeals.

Stephen's heirs v. Swann, 404

2. Lord Fairfax had the entire interest in all lands in The Northern Neck, which he appropriated to himself, by conveyance and reconveyance, or by leases for life or years. S. C., 404

#### II. Title of D. M. Fairfax.

3. No act of assembly passed since the death of lord Fairfax in 1781, has had, or was intended to have, the effect of inquisitions of office, equivalent to escheats, of the lands by him devised to D. M. Fairfax, an alien subject of G. Britain at the time of the devise. S. C., 404

4. D. M. Fairfax took under the will of lord Fairfax, his whole estate in The Northern Neck. S. C., 404

#### NOTE.

When endorser is not liable on the money counts in assumpsit. See Endorser, and

Bank of U. States v. Jackson's adm'r, 231

#### NOTICE.

1. Case in which the consignee of a cargo was held to have received sufficient notice that the master of the vessel was ready to deliver the cargo.

Brown & Rives v. Ralston & Pleasants, 532

2. When notice of election made is unnecessary.

See Trees No. 2, and

M'Coy v. Herbert, 548

3. When necessary, to entitle equitable assignee to recover against assignor. See Assignment No. 7, and

Wood's adm'r v. Duval, 6

#### OFFICE JUDGMENT.

In an action on the case, if there be an office judgment against the defendant, with a writ of enquiry, and afterwards, without any plea in the cause, the jury be sworn as if there were an issue, and a verdict be found for the defendant, the verdict will be set aside, and a new trial directed.

M'Million v. Dobbins, 422

#### ONUS PROBANDI.

See Assignment No. 5, Executors and administrators No. 23, and

Wilcox v. Pearman, 144

Fisher v. Bassett and others, 119

#### PARENT AND CHILD.

It seems, that, as between parent and child, possession of a slave is very equivocal evidence of a gift from the parent to the child, since the delivery of the possession would equally accompany a loan; and the law would rather infer a loan than gift from mere transfer of possession—See *quære*.

Cross v. Cross's adm'r and others, 245

#### PARISH.

What suit for proceeds of glebe land is not maintainable by the freeholders and housekeepers of the parish. See Glebe land, and

Cheathan adm'r v. Burfoot, 580

#### PAROL EVIDENCE.

Whether admissible to restrict generality of residuary clause in will. See Will No. 6, and

Miers and others v. Bedgood ex'or, 361

#### PARTIES TO SUITS.

1. What description of the plaintiff in a declaration may be rejected as surplussage. See Receiver, and

Boyle v. Townes, 156

2. Distributees of a decedent may maintain a bill in equity to assert their rights in the decedent's estate, though they cannot have distribution thereof without having the ex'or or adm'r of the decedent before the court as a party in the cause.

Hansford &c. v. Elliott &c., 79

#### PARTNERSHIP.

I. Rights of partners.

1. What constitutes a partnership, and for what contracts made by a partner the firm is liable.

Weaver v. Tapscott, 424

2. *Quære*, whether, in the case of a mercantile partnership formed without any agreement as to the proportion in which the losses are to be borne and the profits divided between the partners, the same are to be borne or divided equally between them, or are to be apportioned in the ratio of their respective contributions?

Towner v. Lane's adm'r, 203

II. Remedy against firm where one partner has given bond.

3. A member of a firm hires slaves, and the na-

ture of the partnership and circumstances of the hiring are such, that all the partners would be held at law bound for the hire, if the contract of hiring rested in parol; but a specialty is executed for the hire, by one of the firm in his individual character, with another person as surety; and judgment is obtained on the bond against the surety, who satisfies the same. On a bill in equity by the surety against all the partners, it appears that the one who executed the bond is a nonresident of the commonwealth, and insolvent. **HOLD**, the complainant is entitled to a decree against the other partners, for the amount paid by him.

Weaver v. Tapscott, 424

### III. Liability of deceased partner's adm'r to separate creditors.

4. A creditor of a decedent, who has obtained judgment against the administrators, brings an action of debt upon the administration bond, and shews at the trial, that one of the administrators, under an agreement with a surviving partner of the decedent, had sold partnership effects to the amount of 408 dollars 78 cents. There is no evidence that the amount of debts due from the partnership was ever ascertained, or that any settlement of the partnership transactions had ever been made. But it is proved that the administrator exhibited to a witness a statement of partnership debts which he had paid, amounting to about 300 dollars, thus leaving a balance of 200 dollars unaccounted for by him, one half of which balance exceeds the amount of the judgment. Upon this evidence, the jury find a verdict for the plaintiffs. **HOLD**, the verdict ought not to be set aside.

Wayt and others v. Peck and others, 484

### PAUPER SUITS.

See Freedom.

### PAYMENT.

In equity, bond of one partner does not extinguish partnership debt. See Partnership No. 3, and Weaver v. Tapscott, 424

### PLEADING.

#### I. Declaration.

1. When general indebitatus assumpsit lies, though contract was special. See Indebitatus assumpsit No. 1, and

Brown & Rives v. Ralston & Pleasants, 532

2. Against executor on promise to pay legacy. See Legacy and legatee No. 4, and

Kayser ex'or &c. v. Dishier, 357

3. What is a count against ex'or in his representative character. See Legacy and legatee No. 5, and

S. C., 357

4. What is a misjoinder of counts in declaration against ex'or. See Misjoinder No. 1, and

S. C., 357

5. What is no misjoinder of counts in detinue. See Detinue No. 3, and

Boyle v. Townes, 158

6. What description of the plaintiff may be rejected as surplusage. See Receiver, and

S. C., 158

7. Declaration in debt on judgment. See Debt No. 1, and

Kemp v. Mundell and Chapin, 12

#### II. Indictment.

8. Concerning sufficiency of indictment for particular offences. See Duelling, and

Commonwealth v. Lambert, 608

Gaming, and

Linkous v. Commonwealth, 608

Murder, and

Malle v. Commonwealth, 661

Stabbing, and

Commonwealth v. Woodson, 609

9. The defect of some of the counts in an indictment does not affect the validity of the rest, and if any count is good, judgment may be given against the accused.

Kirk v. Commonwealth, 637

#### III. Appearance in felony.

10. In proceedings for felony, the accused must appear and plead in person. See Felony No. 3, and

Sperry v. Commonwealth, 623

717

#### \*IV. Pleas.

11. What must be pleaded in abatement to writ of right. See Writ of right, and

Linton and others v. Bartly and others, 444

12. What is matter of abatement, not available in arrest of judgment on indictment. See Continuance No. 3, and

Morris v. Commonwealth, 686

13. What plea that grand juror was owner of a mill is bad. See Grand jury No. 2, and

Moran v. Commonwealth, 651

14. Verdict for defendant without plea to set aside office judgment is invalid. See Office judgment, and

M'Million v. Dobbins, 422

15. Pleas tendered by a defendant in an action at law, and rejected by the court, are not part of the record, unless made so by bill of exceptions to the rejection of them, or by order of the court that they shall be made so; and a mere memorandum, that, when the pleas were rejected, the court declared that the matter thereof might be given in evidence without the pleas being filed, and that this was done at the trial, does not make the rejected pleas part of the record.

White v. Tomcray, 847

16. If pleas be tendered by a defendant and rejected by the court, and he takes no exception to the rejection of them, he shall be presumed in the appellate court to have acquiesced. S. C., 847

17. The plea of nil debet is not a good plea to an action of debt on a judgment of another state of the union.

Kemp v. Mundell and Chapin, 12

18. Setting aside issue on improper plea. See Practice in actions at law No. 2, and

S. C., 12

19. Consequence of failure by adm'r of defendant in detinue to plead de novo. See Detinue No. 5, and

Greenlee's adm'r v. Bailey, 596

#### V. Admission in pleading.

20. No admission made, directly or by inference, in one part of a party's pleading, can be referred to in aid of another plea, or to supply evidence necessary to be given under it.

Jackson's adm'r v. Bank of Marietta, 240

### POSSESSION.

1. Whether, as between parent and child, a gift or a loan is to be inferred from mere possession by the child. See Parent and child, and

Cross v. Cross's adm'r and others, 245

2. What possession gives no title to loanee. See Loan No. 2, and

S. C., 245

3. What possession of chattel loaned will not avail purchaser from loanee. See Loan No. 4, 5, and

Lightfoot v. Strother, 451

### POWER.

Power of feme covert to dispose of real estate settled to her separate use. See Feme covert No. 2, and

Lee and others v. Bank of U. States, 200

### PRACTICE IN ACTIONS AT LAW.

1. What is no ground of continuance for adm'r See Continuance No. 1, and

Clements v. Powell's adm'r, 1

2. If an improper plea be received, and issue be taken on it, the court may afterwards set aside the issue and the plea; and if this be in substance and effect done, though in form irregularly done, the proceeding shall not be reversed for such irregularity.

Kemp v. Mundell and Chapin, 12

3. Verdict for defendant without plea to set aside office judgment is invalid. See Office judgment, and

M'Million v. Dobbins, 422

4. When joinder in demurrer to evidence should be compelled—and effect of refusal to compel. See Demurrer No. 2, 3, and

Rohr v. Davis and others, 30

5. Abatement of supersedeas as to one of the plaintiffs. See Abatement No. 2, and

Hairston v. Woods, 308

6. Practice on reversing judgment for refusal of continuance. See Continuance No. 2, and

Clements v. Powell's adm'r, 1

7. When new trial will be granted on exceptions to refusal by court below. See New trial No. 2, 3, and

Rohr v. Davis and others, 30

Fisher v. Vanmeter, 18

### PRACTICE IN CHANCERY CAUSES.

1. Effect of omission in decree for legatees against executor, to require refunding bond. See Legacy and legatee No. 10, and

Handly v. Snodgrass and others, 484

2. Whether, in case of decree entered in court of appeals, but not certified, a rehearing of the cause may be granted at subsequent term. See Rehearing, and

Towner v. Lane's adm'r, 262

## 718 \*PRACTICE IN CRIMINAL CAUSES.

See Indictments, informations and presentments.

## PRINCIPAL AND AGENT.

1. What agent may sign contract for sale of land, and what signing is sufficient. See Land No. 1, 2, and

Yerby v. Grigsby, 387

2. When the owner of lands authorizes another to make a contract for the sale thereof, the authority of the agent to receive so much of the purchase money as is to be paid in hand, is a necessary incident to the power to sell. S. C., 387

3. Question upon evidence, whether sheriff received money under execution as agent of the plaintiff. See Sheriffs and sergeants No. 3, and Chapman v. Chevis, 297

4. What demand by attorney at law, of money received by sheriff under execution, is sufficient to charge the sheriff. See Sheriffs and sergeants No. 5, and S. C., 297

5. A. having claims in the hands of an attorney for collection, gives him a verbal direction to pay part of the money when collected to B. in satisfaction of a debt due B. from a third person: HELD, A. in his lifetime, or his adm'r after his death may revoke this direction to the attorney, and demand the money. Beers &c. v. Spooner and another, 153

## PRINCIPAL AND SURETY.

I. What conduct of creditor discharges surety.

1. Principal debtor and surety being bound in a bond for money payable at a future day, the surety, before the debt has become payable, represents to the creditor that the principal is about to remove himself and his effects out of the commonwealth, and requests the creditor to sue out an attachment against him, under the statute, 1 Rev. Code, ch. 123, § 14, and the creditor sues out the attachment accordingly, and it is levied on goods of the principal debtor sufficient to satisfy the debt: but afterwards, the creditor accepts a mortgage from the principal debtor to secure punctual payment of the debt when due, and thereupon the attached effects are, with the creditor's consent, restored to the debtor, and the attachment no further prosecuted; and the debtor elicits the mortgaged effects: HELD, the surety is, in equity, discharged from the debt. Ashby's adm'r v. Smith's ex'r, 164

2. Quere, whether, in such case, the surety had a right, under the statute, 1 Rev. Code, ch. 116, § 6, to demand that the creditor should sue out and prosecute such attachment against the principal debtor? S. C., 164

II. Proceedings against sheriff and sureties.

3. Motion against sheriff and his sureties for non-payment of money received under execution. See Sheriffs and sergeants No. 3, 4, 5, and Chapman v. Chevis, 297

4. What damages are recoverable against sheriff and his sureties in action on sheriff's official bond. See Sheriffs and sergeants No. 6, and Perkins and others v. Giles governor, 297

III. Rights of surety for a firm.

5. Concerning rights of surety in a bond given by one partner for a partnership debt, see Partnership No. 3, and Weaver v. Tapscott, 424

## PRIVATE PROPERTY.

Construction and constitutionality of statute authorizing private property to be condemned for use of internal improvement company. See Internal improvement, and

James River and Kanawha company v. Turner, 313

## PROBATE.

See Administration.

## PROCHEIN AMY.

See Disability No. 1, and

Hansford &c. v. Elliott &c., 79

## PROMISE.

What is insufficient to take case out of the statute of limitations. See Limitation No. 5, 6, 7, and Aylett's ex'or v. Robinson, 45

Sutton v. Burruss, 381

## PROMISSORY NOTE.

When endorser is not liable on the money counts in assumpsit. See Endorser, and

Bank of U. States v. Jackson's adm'r, 221

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## \*PROSECUTOR.

1. Under the 66th section of the act regulating criminal proceedings against free persons, 1 Rev. Code, ch. 166, the prosecutor's insolvency or inability to pay costs is, ordinarily, good cause for ruling him to find security for such payment; but if, in the opinion of the court, public justice requires that the prosecution should proceed, it may refuse to dismiss the indictment, though the prosecutor be insolvent, and security for costs be not given. Commonwealth v. Hill and others, 601

2. An indictment will not be dismissed, though the prosecutor be insolvent, if the court would ex officio have directed a prosecution to be instituted. S. C., 601

## PROTEST.

Case in which a protest by the master of a vessel detained on demurrage was held unnecessary. Brown & Rives v. Ralston & Pleasants, 532

## PUBLIC USES.

Construction and constitutionality of statute authorizing private property to be condemned for use of internal improvement company. See Internal improvement, and

James River and Kanawha company v. Turner, 313

## PURCHASER.

1. What purchaser from loanee acquires no title. See Loan No. 4, 5, and

Lightfoot v. Strother, 451

2. What is a waiver of claim against purchaser pendente lite. See Lis pendens, and

Smith v. Browne's adm'r &c., 293

3. See Vendor and vendee.

## RACEFIELD.

What shall be deemed a racefield, within the meaning of the act to prevent unlawful gaming. Commonwealth v. Wilson, 643

## RECEIPT.

1. Effect of assignor's receipt for the amount of the assigned debt, as against the assignee. See Assignment No. 4, 5, and

Wilcox v. Pearman, 144

2. A vendor of land executes a deed of conveyance to the purchaser, in which he acknowledges receipt of the purchase money, and subjoins to the deed a receipt in full for the same; yet upon proof that in fact the whole purchase money was not paid, he is not concluded from claiming the balance due him in equity. Wilson's curator v. Shelton's adm'r, 343

## RECEIVER.

A person appointed curator and receiver of chattels by a court of chancery, does not, by virtue of that appointment, acquire a right of property; but if he bring detinue for the chattels, describing himself as curator and receiver, and counting as upon his own property, and on a bailment thereof to the defendant, the count is good, the description of curator &c. being surplusage. Boyle v. Townes, 153

## RECORD.

1. What must be shewn by the record in suit against a curator. See Curator No. 1, and

Wilson's curator v. Shelton's adm'r, 342

2. When rejected plea is no part of the record. See Pleading No. 15, and

White v. Toncray, 347

3. What record of the finding of indictment is sufficient. See Indictments &c. No. 2, and

Earhart v. Commonwealth, 671

4. Record of proceedings for felony must shew that accused appeared in person. See Felony No. 3, and

Sperry v. Commonwealth, 623

5. The record of a case adjourned by a circuit court to the general court must shew that such adjournment was with the consent of the accused. Commonwealth v. Young, 633

## REFUNDING BOND.

Effect of omission in decree for legatees against executor, to require refunding bond. See Legacy and legatee No. 10, and

Handly v. Snodgrass and others, 434

## REHEARING.

Upon a petition for a rehearing of a cause in the court of appeals, at a term subsequent to that at

which the court has entered a decree, but before that decree has been certified to the court below, on the ground that the decree was founded on a mistake in point of fact; the question was whether it was in the power of the court to allow the rehearing? And upon this question, four judges present were equally divided in opinion.

Towner v. Lane's adm'r. 262

#### RENT.

What attachment for rent not yet due is void. See Landlord and tenant No. 2, 3, and Johnson v. Garland. 149

#### RESIDUARY BEQUEST.

What passes by residuary clause of will. See Will No. 5, 6, and Mlars and others v. Bedgood ex'or. 361

#### RETAILING ARDENT SPIRITS.

Where a defendant is indicted upon the statute of March 7, 1834 (acts of 1833-4, ch. 8.) for retailing ardent spirits without license, the charge that the spirits were to be drunk at the place where sold, shews that the indictment is upon the 17th, not the 3d section of that statute, and such charge cannot be rejected as surplusage, but must be proved.

Commonwealth v. Coe. 620

#### RETAINER.

What is a decree allowing adm'r to retain his simple contract demand against decedent. See Executors and administrators No. 19, and Shearman adm'r v. Christian and others. 571

#### REVERSAL.

Judgment on reversing for refusal of continuance. See Continuance No. 2, and Clements v. Powell's adm'rs. 1

#### REVIVAL.

See Executors and administrators No. 8. Detinue No. 4, and Cheatham adm'r v. Friend's adm'r. 580  
Greenlee's adm'r v. Bailey. 526

#### REVOLUTIONARY OFFICERS.

##### I. Who entitled to half pay.

1. An officer of the Virginia line on state establishment during the revolution, who became supernumerary after the passing of the act of May 1779, ch. 6, but before the end of the war, and so continued till the end of the war, is entitled to half pay for life under that act, upon the authority of Lilly's case, 1 Leigh 625, which, being directly in point, is to be followed.

Commonwealth v. Marston's adm'r. 36

2. Quere, whether an officer in the state service, who became supernumerary before the act of May 1779, ch. 6, was entitled to the benefit of the provisions thereof? S. C., 36

3. The decision of this court in Lilly's case, 1 Leigh 625, in favour of the claim of supernumerary officers to half pay for life, under the act of May 1779, ch. 6, reviewed, and overruled by three judges against two.

Tatum's ex'or v. Commonwealth. 56

4. But this decision was made in the case of an officer of the Virginia line on continental establishment, who became supernumerary before the passing of the act of May 1779, ch. 6. As to officers in the state service of Virginia, who became supernumerary after the passing of that act, for whose claims to half pay Lilly's case is an authority directly in point, that authority, it seems, is still to be followed, as it was followed in Marston's case, decided a few days before this, and reported ante, p. 36. S. C., 56

##### II. Who entitled to commutation.

5. It seems, that officers in the state service, who continued in actual service till the end of the war, were entitled to demand commutation of five years full pay, with interest from the end of the war, in lieu of half pay for life, according to the practical construction of the acts of assembly relating to the subject; but officers who became supernumerary before the end of the war, could only claim half pay for life, not the commutation.

Commonwealth v. Marston's adm'r. 36

##### III. Where claims for half pay may be settled.

6. The act of congress of July 1832, authorizing the settlement of claims of officers in the state service of Virginia for half pay, at the treasury of the U. States, is no reason for refusing the settlement of such claims at the treasury of Virginia, or for our

courts declining to adjudicate such claims, and to decree them when found justly due. S. C., 36

#### IV. Money received for use of officer's widow.

7. What is money received by administrator of deceased officer to the use of the widow. See Money had and received, and Walden ex'or &c. v. Winston adm'r &c., 160

#### ROADS.

##### Prosecution against a surveyor.

Though the assignment of tithables to work on a public road has been made, not by the county court itself, but by one of the justices, designated for that purpose by the court, and has not been returned to the court or ratified by it, yet if the tithables so assigned do not refuse to work on the road, the surveyor is indictable for failing to keep the same in repair.

Commonwealth v. Piper. 657

#### SALARY.

Concerning the construction and constitutionality of law creating new circuit, as regards salary of the former judge, see Judiciary, and Commonwealth v. Clopton. 109

#### SALE.

1. When postponement of sale under fl. fa. does not affect lien of the execution. See Fieri facias No. 2, and Fisher v. Vanmeter. 18

2. See Fraudulent alienation No. 1, and Mason v. Bond & co., 181

3. Concerning sale of land by an agent, see Land No. 1, 2, 3, and Yerby v. Grigsby. 387

4. See Vendor and vendee.

#### SATISFACTION.

Bond of one partner is in equity no satisfaction of partnership debt. See Partnership No. 3, and Weaver v. Tapscott. 424

#### SEAL.

1. A scroll affixed to an instrument has the force and obligation of a seal, when it appears by the instrument that the person making the same affixed the scroll by way of seal.

Parks v. Hewlett &c., 511

2. Where it is stated at the foot of an instrument of emancipation, that it was signed, sealed and acknowledged in presence of two attesting witnesses, and the instrument is afterwards duly proved by the witnesses in the county or corporation court, it sufficiently appears that the person making the instrument affixed the scroll by way of seal. S. C., 511

#### SET-OFF.

Where assigned bond is discharged by a set-off against assignor, when assignee's right of action against assignor accrues. See Assignment No. 9, and

Scates v. Wilson & Edmunds. 473

#### SETTLEMENT.

Power of feme covert to dispose of real estate settled to her separate use. See Feme covert No. 2, and

Lee and others v. Bank of U. States. 200

#### SHERIFFS AND SERJEANTS.

##### I. Postponement of sale under fl. fa.

1. What acquiescence of plaintiff in sheriff's postponement of sale under fl. fa. will discharge the sheriff. See Fieri facias No. 3, and Fisher v. Vanmeter. 18

##### II. Liability for deputy's default.

2. Concerning the liability of the sheriff for the act of his deputy in restoring property taken under execution, see Fieri facias No. 4, and S. C., 18

##### III. Motion for money received under execution.

2. Question, upon evidence, whether person filling the office of sheriff, and having an execution in his hands, was not the agent of the creditor, and whether the sureties of the sheriff should not be exonerated, on the ground that the amount of the execution had been received by him in the character of agent.

Chapman v. Chevis. 297

4. Where a sheriff makes return on an execution that he has received the money, and makes default in paying the same to the creditor, it is lawful for the creditor, upon a motion under the statute, 1

- Rev. Code, ch. 134, § 48, to obtain judgment against the sheriff and such of his sureties as are alive, without including the representatives of a surety who is dead. S. C., 297
5. Where an execution is delivered to the sheriff of a county other than that in which the creditor resides, and the creditor employs an attorney at law, \*practising in the sheriff's county, to collect the money, without, however, giving the attorney a written order, and then the attorney makes a demand of the money from the sheriff, such demand, if no objection be made at the time to the authority of the attorney to receive the money, is, notwithstanding the statute, 1 Rev. Code, ch. 134, § 54, a sufficient demand to justify a judgment against the sheriff. S. C., 297
- IV. Action on sheriff's bond.
6. In an action against a sheriff and his sureties, upon the official bond of the sheriff, the recovery can only be of such damages as the relator may have sustained by reason of the breach of the condition of the bond.
- Perkins and others v. Giles governor, 397
7. The damages which a creditor sustains by the sheriff's suffering a debtor in execution to escape, are not necessarily equal to the amount of the debt. S. C., 397
- V. When deputy sheriff is incompetent witness.
8. Incompetency of deputy sheriff who took indemnifying bond, to testify on behalf of the obligors in action on the bond. See Indemnifying bond, and Wilson and others v. Alexander sheriff, 459
- SLAVES, FREE NEGROES AND MULATTOES.
1. Whether, as between parent and child, a gift or a loan of slave is to be inferred from mere possession by the child. See Parent and child, and Cross v. Cross's adm'r and others, 245
2. What possession of slave by loanee gives no title against lender. See Loan No. 2, and S. C., 245
3. By the act of 1758 for preventing fraudulent gifts of slaves, though a parol gift of slaves may be given in evidence to shew the character of the possession held by the donee, yet the gift itself is void. S. C., 245
4. See Emancipation No. 2, 3. Freedom No. 2, 3, and
- Parks v. Hewlett &c., 511
- Erskine v. Henry & wife & others, 188
- SPECIALTY.
1. Concerning effect of a scroll by way of seal, see Seal, and
- Parks v. Hewlett &c., 511
2. Bond of one partner does not in equity extinguish partnership debt. See Partnership No. 3, and Weaver v. Tapscott, 424
- SPIRITS.
- See Retailing ardent spirits.
- STABBING.
- An indictment charging that prisoner, "at the county and within the jurisdiction of the court, feloniously and maliciously did stab one P. T. with intention to maim &c. and kill him," will not be quashed, upon objection that it does not allege any assault, striking or wounding, nor that P. T. was within the county or jurisdiction, nor that the intent was felonious or malicious.
- Commonwealth v. Woodson, 609
- STALE DEMAND.
- See Lapse of time No. 1, 2, and
- Atkinson v. Robinson, 393
- STATUTE OF FRAUDS.
- See Fraudulent alienation No. 1. Loan No. 2, 3, 4, 5, and
- Mason v. Bond & co., 181
- Lightfoot v. Strother, 451
- STATUTE OF LIMITATIONS.
- See Limitation.
- STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.
- I. Glebe lands.
1. Ch. 32 b, p. 79 of 1 R. C. concerning glebe lands, construed.
- Cheatham adm'r v. Burfoot, 580
- II. Courts.
2. Sess. acts of 1822-3, ch. 19, p. 19, giving additional salary to judge of general court assigned to fourth judicial circuit, cited.
- Commonwealth v. Clopton, 109
3. Sess. acts of 1830-31, ch. 7, Suppl. to R. C. ch. 106 p. 134, for reorganizing the general court, cited. S. C., 110
4. Sess. acts of 1830-31, ch. 8, Suppl. to R. C. ch. 107, p. 136, fixing salaries of judges of general court and circuit courts, cited. S. C., 110
- 723 5. Sess. acts of 1830-31, ch. 11, Suppl. to \*R. C. ch. 109, p. 136, to establish circuit superior courts of law and chancery, cited. S. C., 110
6. Same chapter, § 15, Suppl. to R. C. p. 140, respecting commissions of the judges, cited. S. C., 110
7. Same chapter, § 5, 27, Suppl. to R. C. p. 138, 144, prescribing the times of holding the courts of the seventh circuit, and allowing an additional salary to the judge of Henrico circuit court, cited. S. C., 110
8. Sess. acts of 1836-7, ch. 61, p. 38, severing the county of Henrico and city of Richmond from the seventh circuit, and forming them into the twenty-first circuit, construed. S. C., 109
- III. Grand Juries.
9. Ch. 75, § 1, p. 264 of 1 R. C. declaring the qualifications of grand jurors, construed.
- Moore v. Commonwealth, 639
- Moran v. Commonwealth, 651
10. Sess. acts of 1835-6, ch. 61, p. 42, restricting the disqualification of mill owners to serve as grand jurors, construed.
- Moran v. Commonwealth, 651
11. Statute of 1748, ch. 11, § 5 Hen. stat. at large, p. 523, disqualifying owners or occupiers of mills to serve as grand jurors, cited. S. C., 654
12. Statute of 1748, ch. 26, § 6 Hen. stat. at large, p. 55, imposing penalties on mill owners for certain offences, cited. S. C., 654
- IV. Sheriffs.
13. Ch. 78, § 18, p. 279 of 1 R. C. concerning action on official bond of sheriff, construed.
- Perkins and others v. Giles governor, 397
- V. Executory Limitations.
14. Ch. 99, § 26, p. 309 of 1 R. C. prescribing new rule of construction of contingent executory limitations, cited.
- Deane et al. v. Hansford & ux., 257
- VI. Frauds and perjuries.
15. Ch. 101, § 1, p. 372 of 1 R. C. requiring contract for sale of land to be in writing and signed by the party to be charged or his authorized agent, construed.
- Yerby v. Grigsby, 387
16. Same chapter, § 2, p. 373, of 1 R. C. declaring in what cases the absolute property in chattels loaned shall be deemed to be with the possession, construed.
- Lightfoot v. Strother, 451
- VII. Probate and administration.
17. Ch. 104, § 12, 32, p. 377, 382 of 1 R. C. declaring what courts may grant probate of wills and administration of intestates' estates, construed.
- Fisher v. Bassett and others, 119
18. Same chapter, § 67, p. 390 of 1 R. C. authorizing commitment of decedent's estate to sheriff or other officers of county or corporation, cited. S. C., 126
- VIII. Ex'ors, adm'rs and curators.
19. Same chapter, § 36, p. 384 of 1 R. C. declaring that ex'ors and adm'rs shall not be chargeable beyond the assets by reason of ill pleading, cited.
- Clements v. Powell's adm'rs, 4
20. Same chapter, § 24, p. 390 of 1 R. C. authorizing appointment of temporary curators to collect and preserve decedents' estates, construed.
- Wilson's curator v. Shelton's adm'r, 343
21. Same chapter, § 42, p. 386 of 1 R. C. declaring what curators of decedents' estates may sue and be sued, cited. S. C., 343
- IX. Marriage certificates.
22. Ch. 106, § 14, p. 396 of 1 R. C. requiring certificates of marriages to be returned to the clerk's office and recorded, and making them evidence, construed.
- Moore v. Commonwealth, 639
- X. Slaves.
23. Ch. 111, § 30, p. 428 of 1 R. C. giving to owner of deported slave an action on the case to recover double the value of the slave, cited.
- Perkins and others v. Giles governor, 399
24. Same chapter, § 51, p. 432 of 1 R. C. declaring what gifts of slaves shall be void, cited.
- Cross v. Cross's adm'r and others, 351

25. Statute of September 1758, ch. 5, § 1, 7 Hen. stat. at large, p. 237, requiring gifts of slaves to be in writing and recorded, construed. S. C., 245
26. Ch. 111, § 53, 54, p. 433, 434 of 1 R. C. authorizing owners to emancipate slaves by deed or will, but providing that the slaves emancipated shall be subject to execution for previous debts of emancipator, construed. 511
- Parks v. Hewlett &c., 511
- XI. Rents.**
27. Ch. 113, § 9, p. 448 of 1 R. C. giving attachment to landlord for rent to become due, construed. 149
- Johnson v. Garland, 149
- 724 \***XII. Sureties.**
28. Ch. 116, p. 460 of 1 R. C. giving summary remedy to sureties for recovery of money paid for their principals, cited.
- Clements v. Powell's adm'rs, 2
29. Same chapter, § 6, giving sureties the right to require creditor to commence and prosecute action against principal—quære as to construction? 164
- Ashby's adm'x v. Smith's ex'x, 164
- XIII. Attachment for debt to become due.**
30. Ch. 123, § 14, p. 478 of 1 R. C. giving attachment for debt to become due, cited. 164
- Ashby's adm'x v. Smith's ex'x, 164
- XIV. Limitation of actions.**
31. Ch. 128, § 4, p. 488 of 1 R. C. prescribing general limitation of personal actions, construed. 45
- Aylett's ex'or v. Robinson, 45
- Sutton v. Burruss, 381
32. Same chapter, § 12, saving to persons under disability the right to bring actions within certain periods after disability removed, construed. 79
- Hansford &c. v. Elliott &c., 79
33. Same chapter, § 16, directing that the court shall expunge items of open account against decedent which appear to have been due more than five years before his death, construed. 45
- Aylett's ex'or v. Robinson, 45
- XV. Death of one of several plaintiffs.**
34. Ch. 128, § 38, p. 497 of 1 R. C. declaring in what cases, on the death of one of several plaintiffs, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, construed. 308
- Hairston v. Woods, 308
- XVI. Jeofails.**
35. Same chapter, § 103, p. 512 of 1 R. C. declaring what defects shall be cured by verdict, cited.
- Kemp v. Mundell and Chapin, 15
- XVII. Executions and indemnifying bonds.**
36. Ch. 134, § 13, p. 529 of 1 R. C. concerning the lien of f. fa. on goods of debtor, construed. 176
- Pegran v. May, 176
37. Same chapter, § 48, p. 542 of 1 R. C. giving motion against officer and his sureties for failure to pay money levied under execution, construed. 297
- Chapman v. Chevis, 297
38. Same chapter, § 54, p. 544 of 1 R. C. concerning sheriff's liability for money levied under execution, to plaintiff residing in another county, construed. S. C., 297
39. Same chapter, § 25, p. 533 of 1 R. C. authorizing sheriff to take indemnifying bond for seizure or sale of property under execution, cited. 461
- Wilson et al. v. Alexander, 461
40. Same chapter, § 27, exempting officer from liability unless obligors in indemnifying bond become insolvent, cited. S. C., 468
- XVIII. Crimes, prosecutions and punishments.**
41. Ch. 147, § 16, p. 566 of 1 R. C. declaring what shall be deemed a tavern within the meaning of the act to prevent unlawful gaming, construed. 606
- Linkous v. Commonwealth, 606
42. Ch. 154, § 1, p. 578 of 1 R. C. punishing offences of counterfeiting and uttering, cited. 632
- Kirk v. Commonwealth, 632
43. Sess. acts of 1838, ch. 109, p. 85, reducing the minimum of imprisonment for the offences last mentioned, construed. S. C., 632
44. Ch. 169, § 63, p. 615 of 1 R. C. authorizing security for payment of costs to be required from prosecutor, construed. 601
- Commonwealth v. Hill and others, 601
45. Sess. acts of 1832-3, ch. 3, § 3, Suppl. to R. C. ch. 270, § 2, p. 326, imposing a penalty for selling goods, wares and merchandise without license, construed. Commonwealth v. Collins, 666
46. Same chapter, § 1, declaring that it shall not be lawful for merchants &c. to carry on their trade or occupation without having obtained a license, cited. S. C., 667
47. Sess. acts of 1827-8, ch. 3, § 3, Suppl. to R. C. ch. 274, § 2, p. 332, and Sess. acts of 1828-9, ch. 3, § 1, Suppl. to R. C. ch. 275, § 1, p. 333, requiring commissioners of revenue to render lists of merchants &c. suspected of having failed to take out license, and directing proceedings thereupon, cited. S. C., 668
48. Sess. acts of 1831-2, ch. 32, § 6, Suppl. to R. C. p. 247, prescribing punishment of slave, free negro or mulatto for assaulting and beating white person with intent to kill, cited. 613
- Commonwealth v. Fells, 613
49. Sess. acts of 1833-4, ch. 3, § 3, 17, p. 7, 11, imposing penalty for retailing ardent spirits without license, construed. 620
- Commonwealth v. Coe, 620
50. Sess. acts of 1835-6, ch. 66, § 1, p. 44, to punish members or agents of abolition \*or antislavery societies for certain offences, construed. 725
- Commonwealth v. Barrett, 665
51. Same chapter, § 2, to punish the writing, printing or circulation of incendiary books &c. cited. S. C., 666
- XIX. Roads.**
52. Ch. 234, § 8, p. 214 of 2 R. C. and Sess. acts of 1836-7, ch. 118, § 10, p. 106, prescribing the mode of estimating damages for land condemned for the use of turnpike and railroad companies, cited. 815, 331
- James River and Kanawha company v. Turner, 815, 331
53. Ch. 236, § 4, p. 234 of 2 R. C. requiring county courts to appoint surveyors of roads, and prescribing the duty of such surveyors, construed. 657
- Commonwealth v. Piper, 657
- XX. Revolutionary officers.**
54. Statute of May 1779, ch. 6, 10 Hen. stat. at large p. 25, making provision of half pay for officers of the Virginia line in the war of the revolution, construed. 36
- Commonwealth v. Marston's adm'r, 36
- Tatum's ex'or v. Commonwealth, 56
55. Statute of October 1779, ch. 21, § 2, 10 Hen. stat. at large p. 160, ascertaining the land bounty of officers, in the Virginia line, cited. 40
- Commonwealth v. Marston's adm'r, 40
56. Statute of November 1781, ch. 8, 10 Hen. stat. at large, p. 449, for reducing officers on the state establishment, cited. S. C., 40
57. Statute of November 1781, ch. 19, § 10, 10 Hen. stat. at large p. 466, directing a return of state officers to be made to the legislature, cited. 37
- Commonwealth v. Marston's adm'r, 37
- Tatum's ex'or v. Commonwealth, 65
58. Statute of May 1782, ch. 47, § 9, 11 Hen. stat. at large p. 84, declaring that officers who have served for three successive years shall be entitled to land bounty, cited. 40
- Commonwealth v. Marston's adm'r, 40
59. Statute of 1790, ch. 21, 13 Hen. stat. at large, p. 131, giving compensation of half pay to certain officers of the state line, cited. S. C., 39
- SUPERNUMERARIES.**
- See Revolutionary officers.
- SUPERSEDEAS.**
- Where there are two plaintiffs in a supersedeas, if one of them die, the cause will abate as to him, and proceed in the name of the surviving plaintiff. 308
- Hairston v. Woods, 308
- SURETY.**
- See Principal and surety.
- SURPLUSAGE.**
1. What description of the plaintiff in declaration may be rejected as surplusage. See Receiver, and Boyle v. Townes, 158
2. What averment in indictment for retailing ardent spirits cannot be rejected as surplusage. See Retailing ardent spirits, and Commonwealth v. Coe, 620
- SURVEYOR OF ROAD.**
- When liable to prosecution. See Roads, and Commonwealth v. Piper, 576
- TREES.**
1. By the sale of timber trees standing, to be chosen by the vendee, an interest passes which the vendee may assign before election made. 548
- M'Coy v. Herbert, 548
2. The assignee having chosen and marked the trees, may maintain trover against the vendor for felling and converting them, although the vendor had no notice of the election. S. C., 548



## TROVER.

- See Trees No. 2, and  
M'Coy v. Herbert, 548

## TRUSTS AND TRUSTEES.

Effect of the statute of limitations in barring a constructive trust. See Legacy and legatee No. 6, and

- Parsons v. M'Cracken and wife, 496

## USURY.

What contract is not usurious.

B. represents to A. that he had been desirous of purchasing C.'s land, but had not done so, from inability to advance funds as speedily as C. required, and that he wishes A. to buy the land and let him have it; whereupon 726 \*it is agreed that A. will buy the land as cheap as he can, and that B. will pay him 900 dollars for it. A. makes the purchase at the price of 750 dollars, and the land is conveyed to B. who gives his notes to A. for the 900 dollars. HELD, the transaction between A. and B. is free from objection on the ground of usury.

- Long's ex'or &c. v. Israel and others, 556

## UTTERING.

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- Hansford &c. v. Elliott &c., 79

2. Words of survivorship, in such cases, are always to be referred to the period of the testator's death, if no special intent appears to the contrary.

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III. What executory limitation is too remote.

4. Testator, by his will, lends slaves and their increase to his grandson T. D. and his heirs of his body, and if he shall die without a lawful heir, then he bequeathed them to the children of his daughter E. L.—HELD, this is an executory limitation after an indefinite failure of issue of the grandson, and therefore void; and the slaves vest in the grandson in absolute property.

- Deane &c. v. Hansford &c., 353

IV. What passes by residuary clause.

5. A testatrix, by the first clause in her will, desires that her negro man Kit shall have his freedom, and receive from her estate \$50. By the second, she gives to D. A. her negro Harry, and directs that D. A. receive from her estate \$100 for the purpose of supporting Harry during his life. By the third, she gives to S. C. \$20. By the fourth, she gives to D. A. A. one buffet and one large trunk; and to K. D. one trunk and one patched bed cover. The fifth and last clause is as follows: "I give to my negro Kit above named a blue cotton bed cover, and to the above named negro Harry one yarn bed cover. I do hereby appoint James Bedgood my executor to this my last will and testament, and that he shall receive the balance of my estate, if any." The testatrix, besides some furniture worth about \$200, dies possessed of \$278 in money.—HELD, that Bedgood is entitled to this money, as well as to any other balance of the estate.

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REPORTS OF CASES  
ARGUED AND DETERMINED  
IN THE  
COURT OF APPEALS,  
AND IN THE  
GENERAL COURT,  
OF  
VIRGINIA.

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By BENJAMIN WATKINS LEIGH.

**VOLUME X.**

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Entered according to the act of congress, this nineteenth day of October  
eighteen hundred and forty-one, for the commonwealth of Virginia, in  
the clerk's office of the district court of the eastern district of Virginia.

**JUDGES**  
OF THE  
**COURT OF APPEALS**

DURING THE TIME OF THESE REPORTS.

---

HENRY SAINT GEORGE TUCKER, PRESIDENT.  
FRANCIS T. BROOKE. WILLIAM H. CABELL.  
RICHARD E. PARKER. ROBERT STANARD.\*

---

*Attorney General* : SIDNEY S. BAXTER.

---

\*Appointed January 19, 1830, *vice* William Brockenbrough deceased.

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**JUDGES**  
OF THE  
**GENERAL COURT**

DURING THE TIME OF THESE REPORTS.

---

DANIEL SMITH.	EDWIN S. DUNCAN.
FLEMING SAUNDERS.	JOSEPH L. FRY.
LEWIS SUMMERS.	JOHN B. CLOPTON.
ABEL P. UPSHUR.	RICHARD H. BAKER.
RICHARD H. FIELD.	JOHN B. CHRISTIAN.
JOHN T. LOMAX.	JOHN J. ALLEN.
JOHN SCOTT.	JOHN Y. MASON.
WILLIAM LEIGH.	ISAAC R. DOUGLASS.
LUCAS P. THOMPSON.	PHILIP N. NICHOLAS.
BENJAMIN ESTILL.	DANIEL A. WILSON.*
JAMES E. BROWN.	

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\*Appointed January 23, 1840, *vice* William Daniel deceased.

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## CASES

ARGUED AND DETERMINED IN THE

# Supreme Court of Appeals of Virginia.

**Beverley v. Ellis & Allan and Others.**

January, 1839, Richmond.

(Absent PARKER, J.)

### **Deed of Trust—Vendor's Lien for Purchase Money.\*—**

Though the title under a deed of trust will be subordinate to that under a prior deed of bargain and sale from the same party, for the same land, duly recorded, yet if it appear that anterior to the deed of trust there was a resale by the bargainee to the bargainor, of which there is proper evidence in writing, equity will hold that the land passes by the deed of trust, subject only to the lien for the purchase money due upon the resale, and thus the rights of the parties will depend upon whether such purchase money has been paid or not.

This is the sequel of the case between the same parties, which was before this court in March 1822; reported 1 Rand. 102.

The controversy arose upon a bill filed in the late superior court of chancery for the Richmond district, by Peter R. Beverley against Ellis & Allan, Charles Copland,

2 \*and Carter Beverley; setting forth, that in January 1808, Carter Beverley bargained and sold to the complainant a tract of land in Culpeper county, containing about 500 acres, and, on the 18th day of that month, acknowledged a deed of conveyance thereof to the said complainant, in the county court of Culpeper; whereupon the deed was ordered by the court to be recorded, and was left with the clerk for that purpose; but, before it had been actually spread upon the record, it was lost or destroyed by the negligence of the clerk: that Carter Beverley afterwards conveyed the same land to a certain William C. Williams and the said Charles Copland, upon trust, for the purpose of securing to Ellis & Allan the payment of certain debts due to them; under which deed the land was sold by the trustee Copland, and Ellis & Allan had become the purchasers thereof. The bill prayed that Ellis & Allan (who, it appeared, had received a conveyance from the trustee) might be decreed to convey the land to the complainant; and general relief.

The allegations of the bill being fully sustained by the evidence, the question before the court of chancery was, whether, as against Ellis & Allan, who had no actual notice of the complainant's title at the time they took their deed of trust, the deed from Carter Beverley to the complainant was to be considered as duly recorded within the meaning of the statute regulating conveyances? The

chancellor, holding that it was not, dismissed the complainant's bill; and from that decree the first appeal was taken. This court reversed the decree of the court of chancery, being of opinion that, upon the circumstances of the case, the complainant must be regarded as having fully complied with the requirements of the act; but it remanded the cause, in order that Ellis & Allan, the appellees, might have an opportunity to establish, if they could, another ground of defence

alleged by them in the court below; 3 namely, \*that the contract between the complainant and Carter Beverley, for the purchase and sale of the land in controversy, had been rescinded by mutual agreement of those parties, before the execution of the deed of trust conveying the land for the benefit of Ellis & Allan.

After the cause got back to the court of chancery, several depositions were taken and other evidence adduced by the parties, in reference to this new branch of the controversy. The evidence established, clearly enough, that in February 1810, prior to the execution of the deed of trust by Carter Beverley, it was agreed between him and Peter R. Beverley, that Carter should take back the land he had sold to Peter, at the price which Peter had paid him for it; and in a general account settled between them on the 8th day of February 1810, and signed and sealed by them both, the first item of debit against Carter was the amount of the purchase money of this land. Upon the result of that settlement, Carter appeared to be very largely indebted to Peter; and he thereupon executed his two individual bonds for the amount of the balance due, payable twelve months after date. The land was never reconveyed by Peter R. Beverley to Carter; nor did it appear that any written memorandum of the resale was ever made, other than the above mentioned item in the account settled on the 8th of February 1810. Subsequent to that date, there were numerous and extensive transactions between the two Beverleys, embracing other large sales and purchases of property, by each to and from the other; and in the course of these dealings, the purchase money due from Carter to Peter for the land in controversy might have been liquidated and satisfied; still, the evidence left it doubtful how that matter really was. The chancellor, however, being of opinion, upon the whole evidence in the case, that the purchase money in question must have been accounted for by Carter Beverley to Peter,

after the settlement on the 8th of February 1810,—\*again dismissed the complainant's bill; and from that decree

\*See monographic note on "Deeds of Trust."



of dismissal, the complainant Peter R. Beverley again appealed to this court.

Stanard for the appellant, and Johnson for the appellees, argued the cause upon the following points made by the former:

1st. That there is no evidence of a binding contract for the resale of the land, which Carter Beverley, or his alienees, can insist on, to take from the plaintiff the title vested in him by the lost or purloined deed.

2dly. That even if there were such a contract, it has not been performed by Carter Beverley, so as to entitle him, or his alienees, to a conveyance; that the purchase money has not been paid, and Peter Beverley, having the legal title, ought not to be deprived of that title until the purchase money shall have been fully paid.

The decree entered in the court of appeals, was in the following terms:

"The court is of opinion, that, admitting the resale of the land in controversy by Peter R. Beverley to Carter Beverley in February 1810, anterior to the date of the deed of trust to the appellees, it remained in the hands of the said Carter subject to the lien of the said Peter for the purchase money, and so passed to the appellees. That the rights of the parties thus depend upon the question whether the purchase money ever has been paid and satisfied to the said Peter; a fact which ought to have been ascertained, either by an account or otherwise, before definitively pronouncing upon those rights. That the dismissal of the bill was therefore premature and erroneous, the evidence in the cause leaving it very doubtful, at least, whether the purchase money has been in any way paid or satisfied. That the cause should therefore be sent back for further proceedings and enquiry; and if it should appear

5 that by any arrangements \*subsequent to the 8th of February 1810, the purchase money was paid and satisfied, or liquidated in any manner, the bill of the appellant should be dismissed, even though at any after time the balance should again have shifted in his favour. But if it should appear that the purchase money, or any part of it, yet remains due and unpaid, then a decree should be rendered subjecting the premises in the hands of the appellees to the payment thereof, that being the true relief to which, upon the whole case, the appellant would appear to be entitled. Therefore,"

Decree reversed with costs, and cause remanded, to be finally proceeded in pursuant to the foregoing opinion and decree.

### Collins v. Lofftus & Co.

January, 1839, Richmond.

31 Am. Dec. 719.

(Absent PARKER, J.)

**Chancery Practice—Parties—Cestui Que Trust.**—In general, a cestui que trust is not bound by a de-

\***Chancery Practice—Parties—Cestui Que Trust.**—See foot-notes to Com. v. Ricks, 1 Gratt. 416; McDaniel v. Baskervill, 13 Gratt. 228. The principal case is cited in Richardson v. Davis, 21 Gratt. 710; Simon v. Ellison, 90 Va. 158, 17 S. E. Rep. 886; and distinguished in Fitzgibbon v. Barry, 78 Va. 763, 764.

cree rendered against his trustees, in a chancery suit to which the cestui que trust was no party.

**Parol Gift—Evidence.**—The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent.

**Loan—Slaves—Evidence.**—What evidence is insufficient to prove a loan of slaves.

**Same—Same—Resumption of Possession.**—What is a sufficient resumption of possession of slaves loaned.

**Same—Statute of Frauds—Resumption of Possession—Recordation.**—According to the settled construction of the clause in the statute of frauds, concerning loans, a resumption of possession by the lender, or the recording a deed or will granting away the property to another within the five years, avoids the operation of the statute and puts an end to the loan.

Moses Hughes senior, late of Nelson county, died in the year 1824, having first  
6 made and published his last \*will and testament, in which (inter alia) he devised and bequeathed as follows:

"I give, devise and bequeath to my two sons Moses and James Hughes, in trust for the use and support of my daughter Polly Collins (the wife of Samuel Collins) and her children, during the natural life of my said daughter Polly, but not to be subject to the debts or the control of the said Samuel Collins, the following property, to wit, the tract of land on which the said Samuel Collins now lives, containing 60 acres, be the same more or less, together with all my interest in the lands allotted to the widow of William Fitzpatrick deceased as dower land, my interest being six eighths of said land; also the following negro slaves, to wit, Charles, Dick, Sam, Dicey and her six children, viz. Albert, Newman, Christopher, Clary, Tabby and Rachel,—Dinah and her two children Joseph and Edy, together with the future increase of said female slaves; also my stock of horses, cattle, sheep, hogs, plantation utensils, household and kitchen furniture, and crop of every description, that shall be upon the said plantation so devised as aforesaid in trust, at my death, except so much of the crop as shall be sufficient to pay the one half of my debts that I may be owing at my death. After the death of my said daughter Polly it is my will and desire that all the property left for the use and benefit of my said daughter and children, shall be equally divided among her children and their legal representatives, share and share alike. It is my will and desire that my son in law Samuel Collins have a support out of the property left in trust

**Same—Same—Principal Case Distinguished—Interest Defeasible by Act of Defendant.**—Where the plaintiff's interest might be barred or defeated at any time by an act of the defendant, his interest is not such as will sustain a bill in equity. Fitzgibbon v. Barry, 78 Va. 756, citing Dursley v. Fitzhardinge, 6 Ves. Jr. 251; 1 Dan. Ch. Pl. & Pr. 317; Story's Eq. Pl. § 301; and distinguishing Collins v. Lofftus, 10 Leigh 6; Richardson v. Davis, 21 Gratt. 706; Hartman's Appeal, 90 Pa. St. 203; Matter of Sheppard's Trusts, 4 De G. F. & J. 423.

†See monographic note on "Gifts" appended to Barker v. Barker, 2 Gratt. 344.

‡See monographic note on "Frauds, Statute of" appended to Beale v. Digges, 6 Gratt. 563.

as aforesaid, during his natural life." Moses Hughes and James Hughes were appointed the executors of the will; which was proved and recorded in Nelson county court in June 1824. Both the executors qualified.

Samuel Collins, the son in law of the testator, between the years 1819 and 1824, contracted a debt with the firm \*of Lofftus & Co. of 423 dollars and 4 cents; for which Lofftus & Co. brought an action against him in Nelson county court, and in May 1825 recovered a judgment for the amount of the debt, with interest and costs. Being arrested under a ca. sa. sued out by the plaintiffs upon the judgment, Collins, on the 26th of August 1825, subscribed and delivered in a schedule of his property (to wit, one rifle gun and one table) and took the oath of an insolvent debtor.

In 1826, Lofftus & Co. filed their bill in the superior court of chancery holden at Lynchburg, against Samuel Collins and Moses and James Hughes, in their own right and as executors of Moses Hughes deceased, impeaching a conveyance that Collins had made of certain property to Moses and James Hughes on the 13th of August 1824, as fraudulent and void; and charging also, that the slaves bequeathed as aforesaid by Moses Hughes the testator, in trust for Mrs. Collins and her children, were liable to the debts of Samuel Collins, because those slaves had been in the quiet and uninterrupted possession of the said Samuel Collins for more than seven years before the testator's death. Neither Mrs. Collins nor her children were made parties to this suit. In May 1830, a decree was rendered therein, by which the conveyance aforesaid, and so much of the testator's will as bequeathed the slaves Sam, Charles, and Dicey and her increase, in trust for Mrs. Collins and her children, were declared fraudulent and void as to the plaintiffs, and accordingly set aside, and the defendants ordered to deliver the property comprised in the conveyance, and the slaves Sam, Charles, and Dicey and her increase, to the marshal of the court, who was directed to advertise and sell the same, or so much thereof as should be sufficient to defray the expenses of sale, and satisfy the principal money, interest and costs due to the plaintiffs. The marshal was further required to deposit the proceeds of sale in bank to the credit of the cause, and \*report his proceedings to the court in order to a final decree.

Whereupon, in July 1830, Mrs. Collins, by John Hughes her next friend, exhibited her bill in the same superior court of chancery against Lofftus & Co. Samuel Collins, and Moses and James Hughes, executors of Moses Hughes deceased, setting forth the above mentioned provisions of her father's will, insisting on her rights under the same, and that, as the controversy respecting the slaves thereby bequeathed had been carried on in a chancery suit against her trustees, to which she was not a party, she was consequently not bound by the proceedings and decree in that suit; in which she further alleged that her interest had not been properly defended by the trustees. She charged, that Samuel Collins her husband never had any title what-

ever to the said slaves, nor any control or possession of them during her father's lifetime except as manager for him of the plantation on which the complainant, with her said husband and their children, resided. Wherefore she prayed an injunction to restrain Lofftus & Co. from proceeding to execute the decree aforesaid, so far as the same directed a sale of the slaves bequeathed for her benefit; and general relief.

The injunction, having been refused by the chancellor, was awarded by a judge of the court of appeals.

The answer of Lofftus & Co. alleged that the slaves in question had remained in the quiet and undisturbed possession of Samuel Collins for more than five years previous to his dealings with these respondents; and insisted that they were properly subject to the debts of the said Collins.

The defendants Samuel Collins, Moses Hughes and James Hughes answered, admitting in substance the allegations of the plaintiff's bill.

A general replication having been put in by the plaintiff to the answer of Lofftus & Co. the depositions of \*various witnesses were taken and filed on behalf of those parties respectively, with a view to shew the duration and character of the possession which Samuel Collins had held in the slaves in controversy, during the testator's lifetime. The effect of the evidence, according to the view taken of it by the court of appeals, is stated in the opinion delivered by the president.

In October 1830, upon the motion of the defendants Lofftus & Co. the court of chancery ordered that the injunction be discharged, as having been improvidently awarded. From which decree this court, on the application of the plaintiff, allowed her an appeal.

The cause was argued here, by Stanard for the appellant, and Johnson for the appellees, upon two questions of law: 1. What is the effect of the first decree against the trustees? does it bind the rights of the cestuis que trust who were no parties to the suit? 2. Whether, if chattels lent remain more than five years in the possession of the loanee, and then the loan be regularly declared according to the statute 1 Rev. Code, ch. 101, § 2, p. 373, a creditor of the loanee, whose lien did not attach by judgment till after the loan was so declared, can subject the property to the satisfaction of his demand? And upon the evidence in the cause, a third question was discussed, namely, Whether, in point of fact, Samuel Collins ever had possession of the slaves in controversy, for five years without interruption?

TUCKER, P. I am far from thinking that the injunction in this case was improvidently awarded by a judge of this court. The property of the feme covert settled upon her by her father's will had been decreed to be sold to satisfy her husband's debts, in a cause to which she was not a party, her trustees alone being the defendants. In the estimate of a court of equity, they were unsubstantial shadows. That court could not pronounce \*upon the rights of the parties

really interested, without having them before it. At law, indeed, the trustee is the proper party defendant; but in equity no decree can be rendered affecting the rights of the cestui que trust, unless he is a party; for it is a fundamental principle of the court that all parties, however remotely concerned in interest, must be before it, or no decree can be made to bind them. *Mittf. Plead.* 144, 3 *Munf.* 376. And 2 *Madd. Ch. Pract.* 142. This is particularly the case as to cestuis que trust, since the trustee is a mere nominal party, and the real beneficial interest is in the cestuis que trust. 2 *Johns. Ch. Rep.* 238; 1 *Ball & Beatty* 181, 184. The exceptions to the rule it is unnecessary to state, as they would have no application here. I think the injunction was properly awarded, and that the only question in the cause is upon the merits.

As to the merits, I am satisfied that the weight of the evidence is decidedly against the allegation that any of the slaves were given to *mrs. Collins*. I have in other cases declared that I deemed it necessary, in order to sustain an alleged parol gift by a father to his daughter on her marriage, that the evidence of such gift should be clear and cogent; and in that opinion I understood my brethren to concur. *Brown v. Handley*, 7 *Leigh* 119; *Mahon v. Johnson*, 7 *Leigh* 317. In this case, to say the least, the testimony is very meagre. I think it altogether insufficient.

Then, as to the alleged loan: It will be unnecessary to say any thing upon the legal question spoken to in the cause. It has been long settled in this court, that according to the true construction of the loan act, a resumption of possession by the lender, or recording a deed or will granting away the property to another, within the five years, avoids the operation of the act and puts an end to the loan. *Beasley v. Owen*, 3 *Hen. & Munf.* 449. The evidence of a loan in this case is itself equivocal.

*Hughes*, having married his daughter  
11 \*to *Collins*, puts him upon one of his plantations to manage it for him, and sends with him various slaves, some to work in the field, and *Dacey* as a house servant. She was therefore still as much in his service as any of the rest, and the evidence clearly proves that they were not loaned. On the whole of them, including *Dacey*, he always paid taxes, and listed them with the commissioner of the revenue in his own name. What more can the owner of slaves do, who places them in the hands of a manager to do service on his estate? How can a creditor complain of being deceived, who advances goods to my manager, not for my use, upon the credit of property held by him upon my own estate, worked by my own slaves, which slaves are listed in my name on the commissioner's books, and the taxes on them paid by me? If he uses ordinary diligence, or if he does not wink hard that he may not see, he must learn that he should not give the credit. In this case, if he had gone to the farm, he would have found it was *Hughes's*: if he had applied to *Collins*, he would have learned that the property was not his; and if (as was

most natural) he had gone to the commissioner's books, which furnish a record of the property of individuals, he would have there seen that *Hughes* claimed to be the owner of the slaves, and paid taxes on them as such. In no other way can the owner of property under the management of another, better manifest his own rights, and negative a pretension on the part of creditors to charge his estate with the debts of that other. Therefore, even if there was no further proof, I should be of opinion to reverse the decree. But it is proved that in four years after the marriage, *Hughes* himself went and lived on the place which *Collins* lived on, and continued to live there till his death. It was managed for him by *Collins* and he received the crops, allowing *Collins* a part of them for his services. He lived in the house where *Dacey* was house servant, and even if she had  
12 \*not before that time been in his possession, yet from that time she must be construed to have been so. The possession must be construed to be with the property, unless the contrary be actually proved; and that has not been done here, as *Dacey* was a menial in a household where a father and his daughter and son in law appear to have resided together, all having the services of the slave; the father having (as one of the witnesses testifies) "gone to live with them that the daughter might be better provided for."

Upon the whole, I am of opinion that this is one of the numerous instances afforded by our courts, of an attempt to make one man pay another's debts.

I am of opinion to reverse the decree, reinstate the injunction, and send the cause back for further proceedings.

The other judges concurring, decree reversed, injunction reinstated, and cause remanded for further proceedings.

### 13 \**Clarke and Others v. Dunnivant.*

January, 1830. Richmond.

#### Will—Statutory Requisitions—Court of Probate.\*—

Though the attesting witnesses to a will have forgotten whether material requisitions of the statute were observed in the execution and attestation, or not, compliance with those requisitions may nevertheless be properly inferred by the court of probate, from the circumstances of the case.

Same—Proof by Attesting Witnesses—Case at Bar.—A will more than eight years old, attested by three

\**Wills*—Number of Witnesses to Prove.—The principal case is cited in *Cheatham v. Hatcher*, 30 *Gratt.* 58, 60.

Same—Signing—Acknowledgment of Signature.—The principal case is cited in *Sturdivant v. Birchett*, 10 *Gratt.* 103.

Same—Subscribing Witnesses Need Not See Signature of Testator at Time of Acknowledgment.—In *Nock v. Nock*, 10 *Gratt.* 115, the court said: "It was certainly never intended, by the framers of our new statute, to require the subscribing witnesses to prove that they saw the signature of the testator at the time of the acknowledgment of the will. That would be to make the validity of wills depend upon the memory and good faith of a witness, and not upon reasonable proof that all the requirements of the statute had

witnesses, being offered for probate, one of the witnesses proves, that being "casually present at the testator's house on a particular occasion, which he minutely describes, the will was produced, read to the testator (who, it appeared, could neither read nor write), signed for him by the witness, and acknowledged by him as his will in the witness's presence, who thereupon subscribed as attesting witness in the presence of the testator. The other witnesses prove merely their own signatures, and that they would not have subscribed unless they had been requested by the testator and had thought that all things were regular; having forgotten all the circumstances of their attestation, except that they were present at the testator's house on the occasion described by the first witness: and one of them states, that if requested by the testator to attest his will, he would have done so, whether the testator were present or not at the time he subscribed his name; while the other admits, that he does not know in what manner the law requires a will to be witnessed. HELD, the proof of due execution of the will is sufficient to admit it to the record.

In the county court of Nottoway, at April term 1837, a writing purporting to be the last will and testament of William Dunnivant then lately deceased, was produced by Pemberton Dunnivant one of the executors therein named, and offered for probate. It was in the following terms:

"In the name of God, amen. I, William Dunnivant of Nottoway and state of Virginia, being in perfect health of body and of perfect mind and memory (thanks be given to God!) calling unto mind the morality of my body, and knowing that it is appointed for all men once to die, do make and ordain this my last will and testament.

14 \*First, my just debts to be paid; and then I lend unto my beloved wife Sarah the following property during her life, that is, the whole of my estate to be kept together until the death of my wife; then, at her death, I will John M. Butcher one dollar, Pleasant Clarke one dollar, John W. Dunnivant one dollar, Mary Crowder one dollar, William G. Butcher one dollar, Elizabeth Butcher one dollar, John Butcher junior one dollar, Susanna Butcher one dollar, Sarah Butcher one dollar, Edgar Dunnivant one hundred dollars and be educated, and Pemberton Dunnivant to receive the balance of my estate, to wit. my tract of land, Beck, Daniel, Eliza, Joe, Billy, Nancy, Moses, James, and all their increase, and stock of all kinds, household and kitchen furniture, plantation utensils. I appoint Shadrack R. Sudbury and Pemberton Dunnivant executors to my estate. In wit-

ness whereof I have hereunto put my hand and seal this fifteenth day of December one thousand eight hundred and twenty eight.

his  
William X Dunnivant, [Seal.]  
mark  
Signed, sealed and delivered  
in the presence of  
P. O. Lipscomb, Allen Robertson,  
John Roberts."

The motion for probate was opposed by Pleasant Clarke and Susanna his wife and William G. Butcher. The court, after hearing testimony in support and defence of the motion, was of opinion that the will was proved according to law by the oaths of the subscribing witnesses, and ordered that the same be recorded. Clarke and wife and Butcher appealed to the circuit court. The evidence before that court, as spread upon the record thereof, was the following:

1. It was admitted by the parties that on the 15th of December 1828, the testator's wife was living; that \*Pemberton Dunnivant was his only surviving son; that John W. Dunnivant, another son, died in the year 1821, leaving only one child, named Edgar; that Susan, a daughter of the testator, was at that time married to Pleasant Clarke named in the will, and was still living; and that another daughter of the testator, Sally the wife of John M. Butcher, was dead in December 1828, having left six children, who are named in the will.

2. P. O. Lipscomb deposed that the first signature as attesting witness to the will in contest is his, in his own handwriting, and that he recollects to have heard the will read to the testator, and thinks he would not otherwise have subscribed it. The testator remarked, that he was not ashamed or afraid for any body to hear his will read. The contents of the paper offered for proof correspond, so far as relates to the Butchers, with the paper he heard read. He signed his name as witness at the time he heard the will read, but cannot tell, within two or three years, when that was. He recollects that the place at which he subscribed his name was at the west end of the house, and that he wrote upon his knee, and within a few paces of the testator, as he thinks. The will was read to the testator in the presence of the witness, and at the same interview; he thinks it was read by Shadrack R. Sudbury. He is positive that the testator acknowledged the will in his presence, from the fact of his having signed it, as he would not otherwise have done so; he would not, though requested, have witnessed such a paper, unless the person executing the same were present and acknowledged it, and all things were regular. Witness is inclined to think, but is not positive, that he himself wrote the signature of the testator's name, and the words "fifteenth" in the body of the will. He does not distinctly recollect any of the provisions of the will he heard read, except those relating to the Butchers, although there were other provisions in it; he did not read the will himself; nor does \*he recollect the position in which he stood when it was read, or whether he was looking over it

in fact been complied with.' *Jesse v. Parker*, 6 Gratt. 64; *Clarke v. Dunnivant*, 10 Leigh 13."

Same—Attestation—Presence of Testator.—The principal case is cited in foot-note to *Sturdivant v. Birchett*, 10 Gratt. 67.

Court of Probate—Province of.—A court of probate occupies the place of a jury as to questions of fact, and its province is, like that of a jury, to draw all just inferences from the evidence. *Nock v. Nock*, 10 Gratt. 112, citing *Smith v. Jones*, 6 Rand. 33; *Boyd v. Cook*, 8 Leigh 32; *Dudleys v. Dudleys*, 8 Leigh 426; *Clarke v. Dunnivant*, 10 Leigh 13. See the principal case cited in *Webb v. Dye*, 18 W. Va. 386.

to see that it was correctly read, or was so placed as to be able to detect any misreading. He is unable to say whether the testator could read or write; he did not see him read the will; nor does he recollect hearing him acknowledge the writing to be his will, though he has no doubt that he did so, from the fact that the witness subscribed the same. He never heard any paper read, purporting to be the will of the testator, on any other occasion; and there is no such paper, except the will now in contest, which has his signature as a witness. The reading of the will was after the testator's declaration that he was not ashamed or afraid for any one to hear his will read. It was read in a tone of voice sufficiently loud to be heard, at the distance the testator was from the reader, by any one whose hearing was not seriously impaired. Witness was well acquainted with John W. Dunnivant, the deceased son of the testator. He does not recollect whether his name was mentioned in the will which he heard read. Witness was casually present when the will was read and signed, in consequence of his wagon being engaged in removing the property of Sudbury up the country, to Buckingham. He does not know why the will was executed and witnessed outside of the house, unless it was because they were there weighing fodder for the wagon. He recollects that other persons were present on the occasion, but does not recollect whether either of the other subscribing witnesses was of the number or not. He does not recollect who produced the will, nor who took possession of it after it was executed. The testator, at the time, was of sound and disposing mind and memory, and never was otherwise, so far as the witness knew.

3. Allen Robertson deposed, that the signature of his name to the will in contest is his own; that he has no recollection of having subscribed the same, but thinks  
17 \*he should never have subscribed it, unless he had been requested by the testator to do so, and other things in relation thereto had been regular. If the testator had acknowledged a paper or will, and requested him to witness it, he would have done so, whether the testator were present or not at the time of his signing as a witness. He lived some six or seven miles from the testator, and knew him well, but does not know, and never heard, that he was deaf. He recollects Sudbury's removal, and that he himself was present at the testator's house when fodder was weighed for the wagon which was to carry Sudbury's property. The testator was fully competent to make a will on that day, and witness never knew him to be otherwise, at any time.

4. John Roberts deposed, that the signature of his name to the will in contest is his own; and that he was at the testator's house on the day on which P. O. Lipscomb and Allen Robertson were there, and on which Sudbury removed from the county. He has no recollection of having been called on by the testator or any other person to witness the will, but he would not have done so unless he had been requested by the testator,

and had thought that all things were regular. He does not know in what manner the law requires a will to be witnessed. He does not recollect when he subscribed his name as witness, nor who was then present, nor whether the testator was present or not, nor whether it was done in the house or out of it: nor does he recollect that he ever heard the will read, or heard any of its contents. The testator, at the time, was capable of making a will, and the witness never knew him to be otherwise.

5. Five other witnesses were sworn and examined. Three of them testified that they knew the testator well, and had often conversed with him, and had never perceived that he was deaf; though one of these witnesses added, that he was in the habit  
18 of speaking loud. One of the \*remaining two witnesses stated, that in the years of 1827, 1828, and 1829, in order to make himself understood by the testator, he was obliged to speak to him in a louder voice than usual: the other stated, that the testator was thick of hearing, but witness does not know that he was so in 1828.

It further appeared that John W. Dunnivant resided during his life with his father the testator, and died at his father's house, in 1821: that in the year 1828, the testator owned a slave named Mary and another named Sam, children of the woman Eliza mentioned in the will: and that the testator, at the time of his death, was 78 years old.

The circuit court affirmed the sentence of the county court; and on the petition of Clarke and wife and Butcher, this court allowed them an appeal from the judgment of affirmance.

Macfarland and Rhodes, for the appellants, said, here was the will of a very aged man, who could neither read nor write, and was probably deaf; an inofficious will, disinheriting natural objects of the testator's bounty, in favour of his surviving son; a very oblivious will, bequeathing one dollar to a son who died seven years before, and forgetting two slaves, though it purports to enumerate the slaves belonging to the testator. Under such circumstances, clear proof of the execution of the will ought to be required. The will was written by one Sudbury, who left the county on the day of writing it, and has not been examined in the court of probate as a witness; it does not appear in whose custody the will was left; and there is no proof that it accords with the previous intentions of the testator, or that it was ever subsequently approved, or even mentioned by him. The case then rests wholly on the proof of execution. Lipscomb, the first subscribing witness, proves his own handwriting, and that he heard the will read to the  
19 \*testator by Sudbury, but he does not remember the time, within two or three years; he thinks he wrote the testator's name, yet he did not know that the testator could not write, and he proves no direction or request of the testator that he should sign for him; he does not remember who were present, or that either of the other subscribing witnesses was there; he remembers only those provisions of the will which relate to

the Butcher family, the least important provisions of all, and forgets the remarkable circumstance that a legacy was bequeathed to a son who died seven years before the execution of the will. The two other witnesses prove their own signatures, and nothing more: neither of them proves the attestation of the will by the others: and one of them states, that if requested by the testator to attest his will, he would have done so, whether the testator had been present or not when he subscribed his name as witness; while the other admits his ignorance of the mode in which the law requires a will to be witnessed. The general rule is, that every fact requisite to the valid execution of a will under our statute, must be proved by two witnesses. *Burwell & others v. Corbin & others*, 1 Rand. 131. There is no such proof here. Moreover, the proof of every such fact must be express and positive. There is no case establishing that compliance with statutory requisites to due execution may be inferred by the court, where the attesting witnesses, when examined, fail to afford direct testimony that they were complied with. The cases of *Hand v. James*, Com. Rep. 531; *Croft v. Pawlett*, 2 Stra. 1109, and *Ld. Ranciliffe v. Parkins*, 6 Dow's P. C. 202, were cases of old wills, where, the attesting witnesses being dead, proof of their handwriting was not merely the best, but the only evidence of due execution that the nature of the case admitted. Here the will was but little more than eight years old, and the attesting witnesses were all examined. Even

if inference were admissible in  
 20 \*the present case, it ought rather to operate against the will, than in its favor: for those facts necessary to due execution which have been forgotten by the witnesses (if indeed they existed at all), were as well calculated to impress themselves on the memory, as any that have been recollected and proved; so that the just inference would seem to be that they never had existence, and not that they existed but have been forgotten.

Johnson and Stanard, for the appellee, said, the evidence shewed that the whole transaction relating to the execution of the will took place at one and the same time, and in the presence of the testator. The will had been previously drawn by Sudbury, who was removing; the parties were assembled on that occasion; the will was then produced, read to the testator, and signed by him, in the presence of the first witness, with his mark (*Harrison v. Harrison*, 8 Ves. 186; *Addy v. Grix*, Id. 504,) or at all events signed with his name, in his presence, by the first witness, and then acknowledged by him as his will, in the presence of that witness; who thereupon subscribed his own name as attesting witness, in the presence of the testator. So far as respects the testimony of that witness, the proof of due execution is plenary. The second witness proves that he attested on the very occasion mentioned by the first, namely, when Sudbury was removing, and they were engaged in weighing fodder for the wagon. And the third witness refers to and identifies the occasion spoken of by the

other two, as that on which he attested the will. Both the second and third witnesses declare that they would not have subscribed, unless they had been requested by the testator to do so, and had thought that all things were regular. The inference arises irresistibly, that all the witnesses were present during the whole transaction; that all of them heard the will read to the testator, saw it signed, heard him acknowledge it, as testified by the first witness, and subscribed their

21 \*names in his presence. It is objected, however, not that noncompliance with the statute is positively proved, but that the evidence does not expressly prove compliance; and it is said, there is no case of a will admitted to probate, where the witnesses, when examined, failed to prove expressly the facts requisite to due execution. There are certainly many cases in which direct proof has been dispensed with. Some of them are admitted on the other side—those, namely, where the attesting witnesses have all died, and the several facts constituting due execution are inferred from the mere proof of their handwriting. So, when the witnesses have become insane, and the failure of memory is total, instead of being partial, as it is here, proof of handwriting is sufficient to admit the will to probate: as it is, likewise, when the witnesses cannot be had to give their testimony in court. And even in a case where the subscribing witnesses deny their attestation, or impeach the competency of the testator, the will may be established by falsifying their testimony. So, a will has been held good, although the subscribing witnesses did not know and could not prove that there was any signature to it when they attested: the jury was left to infer the fact of signature, from the evidence. See the cases cited in 2 Stark. on Evid. (new ed.) 922; *Lowe v. Jolliffe*, 1 W. Blacks. 365. In our own courts too, the requisites of the statute have been held inferrible from evidence not positive to the facts. *Smith v. Jones*, 6 Rand. 33; *Dudley v. Dudley*, 3 Leigh 436. If, then, where the witnesses are dead, insane, or absent, proof of their handwriting is clearly sufficient to admit the will to probate, the question here is, whether, upon the same proof by the witnesses themselves on their examination, the will is to be deemed sufficiently proved for record? Suppose all the attesting witnesses to a will are brought into court and examined, but they declare that they have forgotten every circumstance of the execution

22 \*and attestation; they prove nothing but their own handwriting: in such case the court is clearly bound to infer either that the will was duly executed, or that it was not; and it will make the necessary inference, one way or the other, according to the circumstances of the whole case. Here, all the witnesses recollect the occasion, and the same occasion, of attesting the will; but two of them have forgotten all the concomitant circumstances. It is a mere case of partial failure of memory; and there is no case in which the forgetfulness of attesting the witnesses has been held a sufficient ground for rejecting the will. *White v.*

Trustees of the British Museum, 20 Eng. C. L. Rep. 91; Wright v. Wright, 19 Id. 197; Hudson's case, Skinner 79; Dagwell v. Glascock, Id. 413; Jackson d. Legrange v. Legrange, 19 Johns. Rep. 386.

PARKER, J. I am of opinion that the will of William Dunnivant deceased was well proved, there being no evidence of fraud or unfairness in the transaction.

It is a will attested in 1828, and offered for probate in 1837. After such a lapse of time, the forgetfulness of the witnesses as to some of the circumstances attending its execution, affords no fair presumption that they did not exist. Few persons witnessing a paper would, after eight or nine years, be able to recall every fact that might be necessary to give it legal validity; and if their defect of memory is, without other impeachment, to prejudice the rights of parties claiming under it, the mischief would be greater than any that can result from this decision. The law regulating devises requires reasonable proof that every statutory provision has been complied with, but it does not prescribe the mode of proof, nor that the will shall be proved, as well as attested, by two or more credible witnesses; nor that frail memory shall change its nature, and perform

impossibilities. A will over thirty  
23 years old it is said to \*prove itself, although the testator may have died recently, because of the unreasonableness of requiring strict proof of so old a transaction. (Said by counsel, arguendo, in Calthorpe v. Gough, 4 T. R. 707, 709, n, to have been decided by lord Kenyon in Mackay v. Newbolt. And see *Ld. Raneliffe v. Lady Parkins*, 6 Dow's P. C. 202.) What then if it be 29 years old, or has been attested so long before as to afford a fair presumption, derived from our experience, that many things actually existing may have faded from the memory of the witnesses? Will a jury, or a court of probate, which acts upon the same principles of evidence as a jury, reject the will because those circumstances are not all recollected? If the witnesses are dead, we infer all the necessary requisites from proof of their handwriting, although the memorandum of attestation is silent as to material ones. *Hand v. James*, Com. Rep. 531; *Croft v. Pawlett*, 2 Stra. 1109; *Brice v. Smith*, Willes's Rep. 1. We also infer the signing of the devisor, from the fact of his acknowledging the instrument to be his will, (*Ellis v. Smith*, 1 Ves. jun. 11,) and the signature of the witnesses in his presence, from the fact that they were all in one room. Why then may we not presume the same thing, from the proof of any other facts or circumstances by which those to be inferred are usually accompanied? This is a familiar rule of evidence, illustrated by all the writers on the subject, and applicable to every case where the law has not positively prescribed the degree of proof. Why, in this case, should we make an exception? Why exclude circumstantial evidence, or deduction of fact from fact, and confine ourselves to positive proof, so difficult to be obtained, and more difficult from conscientious than from unscrupulous witnesses? It is admitted there is no

authority for this innovation, and I think it rests on no sound principle. The question is not what facts are to be proved (for about that we all agree), but through what  
24 \*media those facts may be impressed upon the minds of those appointed to try and determine them.

In the case at bar, the will is signed by the testator (for his mark is a signing within the statute; *Harrison v. Harrison*, 8 Ves. 186; *Addy v. Grix*, 8 Ves. 504,) and there are three subscribing witnesses to it, whose names are in juxtaposition; and from the absence of proof to the contrary, we may presume that the ink has the same appearance in all the signatures. All the witnesses prove their handwriting, and declare that they would not have attested but at the request of the devisor. The first witness, Lipscomb, declares that he signed the testator's name recognizing the mark. He proves that he witnessed the will when other persons not recollected were present, and he specifies minutely the particular occasion when that took place. He also remembers that the will was read to the testator at his desire; that he subscribed it within a few paces of him; that he is positive it must have been acknowledged at the time, or he would not have attested it; and that the whole transaction took place outside the house in the open air, where they were weighing Sudbury's fodder, on the occasion of his removal from the county. The two other subscribing witnesses recollect that they were at the testator's house on the very occasion specified by Lipscomb; and none of the witnesses ever attested any other will or paper for Dunnivant, as far as we learn. Here is a chain of evidence very satisfactory to my mind, in proof of the only doubtful fact, that the will was signed by the witnesses, or at least two of them, in the presence of the testator; for Lipscomb signed in his presence, and the others were at the same place, at the same time, attesting after him. But suppose Lipscomb only proves the due execution of the will as to himself, and the other witnesses establish no more than the genuineness of their signatures, being oblivious of all other circumstances; and that one of them  
25 would not \*have attested, "unless requested by the testator, and he had thought all things were regular." (See Roberts's evidence.) Is not this sufficient proof to authorize a court of probate to admit a will to record, when the rejection of the motion will conclude one party, whilst the granting of it will not preclude the other from asking an issue of devisavit vel non? I clearly think so. The forgetfulness of the witnesses ought not to be permitted to defeat the will; and for this position the case of *Dagwell v. Glascock*, *Skinner* 413, is a very strong authority. But there is a case in 19 Johns. Rep. 386, where the reasoning of chief justice Spencer in delivering the opinion of the court is very apposite to this, and covers indeed the whole ground. I cite it because I think the opinion he expresses is strictly in accordance with well established principles of evidence. It is the case of *Jackson d. Legrange v. Legrange*. The will in ques-



tion was witnessed by Quackenbush, Lansing and Wendell. Lansing was dead; Wendell was living, and a resident of the state; but Quackenbush was the only witness called to prove the will. He established the genuineness of his own signature, and proved the handwriting of Lansing; but he had forgotten every circumstance of the transaction, and did not even recollect that he had ever seen the testator. Yet from the circumstances of his name being subscribed as a witness, he supposed he must have seen it executed; and he knew the requisites to a good execution of a will, being at that time about to be admitted an attorney in the courts of New York. It was held that this was not sufficient proof of the will, because Wendell was not produced. The chief justice said, "Wendell ought to have been called, inasmuch as Quackenbush did not prove the facts essentially necessary to the valid execution of the will. If Wendell had been called, he might have either proved or disproved these facts. If his recollection should also have failed him, still, if he could have proved his signature, then, on

26 \*proving the signature of the testator, I should be of the opinion that the will had been sufficiently proved to entitle it to be read. The law does not require impossibilities; and therefore, when the will has been executed a long period before the trial, it is not ordinarily to be expected that the witnesses will be able to remember all the material facts. In this respect a will may be compared to a deed the signature of which is denied."

The will in the case in Johnson was older than in this, but it was not thirty years old, and the circumstances of more or less antiquity is no otherwise material than as it may be supposed to effect more or less the memory of the witnesses. The principle is, that positive, direct proof of material facts may be dispensed with in every case, where "it is not ordinarily to be expected that the witnesses will be able to remember" them. The period between the attestation and the probate might be so recent as to afford very strong, nay irresistible evidence that facts not remembered did not exist; and then all ground for presuming a due execution would be taken away.

A circumstance noticed in the case cited may be supposed to have had some weight; to wit, that Quackenbush knew the requisites to a good execution of a will. Here, Roberts did not know them; and Robertson the other witness says, if the testator had requested him to witness the will, he would have done so, whether he were present or not. It must be admitted that such declarations impair our confidence in the certainty of the inferences deducible from the other facts and circumstances; but still enough remains to authorize us to pronounce in favour of the will. The fact remains, that wills are usually witnessed in the presence of testators; and the other circumstances shew that the ordinary concomitants of attestation and subscription existed in this case; it being satisfactorily proved that in respect to the first witness every thing

27 was regular. In \*this particular, the case contrasts favourably with Jackson v. Legrange, where the first witness only proved his signature; and if he knew the requisites to a good execution, it did not follow that Wendell was equally well informed. Yet the chief justice held that if, in addition to Quackenbush's testimony, Wendell should prove his signature merely, his recollection failing him as to every other circumstance, it would be sufficient.

For these reasons, I am of opinion that the order of the court below should be affirmed.

BROOKE, J. I do not dissent from the opinion of a majority of the court, because I know the inutility, as regards the public, of a difference of opinion as to the fact on any state of the evidence submitted to a jury or a court of probate. As to the principle that all the requirements of the statute must be proved in order to establish a will, there can be no difference of opinion. As to the kind and degree of proof that is necessary to satisfy the statute, I differ with the majority of the court; nor do I think there is anything exorbitant in the requirement of proof to satisfy the statute, either in the case of Burwell and others v. Corbin and others, 1 Rand. 131, or in my opinion in the case of Dudley v. Dudley, 3 Leigh 436. In the first case, judge Roane did not differ with the rest of the court on the construction of the statute, but on the degree of proof of its requirements, as we differ in the case before us. None of the court in the case of Burwell and others v. Corbin and others denied the rule, that, upon evidence, inference may be drawn from the proof of one fact or several facts to prove another fact, in a proper case. In the case before us I do not object to that rule, but I am opposed to making such a use of it as to repeal the statute. I do not think that proof of a will in all particulars by one witness is enough to establish by inference

28 that another, who is examined, recollects \*nothing but his attestation of a recent will, was a witness to all that is proved by the first. To prevent perjury, the statute requires two witnesses. Now, in the case before us, is it more probable that Robertson and Roberts forgot the presence of the testator and that his mark was made by his direction, if in truth he was present and directed his mark to be made, than other facts not so impressive, which they relate? I will not notice the English cases: there is no difference between them and our own cases, except in the degree of proof which is required to satisfy the statute. Inference from one fact to prove another has been carried too far by the courts of both countries: the statute has been left out of sight, and the evidence treated as if all that was necessary was to prove that the testator executed the will. Putting it on that ground, one credible witness is as good as the two required by the statute; and if inference from his testimony is to supply the proof of another witness, required by the statute, the will is proved by one witness instead of two. The cases which, from necessity, admit of inferior proof to that which by the letter of



the statute seems to be required, have no application to the case before us: as where all or some of the witnesses are dead, or out of the jurisdiction of the court; or as in the case in *Skinner*, where they were suborned to deny their signatures. In the first case, proof is admitted of their signatures; and in the second, to contradict the attesting witnesses, and to prove their attestation of the will. But that is not our case. All the witnesses are alive, and examined to prove the will; no secondary evidence is called for. Only one of them proves the presence of the testator when he attested, and that his mark was made by the witness. The other two only prove their handwriting, and that they would not have attested, they think, unless the testator had requested them, and all things had been regular. They do not prove

that he made his mark as his signature, \*or that it was made in his presence and by his direction, nor that he was present when they subscribed their names; two material requisites of the statute. These particulars they could not recollect, though they remembered other matter not so impressive. In the case of *Burwell* and others v. *Corbin* and others, if the evidence of one witness was enough to satisfy the statute, the evidence of *Scrimger* the first witness proved every thing that was required; but if two witnesses were necessary, *Barrick* the second witness proved nothing but the acknowledgment of the testator that the paper writing was his will. He knew nothing of the signature, the factum of signing required by the statute: though *Scrimger* the first witness proved it, he did not. For the grounds of my opinion in that case, I refer to the cases there cited. My opinion in the case of *Dudley v. Dudley*, 3 Leigh 436, was founded on the same course of reasoning; that is, that however full the testimony of one witness may be to prove a will, our statute requires two witnesses to the facts which are necessary to be proved. In England, three witnesses are required: and in *Westbeech v. Kennedy*, 1 Ves. & Beam. 362, two witnesses proved the will in every particular; and though the third witness did not prove the factum of signing, he proved that the testator sealed the will in his presence, which was regarded as proof of the signature. Now it does appear to me that the proof of the two witnesses in that case would not have sufficed, if the testator had not sealed the will in the presence of the third witness. In the case before us, one witness proves what is required by the statute. Suppose his testimony out of the case, and the testimony of *Robertson* and *Roberts* the only testimony; it could not be said that theirs was sufficient. Neither of them proves the presence of the testator when they attested, nor that his mark, which stands for his name, was made in his presence and at his request. All they

30 prove is their \*handwriting as attesting witnesses. But that is held by a majority of the court to be sufficient, in addition to the testimony of *Lipscomb* the first witness; and I will not dissent from them, for the reason before stated.

*TUCKER, P.* The probate of this will depends mainly, I think, upon the question how far the defects of the memory of the witnesses can be supplied by mere inference from their attestation; for although there are some of the requisites of the statute proved, there are others unquestionably at which we can only arrive by implication.

There is no question, I think, that if the subscribing witness to a deed or will be dead, or absent from the country, or otherwise so situated that his testimony cannot be had, the proof of his handwriting is all that is necessary, and his attestation is a sufficient ground for presuming that the instrument has been executed with all the solemnities and ceremonies required by the law. This is confessedly the case with deeds and obligations, as appears from the numerous cases cited in *Phillips on Evidence*, p. 362. It is not less the case with wills; for if the witnesses are dead, or insane, or out of the jurisdiction, so as not to be amenable to process, their handwriting may be proved, and it is then a question for the jury, whether, under the circumstances of the case, it is probable that all the formalities of the statute were regularly observed. This was expressly decided in *Hands v. James*, Com. Rep. 531; *Croft v. Pawlett*, 2 Strange 1109; *Brice v. Smith*, Willes 1, and as we shall presently see, our own court has acted upon similar principles. It is true that in these cases all the witnesses must be dead, or not to be had, for otherwise the due execution of the will cannot be established by proof of the handwriting of one or more. In a trial at law one of the subscribing witnesses, and in a question of probate two of them, may

31 suffice to prove a will, provided they can \*prove all the solemnities required by the statute. But if they can only prove their own signatures, the other witnesses, if living, must be produced, or if dead, their handwriting must be proved; and it is then, as I have said, a question for the jury or the court of probate, whether, under the circumstances, all the requisites of the statute have been complied with. See *Jackson d. Legrange v. Legrange*, 19 Johns Rep. 386.

In the case at bar, then, if all the witnesses were dead, the proof of their handwriting would have justified the court of probate in inferring that the will had been executed with all the solemnities required by the statute. But the witnesses have all been examined. They have all proved their own attestations. They all swear, too, that they would not have attested the will, unless it had been acknowledged by the testator, and they had supposed all things regular. This has been held not only sufficient proof of a deed (1 Binney 436, 2 Hay 338, 1 Cox 10, cited *Phillips on Evid.* 358, in note; 2 Dall. 96,) but it has also been considered adequate in the case of a will. In *Jackson v. Legrange*, 19 Johns. Rep. 389, *Spencer*, chief justice, said, "If the subscribing witnesses prove their signatures, though they may not be able to recollect the delivery, yet if they declare that they never subscribed as witnesses without a due execution of a deed by a gran-

tor or obligor, such proof would be sufficient. In this respect, a will may be compared to a deed, the execution of which is denied." I think, then, from the evidence in this case, we must take it as sufficiently proved that the testator acknowledged the instrument in question as his last will.

The question still recurs whether, as the witnesses have been actually examined, and have failed to prove a compliance with all the requisitions of the statute, that compliance can be inferred from their attestation.

It is very clear that if the witnesses denied their attestation, or would not swear that they saw the testator execute and publish his will, or alleged the incapacity of the testator, their handwriting might be proved and their testimony controverted. *Skin. 413; Lowe v. Jolliffe, 1 W. Black. Rep. 365.* But in these cases there must be evidence produced to contradict their testimony. How is it where, as in this case, they do not negative a compliance with the statute, but merely have forgotten the circumstances? It seems to me, that upon fair analogy, the question should be decided as it would be if the witness were dead and his handwriting proved. And so accordingly, I think, are the authorities to be understood. Thus, in the case of *Dagwell or Dagnee v. Glascock; Skinner 413; Cases Temp. Holt. 741*, there were three subscribing witnesses. One of them would not swear that he saw the testator seal and publish his will. Now, three witnesses were absolutely necessary to the validity of the will, so that here was a failure of proof as in our case; but the court, upon proof of his handwriting, held the will to be sufficiently proved. This case seems to me to be in point. So in the case of *Jackson v. Lefrange*, before cited, chief justice Spencer, speaking of the necessity of calling the other witness to the will, observes, "If his recollection should also have failed him, still if he could have proved his signature, then, on proving the signature of the testator, I should be of opinion that the will had been sufficiently proved to entitle it to be read." That is to say, where the memory of the witness fails, the proof of his signature will justify an inference that all the requisites of the law have been complied with. Then comes the following remark: "The law does not require impossibilities, and therefore, where the will has been executed for a long period before the trial, it is not ordinarily to be expected that the witnesses will be able to remember all the material facts;" and in this regard he likens a will to a deed, where, if the memory of the witness fail as to actual proof of delivery, it may still be inferred from his attestation, and his swearing that he would not have subscribed it as a witness without a due execution.

Then comes the case of *Smith v. Jones, 6 Rand. 33*. In that case the witness, Mrs. Jones, fell short of the full proof of the requisites of the statute. She neither proved that the name of the testator was written by the other witness at the testator's request, nor did she prove the attestation to have been in his presence. Yet judge Carr, delivering

the opinion of the court, says, if *Pendergast* (the other witness) had proved the same facts, "we think the evidence of these subscribing witnesses would have proved circumstances from which a court of probate ought to have concluded that the will was signed by *Pendergast* for the testator, in his presence and by his direction, and moreover was attested by two witnesses in his presence." Here, then, these important substantive requisitions of the statute were inferred, although the witnesses were present at the trial and examined, and yet failed to prove them. And this seems truly reasonable; since it never could have been the design of the statute to vacate a will which was duly executed, whenever the witnesses to it have forgotten any material circumstances attending the attestation. They are indeed always called upon to prove the will, not because the statute requires that they shall prove a compliance with all the requisites of the law, but because they would be most likely to prove or disprove them, and because, upon principles of common law, the attesting witness to every instrument must be produced, if living and within the power of the court.

The case of *Bond & wife v. Seawell, 3 Burr. 1773*, cited by judge Carr, is deservedly considered by him as a strong case in support of this doctrine of inference. In that case the will was on two sheets. It was deemed essential that both sheets should have been in the room at the time of the acknowledgment. Yet two of the witnesses "never saw the first sheet, nor was it produced to them, nor was it upon the table." Nevertheless lord Mansfield was of opinion that the jury might presume, and ought to presume from the circumstances, that essential fact, though the witnesses did not and could not prove it.

Next comes the case of *Boyd v. Cooke, 3 Leigh 32*. In that case the position taken in *Smith v. Jones*, that a court of probate occupies the place of a jury as to questions of fact, and that its province is to draw all just inferences from the evidence, was distinctly maintained. Lastly, in the case of *Dudley v. Dudley, 3 Leigh 436*, the judges reiterated this doctrine, and moreover declared that in the absence of all proof to the contrary, the acknowledgment and attestation gave rise to an irresistible inference that the instrument in that case had been previously signed; and they sustained the will upon this proof, although the testator's name was not signed by himself, and although only one of the witnesses proved that it was signed by another person for him, in his presence and by his direction.

From the whole of these cases, then, I deduce that on a question of probate, the defect of memory of the witnesses will not be permitted to defeat the will, but that the court may, from circumstances, presume that the requisitions of the statute have been observed; and that they ought so to presume from the fact of attestation, unless the inferences from that fact are rebutted by satisfactory evidence. Upon these principles, there can be no difficulty in the present case. *Lipscomb's*

testimony establishes his own attestation and his conviction that he never would have attested if the testator had not acknowledged the will. The other witnesses prove the same. The acknowledgment, then, is established; and from this acknowledgment of the will, we infer an acknowledgment and recognition of the signature. To use the language of judge Cabell, "It is not usual for men to acknowledge papers, either as deeds or wills, and to call on others to attest them, before they are signed. Such a thing may happen; and when it is proved to have happened, the acknowledgment and attestation will be disregarded. But in the absence of all proof to the contrary, the acknowledgment and attestation give rise to an irresistible inference that the instrument had been previously signed." It is moreover a recognition of the signature; for when, taking the paper already signed by his mark and with his name written by Lipscomb, he acknowledges it as his will, he of course acknowledges the whole, and not a part only; and still less can we presume that he designed to exclude the signature from that acknowledgment, without which it would have been no will. But if the signature is acknowledged as his, we are inevitably led to conclude from that acknowledgment and all the other circumstances, that Lipscomb affixed it at his request; and thus proof would be full, even if his mark was not made with his own hand. But that it was so made I cannot doubt, both because of its being most usual for the party to make his mark, and because the paper calls it his mark, besides the recognition of the signing and sealing by the last clause in the will, which he must have heard when the rest of the will was read to him. See 7 Taunt. 251.

The execution by the testator being thus established, we come next to the attestation, and as there is no proof rebutting the inference the attestation was according to law, we must take it to have been so; and thus the execution of the will must be considered as fully proved.

Upon a very careful consideration, therefore, of the whole case, I am of opinion to affirm the sentence. Nor do I apprehend any evil from this decision. It may, perhaps, sometimes lead to the establishment of wills not duly executed, as doubtless may be

the case \*also where the witnesses are all dead or absent, and every thing is presumed from their attestation. But far greater mischiefs would arise from a contrary decision, which should make the rights of every devisee and legatee depend not only upon the honesty, but also upon the slippery memory of witnesses. Under such a decision, no man could be sure of dying testate, since the forgetfulness of a witness would frustrate all his precaution; and a question of title by will, which, in the spirit of the statute of frauds, the legislature designed to rest upon written evidence alone, would after all depend upon the integrity and the memory of those who were called on to attest the instrument. The consequence would

be, that I may have a good will by me to-day, but if I live five years it may become a void instrument, because one of the witnesses to it cannot recall some ceremony of its execution. Such a consequence I would not aid in bringing about. It would tend, I have no doubt, to multiply the attempts, already too common, to set aside wills; since the chances of success must be very much increased, if the frailty of human memory is to be called in to the aid of the discontented heir.

Sentence affirmed.

37

\*Weaver v. Carter.

January, 1839. Richmond.

(Absent, BROOKE, J.)

**Sale of Land—Sale in Gross.**—By written articles, A. agrees to sell and B. to purchase a tract of land, "bounded as expressed in the survey made by C. K. and estimated by the said C. K. at 1022½ acres;" for which B. is to pay 25568 dollars 75 cents. This price is the exact result of the specified number of acres at 25 dollars per acre. Yet HELD, upon the evidence, that the contract was for the sale and purchase of the land in gross, and not by the acre. **Same—Sale by Survey—Allowance for Inaccuracy.**—After a sale and purchase of land by the acre, a survey made shewing 996 acres, and the contract executed by conveyance and payment according to the survey, a bill is filed alleging the quantity of the land to be but 974 acres, and another survey being made, the quantity appears thereby to be a few acres less than 996. HELD, nevertheless, that equity will not decree compensation to the vendee; some allowance being reasonable for the inaccuracy inherent in the process of surveying.

In March 1828, Jacob Weaver exhibited his bill against William F. Carter in the superior court of chancery holden at Fredericksburg, setting forth, that in 1822 he contracted to purchase of Carter a tract of land in Fauquier county, then estimated to contain 1022½ acres, at the price of 25 dollars per acre; and the contract was reduced to writing on the 20th of November 1822, and signed and sealed by the parties. That although the written contract did not expressly mention that the complainant was to pay 25 dollars per acre according to survey, still, such was the understanding and agreement between the parties, as was necessarily inferrible, he conceived, from the contract itself. That the consideration agreed to be paid for the tract, namely, 25568 dollars 75 cents, was precisely the amount of 1022½ acres, the estimated quantity, at 25 dollars per acre. That on the 31st of December 1823, Carter executed to the complainant a convey-

**\*Sale of Land—"More or Less"—Contract of Hazard.**—The principal case is cited in Allen v. Shriver, 81 Va. 188, for the proposition that when the real contract is to sell a tract of land for so many acres as it may contain, more or less, fully understood to be so, the purchaser takes the tract at the risk of gain or loss, by deficiency or excess. The principal case is cited in this connection in Crislip v. Cain, 19 W. Va. 583. See Fleet v. Hawkins, 6 Munf. 188. Upon this subject, see foot-note to Blessing v. Beatty, 1 Rob. 287.

ance of the tract; and although  
 38 \*the deed, on its face, purported to convey only 995¼ acres, according to a survey thereto annexed, yet this circumstance was entirely overlooked by the complainant, who then thought, and, until after the whole price which he agreed to give for the 1022¼ acres had been paid, continued to think, that the conveyance was in conformity with the written agreement. That on discovering the mistake, complainant applied to Carter to refund the amount he had overpaid; which Carter refused to do, saying that he conveyed only 995¼ acres. The bill therefore prayed that Carter might be compelled to answer on oath whether the agreement and understanding between the parties was not for a sale and purchase by the acre, at 25 dollars, and whether he did not receive, for 995¼ acres, 25568 dollars 75 cents; and that complainant might have such relief in the premises as should seem equitable.

The agreement of the 20th November 1822, and the conveyance of the 31st December 1823, referred to in the bill, were exhibited therewith. By the agreement, Carter covenanted that he or his heirs should, on or before the first day of January 1824, convey and assure to Weaver and his heirs, "all his tract or parcel of land lying and being in the county of Fauquier, on the waters of Cedar run, Licking run and Owl run, known by the name of the Lodge Plantation, and bounded as expressed in the survey made by Charles Kemper in March 1814, and estimated by the said Kemper at 1022¼ acres:" in consideration whereof, Weaver covenanted to pay Carter 12784 dollars 37½ cents upon receiving the conveyance, and 12784 dollars 37½ cents on the first of January 1825; and to secure the payment of the deferred instalment by a deed of trust on the whole tract. By the conveyance, Carter bargained and sold to Weaver, for the expressed consideration of 24881 dollars 25 cents, the parcel of land called the Lodge Plantation, "bounded as is expressed and particularly described in a survey and plat

39 \*made by Charles Kemper junior, and dated September 6, 1823, which is hereto annexed, to be had, taken and received as a part of this deed, as fully and completely and in like manner as if the said plat had been fully recited in this indenture; which said tract or parcel of land, according to the said plat, contains 995¼ acres." The certificate of the surveyor, accompanying the plat referred to in the deed, recites that the survey was made "for messrs. William F. Carter and Jacob Weaver."

Carter answered, denying that there was any contract or understanding between Weaver and himself, other than that which appears by the written agreement exhibited by the complainant, and insisting that the sale thereby contracted for was a sale in gross, notwithstanding that the survey therein referred to was adopted by the parties as one of the means of ascertaining the gross sum which the one was willing to take and the other to give. He added, that before any payment was made, the complainant expressed his apprehension that there was a

deficiency in the quantity of the land, and requested the respondent to have it resurveyed; to which respondent, though he then considered the agreement as a sale in gross, and so informed the complainant, yielded his assent, stipulating however that the survey so to be made should be final: that this stipulation was acceded to by the complainant and a resurvey was accordingly made by Charles Kemper junior, upon which there turned out to be a deficiency: that the quantity thus ascertained was made the basis of the final arrangement between the parties; for that quantity alone the respondent received payment, and by that survey the deeds stipulated for in the agreement were made.

Weaver's deed of trust to secure the deferred instalment of the purchase money (which was also made an exhibit in the cause) referred to the plat made by Charles Kemper junior, and described the tract of land according to the boundaries and quantity given therein.

40 \*A general replication to the answer of Carter was put in by the complainant, and the cause was set for hearing.

Afterwards the complainant obtained leave to file, and accordingly filed, an amended bill; in which, after setting forth the original agreement and understanding of the parties, the written articles, and the effect of the whole, in the same manner as in his original bill, he proceeded to state—That Carter executed to him a conveyance of 995¼ acres, the quantity of land appearing to be contained in the tract by a survey made on the 6th of September 1823 by Charles Kemper junior, who was called on by the parties to make the survey. That the complainant, not doubting the correctness of that survey, went on to settle by the same, at 25 dollars per acre, paying 12440 dollars 62½ cents at the time he received the conveyance, and giving his bond for a like sum payable on the first of January 1825, which he had since paid off; the whole amount of 24881 dollars 25 cents being the precise sum that 995¼ acres would come to at 25 dollars per acre. That some time after the last payment was made, the complainant had occasion to have the land surveyed, and employed for the purpose one Zachariah Cox, a surveyor remarkable for his skill and accuracy; when it was ascertained that instead of 995¼ acres, the tract contained but 974 acres 21 poles. That complainant thereupon called on Carter to refund the excess paid him, but Carter refused to do so, pretending that the sale was in gross, and not by the acre, though he well knew that the agreement and understanding was for a sale by the acre. That complainant was induced to execute the written contract, by defendant's suggestion that he would only have to pay for the quantity of land which should be ascertained by survey, at 25 dollars per acre; and if the contract were susceptible of the construction contended for by the defendant, he had practised  
 41 a fraud upon the complainant, \*having drawn the contract himself, and represented to complainant, who confided in his integrity, that it conformed to their verbal

agreement aforesaid; at all events the variation of the written from the verbal contract, if not produced by defendant's fraudulent design, arose from his negligence, haste and mistake, and ought to be corrected. That through the inadvertence of complainant's counsel who drew the original bill, which was filed without being submitted to complainant for inspection, no mention was therein made of Cox's survey; and the erroneous statement that complainant had paid for 1022¼ acres, instead of 995¼ acres the real quantity paid for, proceeded from the same cause. This bill prayed, that a survey of the land might be directed, and that, for any deficiency thereby ascertained, Carter might be decreed to refund at the rate of 25 dollars per acre; and general relief.

The survey made by Cox, referred to in the amended bill, was exhibited therewith.

Carter put in an answer to the amended bill, denying the fraudulent misrepresentations imputed to him; insisting that the sale, upon the true construction and legal effect of the contract, was a sale in gross, and not by the acre; and alleging that such was the express and well understood intention of the contracting parties at the time. He admitted that the whole purchase money had been paid.—To this answer Weaver replied generally.

Several witnesses were examined, and their depositions filed.

Z. Cox deposed that his survey was made to the best of his ability, by that of Charles Kemper junior, and the boundaries therein described; and upon calculation he found that the quantity contained did not agree with that given by Kemper.

Marcus Russel deposed, that he accompanied Charles Kemper junior, when  
42 he surveyed the tract of land in \*question. When they came to Cedar run, Weaver expressed to Carter his unwillingness to go farther than the middle of the run, saying he was to give 25 dollars per acre for the land, and did not wish to pay for more land than he got. Carter then agreed not to cross the run, but to run the line up the middle of it. While they were running another line, the survey seemed likely to embrace more than the expected quantity; whereupon Carter observed to Weaver, that he would have done better to take the land by old Mr. Kemper's survey, for he would have to pay for more land. Deponent understood from Carter, that the land was sold for 25 dollars per acre.

Paul Day deposed, that he lived with Mr. Carter as overseer, and understood that the land was sold for 25 dollars per acre. He thinks it is probable that he heard this from Mr. Carter himself, as he does not remember who else could have told him so.

Charles Kemper junior deposed, that his survey of the land in question was made in the presence of both parties; that he was then the deputy surveyor of the county; that he made the survey with great care, and re-examined his work before he presented his report to the parties; and that, to the

best of his knowledge, his survey was deemed final by them.

At the hearing, the chancellor dismissed the bill, with costs: and the complainant appealed to this court.

In the argument here, by Stanard and Harrison for the appellant, and Johnson for the appellee, one of the questions discussed was whether the court of chancery had jurisdiction of the case? Johnson contending that the plaintiff had a plain remedy at law, and as complete as in equity: that supposing the case to be, as the plaintiff alleged it was, a sale by the acre, a mistake in the survey, and a consequent deficiency in the quantity

of land sold, then his remedy was an  
43 action of covenant \*upon the deed, if the deed contained a covenant for quantity; or, if it did not, an action on the case for money paid by mistake, to which, he insisted, the execution of the deed would have presented no impediment.—But this point was not considered by the court.

Stanard and Harrison said, the original contract in this case was for a sale by the acre, and not in gross; and this was evident both from the terms of the contract itself, and from the deed executed in pursuance of it. Carter, it is true, alleges in his answer, that although the sale was in gross, yet at Weaver's instance he consented to a survey of the land, which was accordingly made by Kemper; and that both parties agreed that this survey should be final. But this was affirmative matter in the answer, which must be proved; yet it was not proved; there was no proof of any agreement that Kemper's survey should be definite as to the quantity of the land. The case, then, was that of a sale by the acre; a survey made, according to which the quantity was 995¼ acres; and that survey erroneous, in making the quantity 21 acres more than the tract contained. The survey was only a mode of carrying the contract into execution, and if there be a mistake in that survey, it cannot bind the party contrary to his contract; otherwise, in every case of contract for a sale by the acre, the mere execution of the contract would estop the vendee from alleging deficiency in the quantity. *Quesnel v. Woodlief*, 6 Call 218, 2 Hen. & Munf. 164, note, and *Jolliffe v. Hite*, 1 Call 329, were cases in which, after the execution of a deed conveying a certain number of acres, more or less, deficiency of quantity was alleged: and in the latter case, where the principles applicable to this subject were discussed, it was decided that wherever the primary contract is for a sale by the acre, though it be carried into execution by a deed conveying a certain quantity, more or less, the vendee is not precluded from claiming for deficiency,

44 \*nor the vendor for excess. The case here is stronger: it is a case where the parties estimate the price by a given measure—1022¼ acres, according to the existing survey, at 25 dollars per acre—and then adopt a new measure of the price, by agreeing to a new calculation of the quantity; and the conveyance executed is for the quantity appearing by that new calculation, the new survey of Charles Kemper junior, un-

qualified by the terms more or less, while the price expressed in the deed is the exact amount of that quantity at 25 dollars per acre. Nor does the agreement to have the land surveyed make the case like that of *Fleet v. Hawkins*, 6 Munf. 188. That was a case of contract for a sale by the acre, and a deed executed conveying 372 acres, more or less: the bill claimed compensation for an alleged deficiency: but it appeared by the answer and proofs, that the parties having agreed to have a survey of the land, the vendor offered to abide by the old survey, and the vendee accepted the proposition; so that the original contract for a sale by the acre was converted into a contract of sale in gross. Here, there was no agreement to abide by Kemper's survey; no new term introduced into the contract. The survey was made not in change of the contract, but in execution of it: the contract was for a sale by the acre; the survey was only to ascertain the quantity; and there is a mistake as to the quantity. If Carter's answer were sustained by proof, the case would be clear in his favor; but his answer is unsupported by either the contract or the proofs. The chancellor, instead of dismissing the bill, ought to have directed a survey (for Cox's survey was *ex parte*, and only exhibited as *prima facie* evidence of deficiency) and then to have decreed compensation for the deficiency so ascertained.

Johnson, contra, said, that upon the original agreement, and the pleadings and proofs in the cause, this was not a contract of sale

by the acre, but a contract of hazard.  
45 \*The original agreement, according to its just construction, imports a sale by boundaries, the quantity of land being estimated at so many acres by reference to an existing survey, and the price, at 25 dollars per acre upon that estimate, amounting to a gross sum of 25568 dollars 75 cents. A new survey was then agreed to, and was accordingly made; and from this circumstance, if left unexplained, it might perhaps be inferred that according to the real intent and understanding of the parties, the contract was for a sale by the acre. But the circumstance is not left unexplained; for the amended bill charges that the written agreement was different from the verbal understanding of the parties, and this charge is directly denied by the answer, which alleges that the express understanding and intent of the parties was, as upon the written agreement it appears to be, a sale in gross, and that afterwards the vendee proposed and the vendor assented to a new survey, which was to be final and conclusive as to the quantity. Kemper's deposition corroborates the answer in this respect, and there is no proof to the contrary. Whether a sale was in gross or by the acre, is always a question of intention. *Keytons v. Brawfords*, 5 Leigh 39.

But suppose the contract was for a sale by the acre, and that the survey was made merely to ascertain the quantity, with no stipulation or intent that it should be conclusive in that respect, whether right or wrong; still the vendee is not entitled to relief. The survey was made in the presence

of both parties, and carefully made; it was satisfactory to both of them; and the contract was carried into execution according to it. After all this, the vendee files a bill alleging deficiency in the quantity—that instead of 995¼ acres, there are only 974; and the proof of inaccuracy in Kemper's survey is the affidavit of Cox, who surveyed the land for the vendee. It would be a mockery of justice to attempt relief in such a case as this. Did any one ever

46 \*believe that a survey, however carefully made, does or can ascertain the true quantity of the land? After the contract is executed, it is not enough to shew merely error or inaccuracy, for error and inaccuracy are incident to the very nature of the transaction; but in every such case the true question is, whether there be such a mistake as will justify a court of equity in unsettling what the parties had deliberately settled for themselves. Mere uncertainty in the survey will not be enough to set it aside; to produce that result, a plain mistake must be shewn, of some substantial amount. *Jolliffe v. Hite*, 1 Call 329; *Nelson v. Carrington & others*, 4 Munf. 332; *Tucker v. Cocke*, 2 Rand. 51; *Keytons v. Brawfords*, 5 Leigh 39; *Koger v. Kane*, Id. 606; *Bierne v. Erskine*, Id. 59; *Folley v. M'Keown*, 4 Leigh 627. The principle of the case of *Jolliffe v. Hite* is, that upon the sale of land by the acre according to survey, and a deed executed conveying the estimated quantity, more or less, the party will be entitled to compensation for such difference only as cannot be accounted for by the difference of instruments, and the like causes; in other words, that surveys are only approximations to certainty, and a reasonable allowance ought to be made for inaccuracies. Here the alleged deficiency is but 21 acres in a tract of nearly 1000—scarcely more than 2 per centum of the whole. This is greatly within the allowed limits of uncertainty. There is no case where the court has ever interfered on account of a deficiency so trivial as this.

The case of *Fleet v. Hawkins*, 6 Munf. 188, rules this case, if the parties here agreed to abide by Kemper's survey. That they did so agree, is proved by Carter's answer, by Kemper's deposition, and by the fact that the contract was executed according to that survey. The only difference between *Fleet v. Hawkins* and the case at bar is, that there the agreement was to abide by the existing survey; here, to make a new survey, and to abide by it when made.

47 \*TUCKER, P. The object of the bill in this case is to recover compensation for an alleged deficiency in the quantity of a tract of land sold by the appellee to the appellant, and which the latter contends he had purchased by the acre. He therefore calls upon the appellee to say "whether the agreement and understanding between the parties was not for the sale and purchase by the acre at 25 dollars." To this the defendant answers, that by the true construction of the agreement, the sale contracted for was a sale in gross; that the survey of Charles Kemper, referred to by the contract, was the

datum on which the estimate of quantity was made; and that both parties agreed finally to abide by that estimate, as, he insists, appears clearly by the agreement. In his answer to a similar interrogatory in the amended bill, he again insists on the same construction of the contract, and avers that "such was the express and well understood intention of both contracting parties at the time of entering into it." I concur with the defendant in his construction of the contract, and am clearly of opinion that though the purchaser here contracted to pay a sum which is the exact multiple of the estimated quantity of land, and in that sense may be said to have purchased by the acre, yet the survey of Kemper, and his estimate of the quantity, was referred to as the basis of the contract, and must be considered as settling between the parties the number of acres to be paid for. If this were at all doubtful from the terms of the agreement, it is placed beyond doubt by the answer of the defendant, which herein is directly responsive to the bill. Taking this then to be the true construction of the contract, it was a contract of risque, and the appellant was bound to abide the deficiency. The case, in this aspect, may be regarded as ruled by *Fleet v. Hawkins*, 6 Munf. 188, the principles of which appear to me unquestionable.

48 \*The appellee, however, agreed to have another survey, upon Weaver's insisting that he had bought by the acre and suspected a deficiency. Whether this agreement was gratuitous or not, it was binding, since it was in the nature of a compromise of conflicting pretensions.

What this agreement was, must be taken from the answer of the defendant. Put it out of the case entirely, and then we have seen that the case is with him. Consider it as founding a new basis, and we must take it as he has stated it, because the plaintiff himself has no where set it forth,—because he has offered no proof in relation to it, and because the proof, such as it is, shews that that survey was to be final, and to settle the rights of the parties definitively. This is not only proved by Kemper to have been his impression, but it is strongly inferrible from the survey having been made (as upon its face it purports to be) for both parties, and in the presence of both, as Russell proves. It is also inferrible from the execution by one, and the acceptance by the other, of a deed agreeable to that survey, and by the execution of bonds and a deed of trust by the appellant, and his acquiescence for four years; all of which facts go decisively to evince the finality of the transaction, and the understanding of parties that that survey should be binding. Four years after, however, the appellant has a new survey made, ex parte, and not by the county surveyor, and now alleges a mistake in Kemper's calculation. I do not think we should disturb the transaction upon such a pretence. The calculation of the quantity of a tract of land is a matter that does not admit of absolute certainty. Though the science according to the principles of which it is made is one of the exact sciences, the subject on

which it operates offers very frequently insuperable obstacles to exactness. Uneven ground, the meandering of water courses, and the impediments of timber land are among these obstacles; while the carelessness and inattention of markers and

49 \*chain carriers perhaps yet more contribute to variations in surveys. Hence our courts have wisely said, that even in sales strictly by the acre, no compensation is to be made for deficiency, where the supposed deficit may fairly be presumed to arise merely from the variations of instruments or of mensuration. In one case it is said that a deficiency of 8 acres in 552 was not too great to be set down to the account of such variations. In this case the deficit is very little more, and on this ground ought not to be regarded. But, in fact, we are not left without some means of accounting for the difference between the surveys here. In the mensuration of the first line of the survey, which is about a mile and three quarters long, the surveyors differ two poles in length. Now it cannot be doubted that one pole or  $5\frac{1}{2}$  yards in a mile is a small variation in measurement; yet these two poles, in a survey averaging 288 poles in width, make a difference of about  $3\frac{1}{2}$  acres. Then, in Cox's calculation table, he sets down his 9th line 5 poles short of his own measurement.\* This, on the width of 246 poles, makes more than  $7\frac{1}{2}$  acres. And lastly he does not run the line by which the conveyance was made, for he runs down the middle of the stream and cuts the island in two, although Carter has conveyed the whole bed and the whole island, and is responsible for them both. According to my calculation, this will account for three acres more; making, in the whole, 14 acres, and leaving the residue of some 7 acres to be accounted for from other trivial variations of instruments and measurement.

In every view of the case, I am of opinion to affirm the decree.

The other judges concurring, decree affirmed.

50

\**Lucketts v. Lucketts.*

*Lockett v. Same.*

January, 1839, Richmond.

(Absent, TUCKER,† P.)

**Specific Performance—Family Compromise—Case at Bar.**—A testator makes two successive wills, both evincing the intention to give each of his children, nine in number, land of 200 acres in quantity, or to the value of 5000 dollars, estimating the land at 25 dollars per acre, and both giving to two sons, who had only about 177 acres each, legacies of 500 dollars, to make their land equal to that of his other children. These wills he cancels, and afterwards makes a third, similar to the former wills as to the devises of land, but omitting the equaliz-

\*In the copy of the record which the reporter had, the mistake here mentioned by the president did not appear.

†He decided the controversy in the court of chancery.

‡See monographic note on "Specific Performance" appended to *Hanna v. Wilson*, 2 Gratt. 243.



ing provision in favour of the two sons; and these two sons are named the executors. One of them offers the last will for probate, but it is rejected, because unattested by witnesses: whereupon the heirs execute an agreement among themselves, to abide by the will so offered and rejected, in the division of the estate. Afterwards the two sons who were named executors refuse to perform the agreement, alleging that they entered into it without having ever read the last will, and under the mistaken belief that it contained the equalizing provision in their favour. But specific execution decreed in equity: there being no sufficient proof, either that the omission of the legacies made their lands unequal in value to those of the other children, or that they executed the agreement in ignorance and under mistake, as they alleged; and it being apparent that if they did execute it under those circumstances, it was their own gross negligence to do so.

Leven Luckett, late of the county of Loudoun, deceased, having nine children, Francis, William, Ludwell, Horace, Matilda, Henry, Alfred, Leven and Robert, and having given Francis and William about 177 acres of land each, made a will dated August 24, 1824, whereby he devised to his daughter Matilda 200 acres of land, and other lands equal in quantity or value to his sons Ludwell, Henry, Horace, Alfred and Leven, 51 and bequeathed \*to Francis and William 500 dollars each, to make their quantity of land equal to what he had devised to the rest of his children; then devised land to his wife for life, remainder to his son Robert, and bequeathed sundry specific and pecuniary legacies to his wife and children. This will he cancelled.

He made another will, dated March 13, 1825, whereby he made a similar provision in land for each of his children, except Francis and William; evincing the intention to give them land of 200 acres in quantity, or to the value of 5000 dollars, estimating the land at 25 dollars per acre; and in a codicil to this will he gave Francis and William pecuniary legacies, to make their land equal to that of the rest of his children. There appeared to be some uncertainty on the face of the will, whether the legacies to Francis and William were of four hundred or five hundred dollars each. William contended that they were of five hundred dollars. This will the testator also cancelled.

He made a third will, dated also March 13, 1825, with a codicil thereto, dated December 19, 1825—wherein he evinced a similar intention to make an equal division among his children, excepting Francis and William, as to whom he omitted the legacies of 400 or 500 dollars, to equalize the lands he had given to them with those he had given to his other children. This will was written by the testator's son Robert, then a minor, and signed by the testator, but was not attested. Francis and William Luckett were named the executors.

The last will was presented for probate to the county court of Loudoun on the 14th of August 1827, by Francis Luckett one of the executors therein named, and probate refused because there was no attestation.

On the next day, the 15th of August, the

other two wills were presented to the county court. In the controversy which subsequently arose between the heirs of the decedent, two of the justices who sat in 52 court on \*that day were examined as witnesses, to prove the purpose for which these wills were produced. According to the recollection of one of the witnesses, it was only for the purpose of comparing them with the last will, and shewing that it conformed with them in the main; but according to the positive evidence of the other witness, one of the cancelled wills was offered for probate, and rejected.

On the same 15th of August 1827, an agreement was entered into by Francis W. Luckett, William F. Luckett, Matilda D. Luckett and her husband Thomas H. Luckett, Horace Luckett, Ludwell Luckett, Henry F. Luckett and Alfred Luckett, under their respective hands and seals, reciting that an instrument purporting to be the last will and testament of Leven Luckett deceased had that day been presented to the court for probate, and owing to some legal informality rejected, and that it was the desire of the representatives of the said decedent, that his estate should be disposed of according to the tenour of said will; with a view to effect which, they the said parties covenanted and agreed to, with and amongst themselves, that in the division of the said estate they would abide by the said will. Letitia Luckett the widow, Leven Luckett, and Robert Luckett who was then a minor, though they never executed this instrument, yet assented to it, and desired that it should be carried into execution.

I. The first suit was a bill exhibited by Horace, Thomas H. and his wife Matilda, Henry, Alfred, Leven and Robert Luckett, children of the decedent, and Letitia Luckett his widow, in the superior court of chancery holden at Winchester, against Francis, William and Ludwell Luckett, for the purpose of having specific execution of the agreement of August 15, 1827.

Francis and William Luckett, in their answers, resisted the specific execution, on the ground that they had executed the agreement without having ever read the last 53 \*will, and under a mistaken belief that it contained the same provision giving them each a legacy in money to equalize their shares of land, which was contained in the two former cancelled wills. Ludwell Luckett also, by his answer, objected to the specific execution of the agreement, because it would work injustice to his brothers Francis and William, although it was a matter of indifference to him, personally, whether the agreement were specifically enforced or not.

II. The other suit was brought in the same court, by William Luckett against all the other parties, alleging, that he had executed the agreement of August 15, 1827 without having read the last will, or either of the two former wills, and under a mistaken belief that all the wills contained the equalizing provision in favour of himself and his brother Francis; and alleging further, that the agreement refers expressly to the will



offered for probate on the same day with its date, and only the cancelled wills were that day offered, so that the agreement does not, literally taken, confirm the last will, and, in effect, leaves it uncertain which was the will thereby confirmed; and therefore praying, that the agreement should be set aside.

The answers of Francis and Ludwell Luckett referred to their answers in the first suit. Robert, Alfred, Letitia the widow, Horace, Henry, and Thomas H. the husband of Matilda Luckett, by their answers, earnestly insisted on the agreement. The answer of Horace Luckett alleged positively, that both Francis and William Luckett well knew, when they entered into the agreement, that the last will contained no provision for making their lands equal to 200 acres each; and that the agreement was intended and understood to refer to that will, and no other.

Many depositions were taken and filed on both sides. But it did not clearly appear whether Francis and William Luckett,

when they executed the agreement,  
54 \*were or were not in ignorance and under mistake, as they alleged, respecting the provisions of the last will. The evidence developed some circumstances which seemed to make it probable that they were, and others leading to the opposite conclusion.

The causes were heard together in the court of chancery; when the chancellor decreed specific execution of the agreement, according to the prayer of the first bill, and dismissed the other with costs. Francis and William Luckett appealed to this court; both of them from the decree in the first suit, and William Luckett from the decree dismissing his bill.

In the argument here, by Leigh for the appellants, and Johnson for the appellees, two questions were discussed: 1. The question of fact, whether Francis and William Luckett, or either of them, executed the agreement in ignorance and under mistake, as they alleged? And, 2. Supposing they did, whether equity will nevertheless decree specific execution, upon the ground that the agreement was fair in itself, and calculated and designed to preserve the peace of the family? The counsel for the appellants earnestly contended, that all the cases decided sustaining similar agreements, were cases in which the parties, acting with full knowledge of all the doubts, whether of fact or law, relating to the subject of their agreement, and designing to settle those doubts and prevent or end disputes by a compromise, entered into the agreement with that view; and that there was no authority whatever for the proposition, that an agreement, because entered into between members of a family, and importing a compromise of their respective rights or claims, will be specifically enforced against parties who executed it in ignorance or under mistake, any more than if it had been an agreement between mere strangers.

55 \*The following authorities were cited and examined: 1 Story's Equity, § 161, 120, 121, 129-132, 134; Id. p. 147, 8, n. 4; 2

Id. § 749, 750, 751, 769; Jeremy's Equity, p. 358, 368, 9; Fonbl. Eq. 107, note (t); Pusey v. Debouvrie, 3 P. Wms. 315; Evans v. Lewellen, 2 Bro. C. C. 150; S. C. Cox's Ch. Rep. 333; Cory v. Cory, 1 Ves. sen. 19; Stapilton v. Stapilton, 1 Atk. 2; Cann v. Cann, 1 P. Wms. 727; Stockley v. Stockley, 1 Ves. & Beam. 23; Harvey v. Cook, 4 Russ. 34; 3 Cond. Eng. Ch. Rep. 556; Frank v. Frank, 1 Ch. Cas. 84; Leonard v. Leonard, 2 Ball & Beatt. 182.

PARKER, J. The first suit is to enforce the specific execution of an ageement; the last, to set it aside. The chancellor decreed specific execution according to the prayer of the first bill, and dismissed the other: and I am of opinion that he did right in both cases.

First, Because it is not proved to my satisfaction, that when Francis and William Luckett executed the agreement of the 15th of August 1827, they were in fact ignorant of the provisions of the last will of their father. The facts and circumstances tending to shew their ignorance or knowledge are nearly equally balanced, and the burden of proof is upon them, to shew clearly a mistake.

2dly, Because, if they did believe that will to contain what has been called the equalizing provision, it was belief induced by gross negligence, which equity ought not to relieve against. All the papers were before them, and they had only to examine them before the agreement was signed, to know what they were doing. They were appointed executors in the last will, and the agreement of the 15th of August was drawn up by Francis, with the obvious intention, as I conceive, of establishing that paper, and no other; and so all the parties understood it. By the slightest diligence, a full

knowledge of the contents of this paper  
56 per \*might have been obtained; and it would be to encourage carelessness and the most inexcusable negligence, to relieve the parties against the consequences of a solemn contract entered into under such circumstances. 1 Story's Equity, ch. 5, § 146.

3dly, It is not clear to my mind that the omission in the last will, of the 400 or 500 dollars to Francis and William Luckett, renders their portions unequal, or makes the agreement to abide by it inequitable. It would clearly be advantageous to them to get 400 or 500 dollars in addition, but I see no proof that they have not got land of as much value as several others of the children. The testator himself no doubt thought, at one time, that it would take 400 or 500 dollars to make their lands equal to those of the rest of his children, for he has said so in the cancelled will; but from his omitting this clause in the last will, we may infer a change of opinion; and there is no evidence to prove inequality, or to afford a fair ground of presumption that if Francis and William Luckett had carefully read the last will, they would not have entered into the agreement. Much less is there any evidence to shew that the setting aside this agreement, and bringing the real estate into hotchpot, will pro-

duce justice and equality between the children; but there is every reason to believe the reverse.

4thly, This is an arrangement to abide by the will of a father, and prevent family disputes. It is, as far as I can see, a fair, reasonable, praiseworthy compromise of the difficulties arising out of a total or partial intestacy, and ought to be upheld, whether the distinction taken by the counsel of Francis and William Luckett be a sound one or not. I am, however, strongly inclined to think that arrangements made between the members of a family, to carry into effect the wills of parents, and to prevent unseemly dissensions about property between near relations, ought, on principles of public policy, to receive greater countenance from a court of equity, than if the agreement sought to be enforced were between mere strangers. 1 Story's Equity, § 132, 137.

But in the view I take of the subject, it is unnecessary to discuss this point by collating the authorities brought to the notice of the court.

I am of opinion to affirm both the decrees. The other judges concurred. Decrees affirmed.

#### Graysons v. Richards.

##### Same v. Beatty.

February, 1839, Richmond.

(Absent, TUCKER,\* P.)

**Deed—Effect of Cancellation—Insolvent.**—A father by deed of gift conveys land to a son, and shortly after the son voluntarily surrenders the deed to the father to be cancelled, with design to divest the title out of himself and restore it to the father, and the deed is cancelled: **HOLD**, the son's title is not divested by the cancellation of the deed, and the land shall be charged in equity with the debts of the son.

**Same—Same—Same—Rights of Creditors.**—In such case, a creditor having obtained a judgment against the son subsequent to the cancellation of the deed, under which the son has taken the oath of insolvency, is not only entitled to satisfaction of his judgment out of the land as still the property of the son, but he may also claim satisfac-

tion out of it of a simple contract debt which the son owes him; and other creditors of the son, who have not recovered judgments against him, coming in at the same time, shall be entertained to claim satisfaction of the debts due them out of the same land.

I. John Richards exhibited a bill in the superior court of chancery of Winchester against John, George, and 58 \*Benjamin Grayson, shewing, that he recovered a judgment against John and George Grayson, in August 1822, for 502 dollars, with interest and costs, and they having been duly surrendered by Benjamin Grayson, who was their special bail in the action, and being in custody, took the benefit of the statute for the relief of insolvent debtors, and were discharged, surrendering, in their schedules, only some debts said to be due to them, which had proved wholly unavailable to satisfy the judgment; and that Richards had also a claim against John Grayson for 102 dollars, due by promissory note dated in May 1828. And the bill then alleged, further, that the defendant Benjamin had, sometime before the year 1821, given to each of the defendants John and George, who were his sons, 250 acres of land, and executed deeds conveying the same to them respectively; and that both the sons had ever since and still remained in possession of the lands so to them given and conveyed; but that the defendant Benjamin had afterwards induced both of the sons to restore to him the deeds he had executed and delivered to them for the lands. The object of the bill was, to have satisfaction of the judgment due to the plaintiff from the defendants John and George, out of the lands which had been given and conveyed to them both, and satisfaction of the simple contract debt due from John, out of the land which had been given and conveyed to him.

The answer of Benjamin Grayson stated, that in April 1817, he conveyed to each of his sons John and George, 200 acres of land; but in June or July following, in consequence of an occurrence in his family, which made it necessary that his lands should be divided among his children in a manner different from that intended when those conveyances were made, the sons voluntarily surrendered to him the deeds he had given them, which had never been recorded, to be cancelled, and they were actually cancelled. He admitted, that \*he had allowed the sons, respectively, still to reside on the lands, and to cultivate the same for their own benefit.

The answers of John and George Grayson were to the same effect.

There were many depositions filed in the cause; but the evidence did not vary the case from that stated in the answers, except that, perhaps, it led to an inference, that the surrender of the deeds by the sons to the father occurred at a later date than that stated in the answers, namely, in 1820, '21 or '22, but still prior to the date of Richards's judgment.

II. Thomas and Otho Beatty also exhibited a bill against John and Benjamin Grayson,

\*He decided the causes in the court of chancery.

**\*Deed—Effect of Cancellation.**—Where land has been conveyed by deed of bargain and sale, the legal title of the grantee is not divested by the return of the deed to the grantor to be cancelled. *Jones v. Neale*, 2 Pat. & H. 339, 351, citing, with approval, the principal case.

The principal case is cited for this proposition in *Seibel v. Rapp*, 85 Va. 32, 6 S. E. Rep. 478; *Vaughn v. Moore*, 89 Va. 929, 17 S. E. Rep. 326; *Delaplain v. Wilkinson*, 17 W. Va. 271; 2 Min. Inst. (4th Ed.) p. 741. See monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

**Same—Same.**—Where a deed has been once completed by delivery, so as to pass title to land, its subsequent oral cancellation or destruction, though by consent of both parties, does not divest the grantee of title, but it still remains in him. *Ferguson v. Bond*, 39 W. Va. 566, 20 S. E. Rep. 593, citing the principal case: *Seibel v. Rapp*, 85 Va. 28, 6 S. E. Rep. 478; 1 Min. Inst. 666.

showing that John Grayson was indebted to them on a bond for the sum of 51 dollars with some arrears of interest; and making the same allegations touching the gift and conveyance of land by the defendant Benjamin to his son John, as were contained in the bill of Richards; this bill likewise prayed satisfaction of the bond debt due from the defendant John to the plaintiffs, out of the land so given and conveyed to him by the defendant Benjamin. The answers of the defendants to this bill were exactly to the same purpose with their answers to Richards's bill; and the proofs in this cause were also the same.

Both causes coming on to be heard together, the chancellor, being of opinion, that the lands which had been conveyed by Benjamin Grayson to his sons John and George, and which yet remained in their possession, were, notwithstanding the cancellation of the deeds of conveyance, liable for the debt due from the sons to Richards upon his judgment against them; and that the land which had been conveyed to John, ought to be charged with the debt due from him on his promissory note to Richards, and likewise with the debt due from \*him on his bond to T. & O. Beatty; decreed, accordingly, that the money should be raised by sale of the lands to be made by the marshal. From which decree, the defendants appealed to this court.

The causes were argued here, by Leigh for the appellants, and by Stanard for Richards, the appellee in the first case; there was no counsel for T. & O. Beatty, the appellees in the second case.

Leigh contended, 1st, that the voluntary surrender of the deeds of conveyance by the sons John and George to Benjamin the father, for the purpose of being cancelled, and the actual cancellation thereof, had the effect of divesting the sons of all title on which the claims of their creditors could attach. He argued, that the creditors of the sons could only claim satisfaction out of these lands upon the strength of the rights of their debtors in them: that the sons, after their voluntary surrender of the deeds to their father to be cancelled, with a view to divest themselves of the title, and actual cancellation, could never have recovered the lands from their father, by any proceeding at law or in equity; they could not have maintained ejectments upon proof of the contents of deeds which they surrendered to be cancelled; and equity would not have aided them to compel their father to execute new deeds of gift: that the creditors of the sons, claiming under them, could not set up a title in them, which they could nowise have set up for themselves: and that, therefore, the debts due to the appellees ought not to have been charged on the lands. He said, there was no authority to the point, that after a voluntary surrender of a deed of gift of lands by the donee to the donor to be cancelled, for the purpose of divesting the title of the donee and revesting it in the donor, and the actual cancellation of such deed, no fraud or mistake being imputable

to the transaction, any title remained in the donee for the benefit of his subsequent creditors, or for any purpose whatever. And to shew that there was no such authority, he cited and examined 4 Cruise's Dig. tit. 32; Deed. ch. 26, § 14, 15, 16, 17, p. 338; Leech v. Leech, 2 Chan. Rep. 100; 13 Vin. Abr. Faits or Deeds. X, 2, 3; Nelthorpe v. Dorrington, 2 Lev. 113; Woodward v. Aston, Ventr. 297; Clavering v. Clavering, 2 Vern. 473; (and lady Hudson's case, stated Id. 476;); 7 Bro. P. C. 410; S. C. on appeal; Bolton v. Bishop of Carlisle, 2 H. Blacks. 263; Roe v. Archbishop of York, 6 East 86; Marshall v. Fisk, 6 Mass. Rep. 24; Hatch v. Hatch, 9 Mass. Rep. 24; Inhabitants of Conway v. Inhabitants of Deerfield, 11 Mass. Rep. 327.—But 2ndly, supposing the decree right in charging the judgment debt due to the appellee Richards, on the lands which had been conveyed to John and George, he said it was wrong in charging the simple contract debt due from John to Richards, and his bond debt due to the appellees T. & O. Beatty, upon the land that had been conveyed to him; for if the title remained in him notwithstanding the cancellation of his deed, yet his creditors could only acquire a lien on it by getting judgments against him. Tate v. Liggit, 2 Leigh 84.

Stanard cited, on the first point, Gilb. Law Ev. 95, and Magennis v. Mac Cullogh, Gilb. Rep. 236, and relied on that case and the case of Roe v. Archbishop of York, to shew, that the cancellation of the deeds did not divest the title of the sons John and George, and restore it to the father Benjamin. He remarked, that the reasoning, in those cases, upon the effect of the english statute of frauds, was equally applicable to the provision of our statute of conveyances, 1 Rev. Code, ch. 99, § 1, p. 361, "that no estate of inheritance or freehold, or for a term of more than five years, in lands or tenements, shall be conveyed from one to another, unless the conveyance be declared by writing sealed and delivered." Indeed, the statute alone was conclusive of the point. For the deeds of the father to the sons certainly

vested the title of the lands in them, and that title could no otherwise be conveyed back to the donor but by deed; nor could the cancellation of the deeds, by any violence of construction, be held tantamount to a reconveyance. Then as to the other objection to the decree; he said, that the appellee Richards, having a right to resort to the court of chancery for satisfaction of the judgment debt due to him from John and George, out of the lands conveyed to them, had a right to tack his simple contract claim against John to his judgment against him, especially as the debtor (except for his right in this land) was insolvent. And while Richards was properly entertained to charge the debts due to him on the land in question, as the property of the debtors, any other creditor of the same debtors, or of either of them, was also properly entertained to ask satisfaction of the debts due them out of the same subject. The case of Tate v. Liggit was not in point

to this case, which ought to be decided upon the principle of *Tinsley v. Anderson*, 3 Call 329.

The court approved and affirmed the decree.

63 \**Lyle v. Higginbotham.*

February, 1830, Richmond.

(Absent CABELL, \*J.)

**Attorney and Client—Privileged Communication—Case at Bar.**—Case in which, under the particular circumstances, a letter written by a mortgagee to his attorney, informing him that the mortgage debt had been paid, and requesting him to dismiss a suit then pending to foreclose the mortgage, was held to be proper evidence in favour of a subsequent incumbrancer, in a controversy with the executor of the mortgagee, who had revived the proceedings to foreclose; the attorney submitting to produce the letter, if directed by the court to do so.

Daniel Higginbotham being a creditor of Philip Ryan by three several judgments, obtained in 1809, 1811 and 1812, respectively, brought a suit in Nelson county court in chancery, to have satisfaction of the debts out of a tract of land conveyed by Philip Ryan to his son William, by a deed which the plaintiff alleged to be voluntary, and therefore fraudulent and void as to him. The cause being removed to the superior court of chancery of Lynchburg by appeal, that court, on the 19th of October 1820, made a decree setting aside the conveyance, and directing the marshal to sell the land at public auction, upon such credit as might be agreed to by the parties, and out of the proceeds pay the plaintiff the amount of his judgments, with the costs of his suit in chancery. The marshal accordingly sold the land upon a credit of twelve months, agreed to by the parties; and at the sale, John Marr became the purchaser, at the price of 665 dollars, for which he executed his bond payable on the 15th of December 1821. The amount due to Higginbotham at the time of the sale was 597 dollars 55 cents; which

64 amount, together with the expenses of sale, being deducted from the proceeds, there remained a balance of only 33 dollars 77 cents.

At this stage of the proceedings, James Lyle administrator of James Lyle deceased, who in his lifetime was the surviving partner of the mercantile firm of George Kippen & Company, exhibited his bill in the same superior court of chancery, against Daniel Higginbotham, Philip Ryan and William Ryan, the parties to the former suit, and John Marr the purchaser at the sale made by the marshal; setting forth, that in the year 1798, Philip Ryan, being indebted to George Kippen & Co. in the sum of £130. 9. 5. executed a deed of trust to secure the payment thereof, bearing date the 21st of Au-

gust 1798, which deed was duly recorded, whereby he conveyed the same tract of land which had been sold under the decree of the court for the satisfaction of Higginbotham's demand. That the debt secured by that deed was still unsatisfied, except the sum of £30. paid on the 21st of July 1800. That James Lyle, the testator of the plaintiff, in his lifetime, brought a suit in the county court of Nelson, in the name of George Kippen & Co. to subject the land to the payment of the debt due the firm, which suit was yet pending and undetermined. That the land was worth double the price for which it was sold by the marshal. The bill prayed, that the final decree in Higginbotham's suit be suspended until the plaintiff's claim under the trust deed should be paid, or provision made for its payment; that Marr the purchaser at the marshal's sale be restrained from paying over any part of the purchase money to Higginbotham or any other person, except by order of the court; that the record and proceedings in the suit of George Kippen & Co. against Philip Ryan, to enforce the deed of trust, be removed into this court, in order to a final decision thereof; and general relief.

The trust deed of the 21st of August 1798 was exhibited with the bill. The record of the suit of George \*Kippen & Co. against Philip Ryan was also exhibited. It appeared that the subpoena in the cause was issued in May 1802; after which, the suit was continued at rules until July 1820, when an order of dismissal for want of bill was entered in court. In June 1821, this order was set aside by consent of the parties, and the cause reinstated. And these were all the proceedings which had taken place in the suit.

Philip Ryan answered, admitting that the debt due to George Kippen & Co. and secured by the deed of trust, was still unsatisfied, except about 100 dollars which he had paid.

Higginbotham, in his answer, disclaimed all knowledge of the debt asserted by the plaintiff; called for proof thereof; and insisted upon the presumption of payment arising from the lapse of time since the deed of trust was executed, upon the laches of Kippen & Co. and upon the dismissal of their suit against Ryan, as presenting a bar to the relief now sought by the plaintiff's bill.

Marr, in his answer, also relied upon the presumption against the plaintiff's claim, arising from the lapse of time, and insisted upon his purchase at the marshal's sale.

As to William Ryan, the bill was taken pro confesso.

By the evidence in the cause it appeared, that in the year 1770, John Ryan senior, the father of Philip Ryan, being indebted to George Kippen & Co. in the sum of £213. executed a deed of trust upon a tract of land of about 400 acres in Amherst county, to secure the payment of that debt: that John Ryan senior died, leaving John Ryan junior his eldest son and heir at law; who, in the year 1786, executed a letter of attorney to William Bibb and George Gillespie, empowering them to sell all the estate which John Ryan senior left in the county of Amherst,

\*He had formerly been counsel for James Lyle senior, the testator of the appellant, and was afterwards examined as a witness in the controversy.

†See monographic note on "Attorney and Client" appended to *Johnson v. Gibbons*, 27 Gratt. 632.

and pay his debts: that Bibb being dead, Gillespie the surviving attorney, on the 21st of August 1798, by deed of bargain and sale of that date, conveyed to Philip Ryan 200 acres, parcel of the same tract which was conveyed by John Ryan senior in 1770 for the security of George Kippen & Co.—and that this 200 acres was the same land which Philip Ryan, by his trust deed of the 21st August 1798, conveyed for the purpose of securing to Kippen & Co. the payment of £130. 9. 5. which, it seems, was the balance then remaining due of their original demand against John Ryan senior.

The affidavit of the honourable William H. Cabell was taken and filed in the cause. He stated, that he was employed (being then at the bar) to draw the two deeds of the 21st August 1798. That Gillespie's conveyance of the land to Philip Ryan was the consideration, and the only consideration, for Philip Ryan's trust deed in favour of Kippen & Co. it being understood and intended by all the parties that the payment of the debt due to Kippen & Co. should be a discharge of so much of the purchase money which Philip Ryan had contracted to pay. That affiant was afterwards employed by James Lyle senior, a partner of the firm of Kippen & Co. to collect the debt for which Philip Ryan had thus become bound; but that, entertaining strong doubts whether Ryan had derived any title to the land by the conveyance from Gillespie alone, after the death of Bibb, under the power of attorney executed to them both jointly, and, consequently, whether he was liable in equity for the debt secured by his trust deed, this affiant took no steps to collect the money from him, and even returned to him an assumpsit of third persons for the sum of £50. which he had delivered to this affiant, and which, when received, was to have been applied in part discharge of the claim of Kippen & Co.—and advised him to bring a friendly suit in chancery, for the purpose of ascertaining whether he had acquired a good title to his land: but this suit was never brought \*so far as affiant knew: and thus the matter rested until he left the bar in 1805. Ryan never questioned the justice of the demand against his father's estate, nor entertained the least doubt of his own obligation, at law or in equity, to pay the amount secured by his deed of trust, until this affiant communicated the doubt to him. Nor did he ever pretend that he had paid the debt.

The cause was heard on the 24th day of May 1823; when the court, being of opinion that the trust deed of the 21st of August 1798 gave priority to the demand of the plaintiff over that of the defendant Higginbotham, and that a resale of the land would probably be beneficial to those interested in the proceeds, decreed that the bond of Marr the purchaser at the former sale should be delivered up to him to be cancelled, and that unless the defendants should, within six months, pay the plaintiff £113. 1. 1. with interest from the 21st of January 1800 till payment, and his costs of suit, the marshal should proceed to sell the land for cash, and out of the proceeds pay to the plaintiff his

debt, interest and costs aforesaid; the surplus, if any, after defraying the expenses of sale, to be paid over to the defendant Higginbotham. The marshal was directed to report his proceedings to the court, in order to a final decree.

He accordingly reported that he had sold the land, on the 10th of January 1824, to Robert Mitchell the highest bidder for the same, at the price of 901 dollars; of which, after deducting the expenses of sale, there remained the sum of 874 dollars 62½ cents, to be applied towards the satisfaction of the plaintiff's demand. This report was confirmed by the court, and the marshal directed to convey the land to the purchaser.

On the 18th of May 1825, the court, proceeding to make a final disposition of the two causes of Lyle adm'r &c. against Higginbotham and others, and Higginbotham \*against Ryans, decreed that Philip Ryan, pay to Lyle, the plaintiff in the firstmentioned suit, 45 dollars 72 cents with interest from the 10th of January 1824 till paid (being the balance due after crediting the proceeds of the land) and his costs of suit; and that the decree in the second suit, directing a sale of the land for the satisfaction of Higginbotham's demand, be set aside, and that suit dismissed, there being no longer any necessity for maintaining the same.

In January 1827, Higginbotham exhibited a bill of review against Lyle administrator &c. Philip Ryan, William Ryan, and John Marr, reciting the proceedings had in the two suits, and alleging that since the determination of those suits, and within a few days past, he had discovered new and important evidence, which he could not by any diligence have discovered sooner, and which he was advised, if known and proved upon the hearing, would have changed entirely the nature of the decrees, and was now sufficient to reverse the same upon a bill of review. He alleged that he had discovered, and he accordingly charged, that the defendant Philip Ryan, the alleged debtor and mortgagor of Lyle's testator, did, previous to the year 1810, by the hands of a certain H. Rose, fully discharge, pay and satisfy the mortgage debt in the proceedings mentioned, and that Lyle's testator did, by written documents, explicitly acknowledge such payment, and at the same time direct the dismissal of a suit previously instituted against the said Ryan to foreclose the said mortgage. That these documents, consisting of letters written and statements furnished by, Lyle's testator in his lifetime to a certain Thomas S. M'Clelland his counsel, were in the possession of M'Clelland, and complainant hoped to have the benefit of them upon the hearing, by a subpoena duces tecum directed to M'Clelland, unless they should be voluntarily furnished. The bill further charged, that the decree in favour of Lyle was procured \*by fraud and collusion between

Lyle, or his agent, and Philip Ryan. Wherefore this complainant prayed that the decrees in the former suits might be reviewed and reversed, and correct decrees en-

tered according to the right and justice of the case.

The documents referred to in the bill were produced by M'Clelland in the progress of the cause, under a subpoena duces tecum. They consisted of a letter from James Lyle senior to M'Clelland, of the 28th April 1810, another letter from Lyle to M'Clelland, of the 29th June 1810, and a list of chancery suits brought in Nelson county court by M'Clelland for Lyle (with M'Clelland's charge in each of them for professional services), which appeared to have been furnished by M'Clelland to Lyle at his request, and afterwards returned with Lyle's letter of the 29th June. The letter of the 28th April contained (inter alia) the following passage: "I observe the list of suits under your care; but what I want most is the situation they now stand in, the ability of the debtors, and the prospect of recovering, and when. To save you trouble, you have a list taken from your letter, with a blank side, that you may, opposite to each, mention the situation and circumstances of each, as far as you can get information; and when you have annexed your notes, you will please return it to me, or send me a copy of it, with your observations." In the letter of June 29, 1810, the testator said: "Our suits, George Kippen & Co. against Philip Ryan, John Brown, and Henry Tennison, were all ordered to be dismissed three years ago by Mr. Ogg. It is strange they should have been continued on the docket. Mr. Ogg declares he positively ordered the dismissal of those suits upwards of three years ago. It must have proceeded from neglect of the clerk that they were continued. Pray, my dear sir, see that they are dismissed, for I have for many years been charged by the clerk for continuances."

The list contained an entry in the following \*terms: "Fee v. Phil. Ryan, £1. 10. Nelson reference docket for new debts. [Debt paid by H. Rose.]"

The bill of review was taken for confessed as to the defendants Philip Ryan, William Ryan, and John Marr.

Lyle answered, that he had carefully examined the books and papers of the firm of George Kippen & Co. and the individual books and papers of his testator James Lyle, and had found no evidence whatever of any payment on account of Philip Ryan's mortgage debt, except as regarded the sum of 100 dollars, paid to his testator, and credited as before mentioned in this respondent's bill. He relied upon the affidavit of judge Cabell, and the answer of Philip Ryan to the lastmentioned bill, as proving that so late as September 1821, the balance of the debt remained unpaid. He suggested that the letters of his testator, and the admission of payment, either did not relate to a suit for the mortgage debt now in dispute, but to some other suit against Philip Ryan; or else that the memorandum on the list of suits furnished to respondent's testator by M'Clelland his counsel, which is now relied upon as evidence of payment, was placed opposite to the name of Philip Ryan by the mistake of J. B. Ogg, who was then the clerk of the testator, and so led the tes-

tator himself into the error which appears on the face of his letter of June 29, 1810. The statement in that letter and the list, he urged, must have been understood at the time as not applying to the suit of George Kippen & Co. against Ryan for the mortgage debt, or the error committed in that respect must have been afterwards explained to M'Clelland, otherwise he would not have lent himself to the injustice of prosecuting that suit for the great length of time he was engaged in it before the final decree was obtained, especially as he had been so regardful of the pretended rights of Ryan and the complainant, as to disregard professional confidence; "of which" (it was added)

"this respondent does not mean to be understood \*as complaining, for if it can be shewn that this debt was paid before, this respondent will refund the money he has received, with as much pleasure as the complainant will in that event receive it." The answer concluded with denying all fraud.

The letters and list before described were produced by M'Clelland on the 23d of October 1830, in compliance with a subpoena duces tecum executed upon him. He submitted to deliver up the papers, if the court should be of opinion that he ought to do so, upon considering the statement made by him in relation thereto; which was, in substance, as follows—

In 1810, M'Clelland received the two letters and the list of cases aforesaid, from James Lyle senior, for whom he was at that time counsel; and in compliance with the instructions of Lyle in his letter of the 29th of June, he did, as he verily believes, direct the clerk to dismiss the suits therein ordered to be dismissed. The suit against Ryan, however, was not dismissed; probably (as the clerk had informed him) because, being on the chancery reference docket, it could not be dismissed without an order of the court. The letters and statement of the cases, being supposed by M'Clelland to be of no further use, were thrown by him into an old trunk. Lyle died in 1811; and from that time until 1821, there was no agent of the firm of George Kippen & Co. so far as M'Clelland knew. During this period, the letters and statement aforesaid passed entirely out of his recollection. In 1821, a certain Tarlton Saunders, as the agent of Lyle's administrator, employed M'Clelland to prosecute the claim of George Kippen & Co. against Phillip Ryan, upon his mortgage; and M'Clelland, having entirely forgotten the contents of the letters and list, did, as counsel for Lyle's administrator, institute the suit against Higginbotham, Ryan and others, and obtain the decree under which the mortgaged land was sold in satisfaction of that claim.

Shortly after that sale, Saunders \*requested M'Clelland to make out a statement of his account against the elder Lyle for professional services; to which he consented, though he regarded that account as long before settled and closed. In preparing this statement, he had occasion to refer to the contents of the old trunk; and among other old papers, he there discovered, much to his

surprise, the two letters and the list of cases before mentioned. He took the earliest opportunity of shewing these papers to Saunders, and requested him to examine into the matter, and to do justice to Ryan, if it should be found that he had been injured by the decree and sale. About a year afterwards, M'Clelland and Saunders met at the house of A. Austin, whom they had chosen to settle the account of professional services, about which they had disagreed; and there M'Clelland again exhibited these papers to Saunders, and assured him, that if he or Lyle should not, within a reasonable time thereafter, explain the matter and rectify any mistake that had taken place in the proceedings against Ryan, he would advise Ryan of the existence and contents of the papers in question, and leave him to avail himself thereof in such manner as he might choose: to which Saunders made no reply. The letters, being vouchers for M'Clelland, were used as such at the settlement, and their contents might thus have become known to the persons present, and communicated by some one of them to Higginbotham or his counsel. No such communication was made by M'Clelland himself, or with his knowledge or consent; though some time afterwards, on being asked by the counsel for Higginbotham whether he had not such letters in his possession, he acknowledged that he had, and at the request of the said counsel, permitted him to take copies of them.

The chancellor expressing the opinion that the conduct of M'Clelland, as shewn by his statement, was entirely free from objection, and that the letters might properly  
73 \*be filed in the suit, they were filed accordingly. "And thereupon" (the record proceeds) "the said M'Clelland in open court made oath to his said statement; and he and the counsel of the plaintiff agreed that the said letters, as well as the statement by the said M'Clelland, might be made use of upon the trial of this cause, in like manner as the deposition of the said M'Clelland with the letters annexed might be, if duly taken under a commission for that purpose."

Lyle on the next day (October 24, 1830) objected to the admission of M'Clelland's statement as evidence, upon the ground that if the matter thereof could properly be evidence at all, the testimony of M'Clelland should have been regularly taken in the usual mode, upon notice to the adverse party; whereas here the examination was in open court, and without notice.

The cause was finally heard on the 1st of November 1830; when the chancellor, declaring that upon every principle of the court he must take M'Clelland's statement, and the letters therein referred to, so far as they might apply in favour of the plaintiff, as evidence,—decree that Lyle, out of his testator's estate, if so much thereof he had, but if not, then out of his own estate, should pay to Higginbotham the whole amount of his judgments against Ryan, with his costs both in that court and in the county court of Nelson; and should pay into one of the banks at Lynchburg, subject to the future order of the court in the cause, whatever balance might

remain of the amount he had received from the proceeds of the mortgaged land, including interest thereon from the 14th day of May 1824, when those proceeds were paid to him.

From this decree Lyle appealed to this court.

Johnson, for the appellant.

Stanard, for the appellee.

74 \*PARKER, J. I am of opinion that the chancellor ought not to have decreed that the appellant should refund the sum of money received by him under the decree of May 1823, without further enquiry as to the payment of the debt from Ryan to George Kippen and Co. by directing an issue, or otherwise.

There are several circumstances in the case, even independent of the admissions of Ryan, which render it highly probable that the debt might not have been paid. If it was doubtful how far his answer was evidence against the appellee (who, in his bill of review, charges collusion and calls upon him to answer) he might, upon the trial of an issue, be examined as a witness; and on the same trial the books and papers of the firm of George Kippen & Co. might be produced, if required by the appellee, and would no doubt afford persuasive evidence the one way or the other.

The letters referred to in the bill seem to me not to be sufficiently authenticated, for I regard M'Clelland's statement as no part of the case, and do not think that the answer of Lyle can be fairly considered as an admission of their genuineness. I am moreover doubtful how far, if genuine, they ought to be received in evidence. The disclosure of these letters by the attorney seems to me to have been without the consent of the client, and to some extent, at least, they were matters of professional confidence. *Parker v. Carter*, 4 Munf. 273. If the order to dismiss a suit is not to be so regarded, the statement to an attorney that the debt has been paid is as much under the seal of professional confidence as any other communication. Nor does it appear that it was ever divulged before, unless we receive M'Clelland's statement of what took place between Saunders and himself concerning the settlement before an arbitrator; and I think it clear that his evidence, taken at the bar of the court, without notice, and at large upon the hearing,  
75 ought not to have been \*received. 2 *Mad. Ch. Pract.* 435, 6; *Graves v. Budgel*, 1 Atk. 444.

But it is said, on the authority of the case of *Fenwick v. Reade*, 1 Meriv. 114, that an attorney submitting to produce title deeds in his possession, which, if admitted by the principal to be in his custody, he would be compelled to produce, may, as standing in the situation of the principal, be also compelled to do so. This may be admitted, and is perhaps consistent with the cases of *Wright v. Mayer*, 6 Ves. 280, and *Stratford v. Hagan*, 2 Ball & Beatt. 164. But there appears to me to be a striking difference between the production of such deeds, and the communication of any fact disclosed in professional confidence. The client himself could not be compelled to discover such com-

munications, for if he could, the reason of the rule which is meant to allow unrestrained intercourse between client and attorney, would be violated, and its object frustrated.

I therefore think that this decree ought to be reversed, and the case sent back with directions to order an issue to be tried before a jury, to ascertain the fact of the payment of the debt by Ryan, in the trial of which issue the circumstance that the suit was directed to be dismissed may, if not admitted, be proved; leaving to the judge the questions which may arise on the admissibility of other testimony.

TUCKER, P. The first and most important question in this case is whether the letters from Lyle to M'Clelland are evidence in the cause. The first objection to them is based upon the rule that an attorney at law will not be permitted to violate professional confidence. But several things must concur to bring a case within the rule. The matter must have been one of professional confidence: it must have been at the time a secret,

for if known to all the world there is no reason for farther concealment: the disclosure must be in invitum, as it respects the client: and lastly, if it might be forced from the client by the rules of the court, parolation it may be drawn from the attorney. In this case, every one of these ingredients is wanting. First, the direction by letter to dismiss the suit was not a matter of professional confidence, though it might have been made so, if, before compliance, it had been countermanded. For an order to dismiss a suit requires an act to be done which in itself implies, and in its execution operates, a disclosure of the order itself, since the attorney could not properly dismiss without authority. It was not, then, a matter of professional confidence. Secondly, if it had been, it had long before been divulged at the settlement between M'Clelland and Saunders before an arbitrator. Thirdly, it is not in invitum; for the defendant, in his answer, expressly disavows any complaint of disregard of professional confidence. "For," says he, "if it can be shewn that this debt was paid before, this respondent will refund the money he has received, with as much pleasure &c." The obvious meaning of which is, that he will feel pleasure in repaying what justice demands, if it can be shewn he had improperly received it, even though the fact should be ascertained by a breach of professional confidence. Lastly, if the plaintiff would have had a right to demand the production of these letters had they been in the possession of the defendant, (about which there can be no reasonable doubt) it would seem perfectly clear that the attorney might with propriety produce them, and indeed be compelled to do so. The case of *Wright v. Mayer*, before lord Eldon in 1801, 6 Ves. 282, seems indeed to hold a different doctrine. But the case is unsatisfactorily reported; and in 1816, in the case of *Fenwick v. Reade*, 1 Merivale 114, the same able judge decided, that an attorney submitting to produce title deeds of his client in his possession \*as the court should direct, might be called upon to produce

them, if the principal could himself have been called upon to do so. This seems to me good sense and sound reason. I am therefore of opinion, that in reading these letters, there is no violation of that professional confidence which it was the object of the rule to respect and maintain.

Another objection has been made at the bar, to the sufficiency of the proof that these letters were written by Lyle. If M'Clelland's affidavit be read, there can be no doubt of it. It is objected to, however, for want of notice &c. and this objection may be sound, unless we take it that the defendant (not the plaintiff, as the record has it, which would be wholly unmeaning) had agreed to read it as if regularly taken. This I doubt whether we can do, however strongly we may suspect that there is a mistake in the record. But M'Clelland's testimony seems to me unnecessary, as the defendant does not contest or call for proof of the letters, but endeavours to explain away the supposed mistake in them. In this state of the case I shall take them as proved, and the rather, as, in case of their rejection, the cause would necessarily go back for further proof.

Taking the letters as evidence, the result must be the affirmance of the decree. The presumption of payment from length of time is complete, and is sustained by plenary proof. The commencement of a suit to foreclose, the failure for nearly 20 years to file a bill, the order to dismiss the suit, the memorandum of the debt having been paid by H. Rose, leave the court no alternative but to presume the payment. The answer of Ryan, being no evidence between the contending incumbrancers, cannot affect this conclusion. And the testimony of judge Cabell, so far from shewing that the debt was due, furnishes perhaps a clue to the order of dismission. Strongly impressed with the injustice of the demand against Philip Ryan, who had never got a good title for the land, he may have communicated his views to Lyle, who may have acquiesced in them, and sought and obtained payment in some way from the heir of the original debtor. So it is, we have Lyle's statement nearly thirty years ago, that the debt was paid; and it is now too late to ascertain the mode and circumstances of the payment. The decree must be affirmed.

BROOKE, J., concurred; and further held, that the statement of M'Clelland was competent evidence.

Decree affirmed.

## 79 \*Catlett and Wife v. Marshall and Others.

February, 1839, Richmond.

(Absent TUCKER, \* P.)

**Wills—Annuities Given in Remainder—When They Vest.**—A testator, having bequeathed annuities for

\*He decided the cause in the court of chancery.  
†Wills—Vesting of Estates.—The law favors the vesting of estates, as soon as the words of the instrument will admit of it. See *foot-note* to *Brent v. Washington*, 18 Gratt 526; *Corbin v. Mills*, 19 Gratt 440. The principal case is cited, in support of this



life to his three nieces, Frances, Sybella and Ann, and charged them upon his real estate. devises, that upon the death of Frances, her annuity be given and continued to the second child of B. F. during his or her natural life; that upon the death of Sybella, her annuity be given and continued to the third child of B. F. during his or her natural life; and that upon the death of Ann, her annuity be given and continued to the fourth child of B. F. during his or her natural life. At the date of the will, B. F. is a widower, with five children, of whom the four eldest are known to the testator, the second and third being sons, and the fourth a daughter; and all of these five children survive the testator. By a second marriage, contracted in the testator's lifetime, B. F. has another child; who, being the fourth child at the decease of the annuitant Ann, claims the annuity. **Held**, the annuities in expectancy vested at the death of testator, in those children of B. F. who were then the second, third and fourth, and were not contingent until the deaths of the prior annuitants.

Thomas lord Fairfax, proprietor of the northern neck of Virginia, by his last will and testament, dated the 8th of November 1777, and duly executed and proved to pass and charge real estate, bequeathed to his nieces Frances Martin, Sybella Martin and Ann Susanna Martiu, annuities of £100. sterling each, for and during their natural lives; the payment of which he charged upon the real estate devised by the will to his nephew Denny Martin. To his three nephews, the said Denny Martin, Thomas Bryan Martin and Philip Martin, he bequeathed all the negro slaves that he should die possessed of, to be equally divided among them, share and share alike.

rule, in *Cheatham v. Gower*, 94 Va. 386, 26 S. E. Rep. 853; *Corbin v. Mills*, 19 Gratt. 472; *Stokes v. Van Wyck*, 83 Va. 733, 3 S. E. Rep. 387. See *Sellers v. Reed*, 88 Va. 379, 13 S. E. Rep. 754. opinion of *LEWIS, P.* and *Cooper v. Hepburn*, 15 Gratt. 558. But see *Hinton v. Milburn*, 23 W. Va. 171.

**Same—Same—Testator's Death.**—It is well settled that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will. *Chapman v. Chapman*, 90 Va. 409, 18 S. E. Rep. 913; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Jameson v. Jameson*, 86 Va. 51, 9 S. E. Rep. 480; *Raney v. Heath*, 2 Pat. & H. 206; *Hinton v. Milburn*, 23 W. Va. 171.

**Same—Legacies—When Vested—When Contingent.**—Where a future time for payment of a legacy is defined by the will, the legacy will be construed as vested, when the time is meant to be annexed to the payment or possession only, but as contingent, when annexed to the gift itself. Thus, a legacy payable to the legatee at twenty-one, or any other age, is vested; but a legacy payable to a legatee at twenty-one, or when he attains twenty-one is contingent unless the intermediate interest is given to him, in which case the legacy is vested. *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754; *Major v. Major*, 32 Gratt. 819.

**Same—Vesting of Mixed Funds.**—The vesting of a mixed gift of realty and personalty, is controlled by the rules relating to devises of real estate. *Raney v. Heath*, 2 Pat. & H. 207; *Sellers v. Reed*, 88 Va. 377, 13 S. E. Rep. 754.

80 \*By a codicil dated the 27th of November 1779, also duly executed and proved to pass and charge real estate, the testator made the following new provisions: "The negro slaves left in my will to be equally divided between my nephews Denny Martin, Thomas Bryan Martin and Philip Martin esqs. shall be divided into four equal parts, instead of three. One fourth part thereof I give and devise to Bryan Fairfax esq.—my intent and meaning being that he shall have an equal share or part of my said negroes with my aforesaid three nephews. And whereas in my aforesaid will I have bequeathed an annuity of £100. sterling to each of my three nieces Frances Martin, Sybella Martin and Ann Susanna Martin during their several lives; I do hereby devise and bequeath, that upon the death of Frances Martin, her annuity of £100. be given and continued to the second child of the aforesaid Bryan Fairfax, during his or her natural life; and that, upon the death of Sybella Martin, the annuity of £100. sterling bequeathed to her be given and continued to the third child of the aforesaid Bryan Fairfax, during his or her natural life; and further, that upon the death of my other niece Ann Susanna Martin, the annuity of £100. sterling bequeathed to her be given and continued to the fourth child of the said Bryan Fairfax, during his or her natural life."

The will and codicil were proved and recorded in the county court of Frederick, in August 1782.

At the date of the codicil, and at the time of the testator's death, Bryan Fairfax had five children living; namely, Thomas his eldest son and heir, William, Ferdinando, Elizabeth and Robert. His first child, a daughter, had died before the date of the codicil: at that date, therefore, and at the death of the testator, Thomas was the second child in the order of birth, and the first in the order of seniority; and in the same order of seniority, William, Ferdinando and Elizabeth were the second, third and fourth, respectively. Bryan Fairfax

81 \*lost his first wife in 1778, and married again at some period before October 1780. By his second wife he had two children, Hannah and Ann; the first of whom died in infancy.

After the death of lord Fairfax and of Denny Martin, the manor of Leeds, a part of the real estate devised to the latter, was sold and conveyed by Philip Martin his heir at law, to James M. Marshall, John Marshall and Rawleigh Colston, jointly; the purchasers covenanting to pay or secure to the second, third and fourth children of Bryan Fairfax, from and after the deaths of Frances, Sybella and Ann Susanna Martin, respectively, the annuities given to the said children by the codicil to lord Fairfax's will.

Ann Susanna Martin died in 1817. At that time there were living only four children of Bryan Fairfax; namely, Thomas, Ferdinando, Elizabeth, and Ann the surviving child of the second marriage.

In 1826, Charles J. Catlett and Ann his wife, who before her marriage was Ann Fairfax

(surviving daughter of Bryan Fairfax by his second wife) exhibited their bill in the superior court of chancery holden at Winchester, against James M. Marshall, John Marshall, and the heirs at law and devisees of Rawleigh Colston, who was then dead, setting forth the provisions aforesaid of the will and codicil of lord Fairfax, the conveyance of the manor of Leeds to James M. Marshall, John Marshall and Rawleigh Colston, and the covenant on the part of the purchasers; insisting, that upon the true construction of the codicil, the female plaintiff became entitled, on the death of Ann Susanna Martin, to her annuity of £100. sterling, she being at that time the fourth child of Bryan Fairfax; and praying that the arrears of the annuity accrued since the death of the said Ann Susanna, with interest thereon, might be decreed to the plaintiffs, and provision made for securing to them the payments \*thereafter to become due annually during the life of the female plaintiff.

The defendants, by their answers, insisted that according to the just construction of the codicil, the reversionary interests in the annuities, thereby bequeathed to the second, third and fourth children of Bryan Fairfax, vested, on the death of the testator, in the persons who at that time answered the description in the codicil, and did not pass to those who might answer that description at the death of the first annuitants.

By the evidence filed in the cause it appeared, that lord Fairfax and Bryan Fairfax were second cousins: that in 1765, lord Fairfax granted a tract of land of 12588 acres to Bryan Fairfax for life, with remainders to his sons Thomas and William, successively, in tail male; Thomas being described in the grant as "the eldest son," and William as "the second son," of Bryan Fairfax: that about the year 1772, Bryan Fairfax and his wife, with several of their children (probably all that were born up to that time, of whom Elizabeth was the youngest) were at Bath in Berkeley county, where, during several weeks, they lodged in the same house with lord Fairfax: and that some four or five visits were interchanged between lord Fairfax, who resided in Frederick county, and Bryan Fairfax, who resided in Fairfax county, in the boyhood and within the recollection of Thomas Fairfax, who was born about the year 1761; so that some of these visits probably took place after the birth of Elizabeth, which occurred about 1770.

The cause was heard in December 1827; when the chancellor, being of opinion that the person entitled to the annuity in question after the death of Ann Susanna Martin, was Elizabeth, the fourth child of Bryan Fairfax at the date of the codicil and at the death of the testator, and not the female plaintiff, who answered the description of the fourth child at the death of Ann Susanna Martin,—dismissed the bill with costs. From which decree the plaintiffs appealed to this court.

83 \*Taylor and Robertson, for appellants. Three questions arise upon the second clause of the codicil: 1. Are the annuities of the nieces to be continued to the

second, third and fourth children of Bryan Fairfax according to the numerical order of their births? 2. Are they to be continued to the second, third and fourth children living at the death of the testator in 1782? 3. Or was it intended by the testator that any children of Bryan Fairfax, who might be the second, third and fourth children of him, living at the death of the prior annuitants, should take? We contend that the last-mentioned disposition was the one intended by the testator.

The following propositions of law are premised:

1. In the construction of wills, the intention of the testator is the rule and guide; and that is to be collected from the whole will. *Frogmorton v. d. Bramstone v. Holyday et al.*, 3 Burr. 1622; *Oates v. d. Markham v. Cooke*, Id. 1686; *Butler v. Duncomb*, 1 P. Wms. 457.

2. A general intent, if manifest and clear from the whole will taken together, will control a particular intent, however expressly declared. *Robinson v. Robinson*, 1 Burr. 38; 2 Fonbl. Eq. ch. 3, § 2, p. 55, note (h); *Roe v. d. Dodson v. Grew et al.*, 2 Wils. 322; *Doe v. Applin*, 4 T. R. 82; *Doe v. Smith*, 7 T. R. 531; *Doe v. Cooper*, 1 East 229; *Pierson v. Vickers*, 6 East 548; *Jesson v. Wright*, 2 Bligh's P. C. 49; *Doe v. Harvey*, 4 Barn. & Cres. 620.

3. The construction of a will may be made from circumstances as they were at the time of making the will. All Souls College v. Codrington, 1 P. Wms. 597; *Godfrey v. Davis*, 6 Ves. 44; *Cartwright v. Vawdry*, 5 Ves. 532, 3, 4; *Shelton's ex'ors v. Shelton*, 1 Wash. 56, 7.

4. Where the testator's language is equivocal, the circumstances of his family, or of the family to be benefited, are admissible in evidence, to put a construction on it.

*Randolph's Peake* 125; *Powell* on 84 \*Devises 518; *Kerman v. Johnson*, Sty. 281, 293; *Moore v. Price*, 3 Keb. 49; *Cooper v. Williams*, Prec. in Ch. 71.

The first clause of the codicil was intended to benefit Bryan Fairfax personally: and that the second was meant to benefit the family of Bryan Fairfax generally, without regard to any particular child, is manifest upon the following considerations. The testator has used no words so unequivocally designating particular children, as to amount to what the law calls a *descriptio personarum*: and the language which he has used is inconsistent with the idea of any such particular designation; for it appears by the grant made to Bryan Fairfax in 1765, and by the testimony in the cause, that he knew, at the date of the codicil, that the second and third children of Bryan Fairfax were sons, and the fourth a daughter; yet to each of the objects of his bounty he continues the annuity during his or her natural life; and this, not by an independent clause, but by one connected with and immediately following that in which he has provided for the father—which is always considered a strong circumstance to shew a general intent. It is unquestionable, that the testator did not mean to restrict his bounty to the particular indi-

viduals who were the second, third and fourth children of Bryan Fairfax at the date of the codicil: his acquaintance with those individuals, viewed in connexion with the fact of his using language which imports that each object of his bounty might be either a male or a female, renders such a restrictive construction impossible. He designed to leave indeterminate and unascertained, at that time, the persons who were to take upon the death of the annuitants. Nor is there anything in the language of the testator, in the circumstances of his own family, or in those of the family of Bryan Fairfax, which indicates, or renders probable, an intention that the persons who were to take annuities of the nieces should become determinate at his own death. His language is

85 \*opposed to that construction; for he devises, that "upon the death" of each annuitant, her annuity shall be continued to "the second" &c. child of Bryan Fairfax; and even if this be somewhat equivocal, and do not necessarily import that the annuity is to be taken by such child as, upon the death of the annuitant, may be the second, &c. still, that meaning occurs more obviously and naturally than any other; while the extraneous circumstances, which must necessarily be looked to in every case like this, combine to strengthen the probability that such, and no other, was the real intent of the testator. He undoubtedly intended a benefit to some three of Bryan Fairfax's children; but he knew that if he designated, by the terms of his will, the particular child who was to succeed to each particular annuity, so that, before the death of the prior annuitant, the successor might be individually known and named, his or her death in the lifetime of the prior annuitant would cause the lapse of the annuity, although other children of Bryan Fairfax, equally dear to him, might be living; and it is therefore unlikely that he designed to ascertain, previous to the death of the annuitant, the person who was to be the successor. Supposing this to be the proper construction of the clause, and that the testator intended to leave the objects of his bounty thus indeterminate until the period when that bounty was to be enjoyed, such an intention contravenes no rule of law. The authorities establish, beyond all doubt, that where property is given to a class of persons, as children, grandchildren, brothers &c. all persons that answer the description at the time for distributing the fund, no matter whether they were in being at the date of the will, or were born after the testator's death, nor whether they be the offspring of a marriage contracted before the testator's death, or afterwards, are entitled to share in the distribution. *Gilmore v. Severn*, 1 Bro. C. C. 581; *Hoste v. Pratt*, 3 Ves. 730; *Hughes v.*

86 *Hughes*, 3 \*Bro. C. C. 434; S. C. 14 Ves. 256; *Curtis v. Curtis*, 6 Madd. 17; *Ellison v. Airey*, 1 Ves. sen. 111; *Belt's Suppl.* 73; *Baldwin v. Carver et al.*, Cowp. 309; *Attorney General v. Crispin*, 1 Bro. C. C. 386; *Congreve v. Congreve*, Id. 530; *Devisme v. Mills*, Id. 537; *Crone v. Odell*, 1 Ball & Beatt. 459, 483; *Morse v. Morse*, 2

Cond. Eng. Ch. Rep. 511; *Leake v. Robinson*, 2 Meriv. 381, 2; *Barrington v. Tristram*, 6 Ves. 345. If Ann Catlett, then, at the death of Ann Susanna Martin the third annuitant, was the fourth child of Bryan Fairfax, she fell within the exact description of the testator, at the first moment that the annuity could vest in or be taken by any person under the will; and by the strongest and clearest analogy, she was entitled to take it. To the construction which we contend for, it may perhaps be objected that the children of Bryan Fairfax and the three nieces of the testator might so have died, as to render the execution of the will difficult or impracticable. But with such considerations the court has nothing to do, in any case where the intention of the testator is ascertained. *Diffis v. Goldschmidt*, 1 Meriv. 417; S. C. 19 Ves. 566; *Hutcheson v. Jones*, 2 Madd. 124. In the language of lord Ellenborough in *Driver v. Frank*, 3 Maule & Selw. 55, 6, the court is not warranted in making another will for the testator than that which he has actually made for himself, because inconveniences which he did not foresee or provide against might, in another state of events, have resulted from the will which he has made.

Johnson and Leigh, for the appellees, contended that those of Bryan Fairfax's children who were the second, third and fourth in the order of seniority at the death of the testator, became entitled to the annuities in succession to the nieces respectively. In maintaining this construction of the codicil, they said, they had not to encounter any one of the propositions of law stated by the counsel for the appellants. All of those propo-

87 sitions \*might be admitted, without affecting the case in the slightest degree. Supposing the testator's general intent to have been, as assumed on the other side, to make a provision for Bryan Fairfax and his family, that intent was perfectly consistent with the construction for which they contended: while that construction would at the same time explain the use of the alternative words "his or her," applied to each of the children designated: since, even admitting that the testator knew, at the date of the codicil, all the children of Bryan Fairfax then living, he could not know whether, at the period of his own death, the second, third and fourth children would be the same individuals who then answered that description, or not. On the other hand, the construction insisted on by the appellants involved consequences which it was impossible to regard as having been within the contemplation and intent of the testator. It might be presumed that he did not intend any one child to have more than one annuity: yet, according to the construction of the appellants, all the annuities might have gone to the same child; for possibly, of the three annuitants, Ann Susanna might have died first, Sybella next, and Frances last, and the same individual might have been the fourth child of Bryan Fairfax at the death of Ann Susanna, the third at the death of Sybella, and the second at the death of Frances. Again, one and the same individual might possibly have been the fourth

child of Bryan Fairfax at the death of Sybella, the third at the death of Frances, and the second at the death of Ann Susanna; in which case, upon the same construction, he would have taken no one of the annuities, though he survived all the annuitants. And the person taking all three of the annuities, in the case first supposed, might be a child of Bryan Fairfax born after the testator's death: while the person losing all of them, in the other case, might

88 be one of the very children with whom the testator was acquainted in his \*lifetime. The general rule is, that wherever the legatee is not named, but designated by description, you ascertain at the death of the testator who answers that description. There are doubtless exceptions; but whoever relies upon an exception must take the onus of shewing that his case falls within it. In this case, no ground of exception has been suggested. The cases of *Hansford & ux. v. Elliott et al.*, 9 Leigh 79; *Doe d. Long v. Prigg*, 8 Barn. & Cres. 231; 15 Eng. C. L. Rep. 206; *Driver v. Frank*, 6 Price 75; 2 Eng. Exch. Rep. 370; *S. C. 3 Maule & Selw. 24*; *Lady Lincoln v. Pelham*, 10 Ves. 166; *Bowles v. Bowles*, Id. 177; and *Danvers v. Earl of Clarendon*, 1 Vern. 35, are strong authorities in support of that construction for which the appellees here contend. All of them proceed on the principle, that the law favours such a construction as will leave bequests contingent as short a time as possible: and this is more especially the case where legacies are charged upon land, since then the ascertainment of the persons entitled is important as well to the heir or devisee whose land is charged, as to the legatees themselves, whose interests, when vested, become a marketable property, though the vesting in actual possession may be still uncertain and contingent. The cases cited on the other side, in which a fund was bequeathed to be distributed among a designated class of persons, are not adverse. The result of them all is simply this: All persons answering the description, who are in case at the testator's death, take vested interests (unless some other provision necessarily keeps them contingent) and those not then in esse take vested interests as they successively come into being: the shares vest in possession immediately, if there is no particular estate, or if there is one, then as soon as it is determined: and even if some peculiar provision keep the shares of the legatees contingent till the happening of a particular event, still these contingent

89 interests are \*transmissible to their representatives, if the persons to whom they are contingently given be certain and determinate.

**PARKER, J.** In expressing the opinion which I have formed in this case after long consideration, I do not mean to enter at large upon the various topics discussed with so much ability by the counsel who argued it, but merely to state the grounds of my judgment, that the decree ought to be affirmed.

Lord Fairfax, by his will, bequeathed to his nieces Frances Martin, Sybella Martin

and Susanna Martin, and to each and every of them living at his death, an annuity of £100. sterling during their and each of their natural lives, and charged his land devised to his nephew Denny Martin with the payment. This will is dated in 1777. By a codicil thereto, dated the 27th of November 1779, he made some provision for Bryan Fairfax, and after reciting the bequest of the annuities aforesaid, he adds, "I do hereby devise and bequeath that upon the death of Frances Martin, her annuity of £100. be given and continued to the second child of the aforesaid Bryan Fairfax, during his or her natural life: and that upon the death of Sybella Martin, the annuity of £100. sterling bequeathed to her be given and continued to the third child of the aforesaid Bryan Fairfax, during his or her natural life: and further, that upon the death of my other niece Ann Susanna Martin, the annuity of £100. sterling bequeathed to her be given and continued to the fourth child of the said Bryan Fairfax, during his or her natural life."

At the date of the will and codicil and at the death of the testator, Bryan Fairfax had five children living; and at those periods, William, Ferdinando and Elizabeth answered the description of his second, third and fourth children. But at the death of Ann Susanna

90 Martin in 1817, the wife of the complainant answered the description \*of Bryan

Fairfax's fourth child, in consequence of the death of some of his other children; and in this character she claims the annuity of £100. sterling bequeathed to the said Ann Susanna. The question therefore is between a child of Bryan Fairfax answering the description at the date of the codicil and at the death of the testator, and another child answering the description at the death of the annuitant; and it is a question purely of intention. The only rule of law which seems to be applicable to the subject is this; that in general the courts are inclined to favour the vesting of legacies or other gifts, as soon as the words of the instrument will admit of it: and where lands are charged, there is good reason for this rule, in order that the precise nature of the charge may be understood, and the rights of property ascertained. If the intent, however, be apparent on the face of the will, neither the technical rule respecting the early vesting of an estate, nor possible inconveniences arising from a literal adherence to such intention, are to be regarded. We are not warranted (as lord Ellenborough expressed himself in *Driver v. Frank*, 3 Mau. & Selw. 25,) in making another will for the testator than that which he has actually made for himself, because inconveniences not foreseen or provided against might, in a certain state of events, result from the will which has been made: although (in the language of another eminent judge on the same occasion) the case is very different where the intention is not fully expressed, but is to be collected and inferred as only probable. In that case the probability, from which the intention is to be inferred, may be outweighed by the improbability that the testator could intend to make

a distribution of his property, attended with such inconveniences as would follow from carrying into effect his supposed intention. And to this extent only can we give weight to the argument founded, in this case, on the difficulty, confusion and injustice  
91 which might result, if it should \*be considered that the persons who were to take these several annuities were not determinate until the deaths of the first annuitants.

In ascertaining the intention of lord Fairfax, we must remember that he was not standing in loco parentis to the children of Bryan Fairfax; that Bryan Fairfax was but distantly related to him; that the testator was probably acquainted with the four eldest children of Bryan Fairfax some time before the date of his will and codicil, and with no other child, Robert the youngest being then an infant of tender years; that Bryan Fairfax was, at the date of the codicil, almost certainly a widower; and that no general intent appears, to provide for all the children of Bryan Fairfax, but only for his second, third and fourth. If we ascertain what children were in the contemplation of the testator, as sustaining the character of second, third and fourth child, no difficulty can arise about the time at which the gift vested; for it cannot admit of a doubt, that where a legacy is given to one for life, and after his decease to a determinate child of another, or to younger children generally, it vests at the death of the testator, and is not postponed till the death of the tenant for life, when the estate is to come into possession. *Lady Lincoln v. Pelham*, 10 Ves. 166.

In the case before the court, the testator has not clearly indicated the period when the right to the annuities should vest in interest, in the second, third and fourth child of Bryan Fairfax. But the circumstances under which he made his will, and the state of Bryan Fairfax and his family at the time, render it highly probable that he look only to the second, third and fourth child at the date of the bequest, or at the time of his own death. The expressions his or her certainly prove that he contemplated the possibility of the second, third or fourth child being male or female, at the time of enjoying the annuity; but the chancellor has properly remarked that the neces-

92 sity for the use of these terms \*equally existed, whatever time he looked to as ascertaining the persons to take. If that time was to be the period of his own death, Elizabeth the fourth child might, by the death of her brothers, become the second or third, and Robert be substituted in her place. There being then no clear intent manifested on the face of the will, and the circumstances shewing that lord Fairfax more probably designed to benefit the children known to him and then in esse, answering the description, than children to be born at a future period; and this construction coinciding with the principle established by this court in the case of *Hansford & ux. v. Elliott et al.* on the authority of *Doe d. Long v. Prigg*, 8 Barn. & Cres. 231, that where no special intent to the contrary is manifested,

the vesting of legacies shall be referred to the death of the testator, and not to the time of distribution and payment; and being, as I think, further supported by the case of *Driver v. Frank*, 3 Mau. & Selw. 25; S. C. 6 Price 41,—I am of opinion that the second, third and fourth child of Bryan Fairfax at the death of the testator, were entitled in interest to the annuities; an interest which, though contingent, and not transmissible to representatives, was valuable and saleable, and therefore to be noticed and protected by this court.

The decree is to be affirmed.

The other judges concurred. Decree affirmed.

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\*Manns v. Flinn's Adm'r.

February, 1839, Richmond.

(Absent BROOKE, J.)

**Fraudulent Devises—Action of Debt—Executor's Bond.**

—Under the statute against fraudulent devises, an action of debt lies on an executor's bond, for a creditor claiming a debt from the executor's estate, arising from a breach of the condition by the executor in his lifetime, against the executor's devisees, to have satisfaction out of the lands devised.

**Executors and Administrators—Grant of Administration Void.**—Judgment is recovered against A. in his lifetime; A. dies, and upon the supposition of his intestacy, administration of his estate is granted to B; a will of A. being afterwards found and proved, the former grant of administration is revoked, and administration with the will annexed granted to C; and suit is brought on the judgment after five years had elapsed from the grant of administration to B. but within five years from the grant of administration to the rightful adm'r C.—HELD, the five years limitation prescribed by the statute 1 Rev. Code, ch. 128, § 17, began to run, not from the void grant of administration to B. but from the qualification of C. the rightful adm'r, and so the statute was not a bar to the suit.

**Same—Same—Construction of Statute.**—Quere,

whether the provision of the 17th section of that statute applies to judgments against a decedent in autre droit, or only to judgments against him in his own right? and whether it is a protection to the heirs or devisees of the decedent as well as his ex'or or adm'r?

**Chancery Practice—Sale of Land—Rents and Profits—Decree—Affirmance.**—An interlocutory decree di-

\*Executors and Administrators—Grant of Administration Void.—In *Manns v. Flinn*, 10 Leigh 93, the court held that the grant of administration as upon an intestacy where a will exists, though not ostensible, was void, or a nullity quoad the executor. The principal case is cited in *Gibson v. Beckham*, 16 Gratt. 325.

†Judicial Sales—Inquiry Into Rents and Profits.—See foot-note to *Barr v. White*, 30 Gratt. 532; *Ewart v. Saunders*, 25 Gratt. 203; and monographic note on "Judicial Sales" appended to *Walker v. Page*, 31 Gratt. 636. See 17 Am. & Eng. Enc. Law (2d Ed.) p. 958.

Same—Same.—In *Ewart v. Saunders*, 25 Gratt. 207, the court said: "It will be observed that the statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not

rects a sale of lands to satisfy a debt, in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for such alteration: upon appeal to this court, **HOLD**, the decree shall not be reversed for such cause, but affirmed, and the cause remanded, with direction to alter the decree, and direct satisfaction out of the rents and profits, if such alteration be asked, and if the debt can be satisfied out of the rents and profits within a reasonable time.

In August 1813, John Flinn recovered a judgment in an action of debt in the county court of Greenbrier, \*against Moses Mann executor of Andrew Hamilton, for £1000. to be discharged by the payment of £100. with interest from the 26th July 1795, and the costs of the suit. Flinn died shortly afterwards, and in September 1815 administration of his estate was granted to Anthony Rader; in whose name the judgment was revived by scire facias in June 1818, for the debt, interest and costs, and the costs of the scire facias. On this judgment a fieri facias was sued out in August 1818, which was returned nulla bona. And this was the last proceeding had at law in the case.

Moses Mann died in 1822, and in the same year, the county court of Alleghany, on the supposition that he had died intestate, granted administration of his estate to Nash Le Grand and two others. But he in fact left a will, which, being afterwards found, was proved in the circuit court of Alleghany in October 1823; and, at the same time, the letters of administration which had been previously granted to Le Grand and others were revoked, without prejudice to any person for any acts done prior to the production and probat of the will, and the executor

named in the will refusing to act, administration with the will annexed was granted to Lewis Mann.

Rader, the first administrator of Flinn having died, administration de bonis non of Flinn's estate was granted to Joseph Maze in November 1827.

No proceedings having been had on the judgment of Flinn's administrator against Moses Mann to revive the same against his representatives, and no action of devastavit having ever been brought thereon; Maze the administrator de bonis non of Flinn, in March 1828, exhibited his bill in the superior court of chancery of Greenbrier, against Lewis Mann the administrator with the will annexed of Moses, setting forth the original judgment recovered by Flinn against him as executor of Hamilton, the judgment recovered by Rader the first \*administrator of Flinn on the scire facias, and the execution sued out by Rader and the return of nulla bona thereon: alleging, that the debt remained still unsatisfied; that assets of Hamilton's estate sufficient to satisfy the debt came to the hands of Moses Mann his executor, which he had wasted or misapplied; and that sufficient assets of Moses Mann's estate came to the hands of the defendant Lewis Mann his administrator with his will annexed: and praying accounts of Moses Mann's administration of his testator Hamilton's estate, and of the defendant's administration of Moses Mann's estate, and a decree for the amount of the judgment out of the assets of Moses Mann's estate.

The defendant, in his answer, said, that Moses Mann had duly and fully administered the estate of Hamilton, and that he himself had duly and fully administered the estate of Moses Mann; and after shewing that Moses Mann died, and that administration of his estate was granted to Le Grand and others, in the year 1822, he relied on the pro-

pay the judgment in five years. When there is doubt about the fact, or an inquiry is demanded by either of the parties, the court will generally direct one of its commissioners to ascertain and report the annual rents and profits of the land. But this is not a necessity in every case. If none of the parties ask such an inquiry there may, in a proper case, be a decree for the sale of the property without it. *McClung v. Beirne*, 10 Leigh 406; *Manns v. Flinn*, 10 *Id.* 98." This language is quoted in *Brengle v. Richardson*, 78 Va. 411; *Horton v. Bond*, 28 Gratt. 321. See the principal case cited in *Newlon v. Wade*, 43 W. Va. 287, 27 S. E. Rep. 245.

**Same—Same—Enquiry Presumed to Be Waived.**—Where the bill does not allege the insufficiency of the rents and profits to satisfy the liens within the period of five years, and where there has been no enquiry, but the decree of the court below sets forth that it appears that the lands without the improvements when sold would not more than pay the liens, the party entitled to the enquiry may be presumed to have waived it, and the decree of sale will not be set aside on account of the omission of such enquiry; but it will be amended, and that party be allowed to have the enquiry if he chooses, and so amended the decree will be affirmed. *Brengle v. Richardson*, 78 Va. 406, 412, citing the principal case; *McClung v. Beirne*, 10 Leigh 406; *Ewart v. Saunders*,

25 Gratt. 208. See *Price v. Thrash*, 30 Gratt. 515; *Hill v. Morehead*, 20 W. Va. 429.

In *McClung v. Beirne*, 10 Leigh 406, it is said: "The next error assigned is the failure to ascertain whether the rents and profits would not pay the debt in a reasonable time. To this it may be answered that defendant, not having asked the enquiry, is presumed to have waived it. *Manns v. Flinn*, 10 Leigh 98." The principal case is cited in this connection in *Moore v. George*, 10 Leigh 247; *Rose v. Brown*, 11 W. Va. 140; *Brengle v. Richardson*, 78 Va. 412.

**Same—Same—No Application for Enquiry Made—Effect.**—Where no application for such an enquiry is made, and the decree appealed from is interlocutory, the appellate court will not reverse the decree for the failure to direct the enquiry; but will amend it, allowing the defendant to have the enquiry if he chooses, and so amended will affirm it. *Ewart v. Saunders*, 25 Gratt. 208, citing the principal case. The principal case is cited in this connection in *Rose v. Brown*, 11 W. Va. 139; *Johnson v. Wagner*, 76 Va. 592, and distinguished in *Cronie v. Hart*, 18 Gratt. 745. See the principal case cited in *Palro v. Bethel*, 75 Va. 833.

See opinion of JUDGE STANARD in the principal case, p. 108, where he distinguishes the case of *Tenant v. Pattons*, 6 Leigh 196.

vision of the statute of limitations 1 Rev. Code, ch. 128, § 17, \* as a bar to the relief sought in this suit commenced in March 1828.

Hereupon, in November 1828, Maze filed an amended and supplemental bill, making new parties, namely, the children of Moses Mann, to whom by his will he devised his real estate, and who (the bill alleged) 96 were also his heirs: and exhibiting the official bond of Moses Mann as executor of Hamilton, whereby he bound his heirs, he insisted, that, in case it should turn out that the personal assets of his estate had been duly administered and exhausted, then, by force of his executorial bond, his real estate in the hands of his heirs and devisees was chargeable with the debt he owed to Flinn's estate; and he prayed satisfaction thereof, accordingly, out of the real estate, and an account of the same.

These new parties, in their answers, controverted the justice of the claim; and supposing it just, they controverted the liability of the real estate devised to them for such a debt. And they also pleaded the statute of limitations as a bar to the relief sought in this suit.

Moses Mann qualified as executor of Hamilton in June 1796, and gave bond for due administration in the form required by the statute, binding his heirs.

It appeared, by exhibits in the cause, that Moses Mann had made three settlements of his accounts of administration of Hamilton's estate, before commissioners of the county court of Greenbrier, which were returned to that court and recorded; the first in 1800, the second in 1801, and the third in 1816; by which, if those settlements had exhibited a due administration, he would have been a creditor of the estate. But the first of those accounts shewed, that before the settlement thereof was made, he had delivered specific legacies to the legatees of Hamilton, to the value of £348. (according to the appraisement of the estate) without requiring refunding bonds from them.

It also appeared, that a decree in favour of the administrator of one Mitchell against Moses Mann as executor of Hamilton, for 406 dollars, had been satisfied and paid by him in October 1821; and that another decree rendered in 1827, in favour of one Meze against Lewis Mann administrator with the will annexed of Moses Mann executor of Hamilton, for about 865 dol-

97 lars, had been satisfied \*and paid by Lewis Mann. But the nature of the claims on which those decrees were founded, and the times at which they had been asserted by the creditors, whether before or after Flinn had recovered his judgment in 1813, nowise appeared; nor indeed was any thing alleged by the defendants to shew that the parties were justified in paying the amount of those decrees in preference to the debt due on Flinn's judgment.

The court having ordered the accounts prayed by the bills, it appeared by the commissioner's report—

1st, That Lewis Mann, the administrator with the will annexed of Moses Mann, had duly and fully administered the personal assets of his testator's estate.

2ndly, That, upon the account of Moses Mann's administration of Hamilton's estate, if the executor was chargeable with the sum of £348. the value of the specific legacies which he had delivered to the legatees of his testator, and with interest thereon from the time he had delivered the same, he had assets in his hands sufficient to satisfy Flinn's judgment, even though the payments of the debts decreed to Mitchell's administrator in 1821, and to Meze in 1828, were allowed as proper credits; or that if he was chargeable with only the £348. the principal value of the specific legacies, yet if he was not entitled to take credit, as against Flinn's administrator, for the payments made in satisfaction of the decrees in favour of Mitchell's administrator and of Meze, he had sufficient assets in his hands to satisfy Flinn's judgment. And exceptions were filed by the plaintiff to the commissioner's report, presenting the two questions—Whether the estate of Moses Mann ought to be charged with interest on the £348. the value of the specific legacies he had delivered to the legatees of his testator? and whether, as against Flinn's administrator, credit ought to be allowed to his estate for the payments to Mitchell's administrator and to Meze?

98 \*3rdly, It appeared, that lands were devised by Moses Mann to his children. made defendants by the amended bill, to the value of about 5500 dollars. But a part of these lands had been sold; and in the progress of the cause, 395 dollars of the purchase money thereof had been paid into court by the purchaser, and 300 dollars more remained yet due from him.

Upon the hearing, the court held, that Moses Mann's estate ought to be charged with the principal and interest of the £348. the value of the specific legacies which he delivered to the legatees of his testator; and that it was not entitled to credit, as against Flinn's administrator, for the payments made to Mitchell's administrator and to Meze; and, therefore, that there were, at the death of Moses Mann, assets of the estate of his testator Andrew Hamilton in his hands more than sufficient to satisfy the claim of Flinn's administrator: That the whole amount of the judgment recovered by Flinn in August 1813 (principal, interest and costs) remained unsatisfied: That the statute of limitations presented no bar to the recovery

\*The words of the statute are—"No action of debts shall be brought against any executor or administrator &c. upon a judgment obtained against his testator or intestate, nor shall any scire facias be issued against any executor or administrator &c. to revive such judgment, after the expiration of five years from the qualification of his executor or administrator; and all such judgments, after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged: saving to all persons, non compos mentis, femes covert, infants, imprisoned, or out of the commonwealth, who may have been entitled to the benefit of such judgment, three years after their several disabilities removed."



thereof: And that the personal assets of Moses Mann's estate, appearing to have been duly administered and exhausted, his real estate, in the hands of the defendants his devisees and heirs at law, ought to be subjected to the payment of the debt due the plaintiff. Therefore, the court decreed, that unless the defendant should, within three months, pay the plaintiff the amount of Flinn's judgment (principal, interest at the rate of five per centum per annum from the 26th July 1795, and the costs), together with the costs of this suit, the marshal of the court should sell the lands devised to the defendants, or so much thereof as should suffice to satisfy the decree and the expenses of the sale. But the court directed, that if the defendants should give their consent to the payment to the plaintiff of the 395 dollars which had been paid into court, and of the 300 dollars which was still due, on account of purchase \*money of the lands by them sold, those sums should be credited against the debt decreed to the plaintiff, and the marshal should sell only so much of the lands yet remaining in the hands of the defendants as would suffice to satisfy the balance of the debt.

The defendants, by petition to this court, prayed an appeal from the decree; which was allowed.

The cause was argued here, by Johnson for the appellants and Leigh for the appellee.

I. Johnson contended, that the 17th section of the statute of limitations was a bar to any relief sought in this case, either against the personal representatives, or the devisees, of Moses Mann. The foundation of the claim was a judgment recovered by Flinn, afterwards revived by his administrator, against Mann in his lifetime as executor of Hamilton; and after Mann's death, the administrator of Flinn might have had a scire facias to revive the judgment against the administrator de bonis non of Hamilton; but if he sought satisfaction out of Mann's estate, his remedy was an action of debt on the judgment against his representative, suggesting a devastavit by Mann; an action of debt against Mann's administrator with his will annexed, on a judgment against his testator. The case, then, was within the plain words of the statute; and the only question was, from what time the statute began to run? Whether from the grant of the letters of administration with the will annexed in October 1823, in which case the five years had not expired before this suit was brought? or, from the grant of administration of Mann's estate, upon the supposition of his intestacy, to Le Grand and others, in 1822, in which case the term of five years was fulfilled? He contended, that the limitation began to run from the first grant of administration in 1822. For he argued, that though the administrators were (by the condition of their bond, 1 Rev. Code ch. 104,

§ 35, p. 383), bound \*to "render and deliver up their letters of administration" upon the subsequent discovery and probat of the will, yet the grant of administration to them was not void; that Flinn's administrator might have maintained an ac-

tion against them; and when their authority was revoked, he ought to have brought his action against the administrator with the will annexed within five years from the time when he might have brought it against any representative of the estate; within five years, namely, from the first grant of administration of Mann's estate to Le Grand and others.

Leigh said, that several very doubtful points might arise upon the construction of the statute in question; as, for instance, whether the statute applied to the case of a judgment against a decedent as executor or administrator of another, or only to judgments against him in his own right? or, whether the statute afforded a protection for the heir or devisee of the decedent as well as his personal representative? In *Mercer's adm'r v. Beale & al.*, 4 Leigh 189, 205, an opinion was intimated by Tucker, P., that wherever the statute protected the personal representative of the decedent, it would equally avail to protect his heir: but the other judges gave no opinion on that point: and the remarks of the president were applied to a case where the foundation of the claim against the heir, was a judgment against the ancestor, on which the statute barred the remedy against the personal representative; not to a case like the present, in which the claim against the heirs and devisees was not founded on the judgment against their ancestor and testator, but on his executorial bond which bound his heirs. But, he said, no such questions need be decided in this case. Supposing the statute applied to such a case, it began to run only from October 1823, when administration with the will annexed of Moses Mann was granted to Lewis Mann; and this suit was brought within five years counted from that date. The

101 \*previous grant of administration of Moses Mann's estate to Le Grand and others, upon the supposition of his intestacy, was, by the subsequent discovery and probat of the will, rendered void from the beginning; *Abraham v. Cunningham*, 1 Petersd. Abr. 250; *Turner v. Davis*, 2 Sound. 148. And if Flinn's administrator had brought a suit against those administrators, an end would have been put to his proceedings against them, by the revocation of their authority, and the grant of administration with the will annexed to Lewis Mann; nor could any proceedings instituted against him have been, by any means, connected with the former proceedings against the administrators.

II. Johnson contended, that the lands of Moses Mann in the hands of his devisees, ought not to have been charged with the debt claimed by Flinn's administrator, under his executorial bond; because there was no debt ascertained to be due from him at the time of his death; it was an uncertain and unliquidated demand. The statute against fraudulent devisees gave a remedy against devisees only for debts of the devisor, not for damages however incurred. Covenant would not lie against devisees upon a covenant of the devisor for breaches in his lifetime, for such breaches gave a claim, not



properly for a debt, but only for damages: and, he said, the action on an executorial bond for breach of the condition, was analogous to, and in substance the same with, an action for breach of a covenant. No remedy whatever was given directly to a creditor on an executor's bond. He could only prosecute a suit upon it in the name of the justices of the court of probat, who were the obligees; and the penalty, the debt, was recoverable in their names, not for the benefit of the relator only, but of all creditors; the relator recovered nothing but the damages sustained by himself by the breach of the condition. Other creditors could only come in by scire

102 *facias*, which is a remedy that the statute against \*fraudulent devisees does not give; and surely, the creditor first suing could not be entitled to an action against devisees, if no subsequent creditor could have recourse against them.

Leigh admitted, that covenant would not lie against devisees on a covenant of the devisor; but, he said, the only reason was, that at common law, if an ancestor devised lands, a creditor by specialty had no remedy either by action of covenant or of debt against the devisee, and the statute against fraudulent devisees gave an action of debt against the devisee, but did not give an action of covenant. 2 Wms. Saund. 7, n. 4; Wilson v. Knubley, 7 East 128. But as an action of debt lay on a bond with collateral condition, as well as on a bond for payment of money, the statute gave the creditor a remedy on such a bond against the devisee of the obligor. There could be no difference, in this respect, between the remedy on an executorial bond and on any other bond with collateral condition. The creditor was entitled to an action of debt upon it, though the action must be brought in the name of the justices, who were the obligees; and that action was prosecuted for the benefit of all the creditors, as well as for the relator. His action was, in effect, the action of all creditors, though other creditors were put to their scire *facias* to entitle themselves to the benefit of the judgment in the action.

III. Johnson objected, that the decree was erroneous in directing a sale of the lands, without first ascertaining that the rents and profits thereof would not have been sufficient to satisfy the debt within a reasonable time. He cited Tennent's heirs v. Patton, 6 Leigh 196.

Leigh answered, that the decree was interlocutory, and if it was erroneous in this respect, this court might provide for the correction of the error.

IV. The other questions discussed at the bar, were—Whether the executor ought to be charged with the value of the specific legacies, they having been delivered

103 \*about thirty years before the bill was filed, and there being no proof that he had notice of Flinn's claim? Whether the executor ought to be charged with this subject, without bringing the legatees before the court, and holding them, in the first instance, responsible for the property they had received? Whether, if he was properly chargeable with the principal, he ought,

under the circumstances of the case, to have been charged with interest? And whether the claim of Flinn's administrator was entitled to preference over the debts due to Mitchell's administrator and to Meze, paid in 1821 and 1828?

STANARD, J. The appellee by his original bill against the personal representative of Moses Mann, sought satisfaction of a judgment obtained by his intestate against Moses Mann as executor of Andrew Hamilton, out of the personal assets of Mann's estate; and by his amended bill, he made the devisees of Mann (who were his children, and, in part, his heirs) defendants, and sought satisfaction of his claim out of the real estate devised to them, in the event that he should fail to get it out of the personal. All the defendants relied on the 17th section of the statute of limitations as a bar to the plaintiff's claim; and the devisees further insisted, that the debt could not be charged on the lands devised. I am of opinion, that neither of these defences is sustainable.

Five years did not elapse, from October 1823, when administration of Moses Mann's estate with his will annexed was granted to Lewis Mann, to the institution of this suit in March 1828; and consequently, if the administration granted to Le Grand and others in 1822, upon the supposition of an intestacy, had not been granted, there would have been no pretext for applying the limitation in question in bar of this suit. A case for the effectual application of that provision of the

104 statute, can be made only by coupling the two grants of administration \*together, and thus, in respect to this matter, giving efficacy to the first, so as to make it the terminus from which the statute should begin to run. This, I think, is inadmissible. The grant of administration as upon an intestacy, when a will exists, though that will be not ostensible, is void for every purpose, except perhaps the single one of protecting a debtor of the decedent in the payment of a debt to such administrator while the will remains concealed or unknown. 1 Wms. on Ex'ors, 369, & seq. Against him the creditor could have no effectual remedy, nor could he, if he had initiated proceedings against him, have pursued them to judgment against the rightful administrator. To allow the rightful administrator to use the void grant to eke out his defence, would be to unite the invalid to the valid, and draw succour to a right the existence of which infers the nullity of that from which succour is sought. The statute requires proceedings to be commenced within five years from the qualification of the executor or administrator: is it for the defendant to say that there was such a qualification, and to use for his protection a proceeding which was in derogation of his rights, and the nullity of which results from those rights?

It is, moreover, the decided inclination of my mind, that this provision of the statute of limitations is not available in bar of a claim on a judgment against a testator or intestate in *autre droit*. But as it is unnecessary to decide this point in the present case, I forbear to express any final opinion upon it,

or to enter into the reasoning which has given to my mind the inclination now avowed.

The charge of the debt due to Flinn's administrator on the lands derived by the defendants from Moses Mann, is made under his executorial bond by which his heirs are bound: and the objection is, that the defendants are devisees, and as such are not chargeable, under the statute against fraudulent devises, on any obligations of

105 \*the testator other than those which evidence some certain debt, and especially not on obligations on which the claimant must sue in the name of others and is a party as relator only.

As to the first branch of the objection, it is to be remarked, that it is not urged against the remedy in equity to which the appellee has resorted; for that would be an objection not to the right but to the mode in which it is sought to be enforced. If the right exists, I have no doubt the appellee has the remedy in equity he has resorted to. The objection is, that his claim is not within the protection of the statute, and he could not have maintained an action at law for it against the devisees. In the present case, as the parties are heirs as well as devisees, this objection might perhaps be turned aside by the appellee, by considering the defendants as having succeeded as heirs to the lands proposed to be charged, to the extent of the interest they would have taken as heirs had there been an intestacy, and regarding them as holding the lands, to that extent, by their better title as heirs. But dismissing that inquiry, and treating them as devisees, my opinion is, that the objection to the liability of the lands devised to the appellee's claim is untenable. The application of the strictest principles of construction to the statute against fraudulent devises results in this—that as the statute gives the remedy by action of debt against the devisee, he and the lands devised are liable only for such claims as can be asserted and recovered by an action of debt. *Wilson v. Knubley*, 7 East 128. Now, the claim of the appellee is within the letter of the restriction resulting from this construction. At the death of Moses Mann, the right of Flinn's administrator to assert his claim by action of debt on Mann's executorial bond, was consummated. The debt too was ascertained; and though in such a suit Mann perhaps might have shewn that he was entitled to exoneration in whole or in part, the

106 possibility of \*such defence rendered the extent of his liability not more uncertain than it would have been, if the claim to exoneration had been founded on disputed set-offs to a bond for his own debt and for a sum certain; and if the claim was on a bond with a collateral condition, and the amount as well as the extent of the responsibility was unliquidated, yet it would be within the letter and strict construction of the statute, and chargeable on the devisees and land devised.

The other branch of the objection, namely, that the action at law, had one been brought, must have been brought in the name of the justices, and the claimant would only have been a relator, is, I think, equally unavail-

able. The only difficulty in bringing a claim asserted on such a security within the letter of the statute, would arise when a second claimant should, after a judgment rendered in favour of the first, seek his remedy: that remedy would be a *scire facias* on the judgment rendered in the suit of the first claimant; and so, it is supposed, it would be liable to the objection arising from the technical and literal construction by which the operation of the statute against fraudulent devises has been limited. But the objection would not be applicable to the case: for the first action on the bond is not only for the benefit of the relator in that suit, but for all others to whom the security enures, and those that come in after the judgment in the action of debt prosecuted for the behoof of all, may with strict propriety be regarded not only as having had a right to an action of debt, but as having used that remedy.

As to the accounts, I think the amount of the appraised value of the specific legacies, and interest thereon, were assets of Hamilton's estate in the hands of Moses Mann his executor, chargeable with the appellee's claim; and that the payments made on the decrees in favour of Mitchell's administrator in 1821, and of Meze in 1828, cannot be allowed as credits to reduce

107 \*the assets chargeable with the appellee's claim. For judgment had been rendered in favour of Flinn the appellee's intestate, as early as 1813, which charged the assets then in the hands of Moses Mann or for which he was then accountable. If this charge could be dislodged by a subsequent judgment or decree, it must have been a subsequent judgment or decree rendered for a claim of higher dignity than Flinn's, and Mann must have had notice of that claim before the rendition of Flinn's judgment. But such superior dignity and notice are not shewn, and not even alleged. Nothing appears in the case to authorize the court to put the appellee on the pursuit of the specific legatees of Hamilton, for the protection of the executor Mann and his representatives. *Prima facie*, the creditor is under no obligation to make such pursuit. Were it conceded that peculiar circumstances might exist, from which an equity in favour of an executor might arise to cast this duty on a creditor, yet that equity should be asserted, and the circumstances suggested in the progress of the cause, in order to enable the creditor to have the circumstances investigated, with a view to relieve him from the duty of pursuing the legatees, by shewing that their removal or insolvency, or other circumstances, would render the pursuit fruitless or in the highest degree inconvenient. The pleadings in this case assert no such equity, suggest no such circumstances. The length of time which has elapsed during the prosecution of the appellee's claim (the only circumstance relied on to put the appellee on that pursuit, and apparently urged for the first time in the argument before the appellate court) is unavailing to sustain the pretension. The lapse of time affords a presumption that the pursuit would have been fruitless, and had it been urged in the progress of the cause in

the court below, that presumption might have been corroborated by proof.

108 \*The imputation of error in the decree, for directing the amount of the appellee's claim to be raised by a sale of the lands, instead of applying the money which had been paid into court towards the satisfaction of it, and raising the residue out of the rents and profits, is in part unfounded. The fund subject to the order of the court is applied in the way suggested, unless the appellants should prevent it by withholding their consent to such application; and of this they have no right to complain. Without questioning the principles on which *Tennent's heirs v. Patton* was decided, I do not think the decree in this case should be reversed, because it directs the debt to be raised by a sale of the lands. In that case, the decree was final, in this case it is interlocutory: there infants were concerned, here the devisees are adults: there, no opportunity existed at the time the appellate remedy was sought, to bring the subject to the notice of the court below, and get redress for an error on a point not before brought under its notice; here, such opportunity did exist: there, the infants could not waive or renounce any right or privilege; here, the adults had full capacity to do so. According to the principles of the case of *Tennent's heirs v. Patton*, the heir or devisee has the right or privilege to have the debt raised out of the rents and profits, if it can be done in a reasonable time; but if adults, they may surely waive this privilege, and find it to their advantage to have the amount raised by a sale of the land, rather than subject themselves to the charge of a receiver, the inconvenience of renting out and tenantry the whole land, and the sequestration of all the profits. It seems from the record in this case, that the whole controversy in the court below related to the existence of the claim, and the liability of the lands devised to be charged with it: there was no controversy about the manner of raising the money out of the lands. If it does not appear that

109 the defendants were \*apprized of their right to have it raised out of the rents and profits, yet it is by no means certain, that, if they had been apprized of it, they would have preferred that mode of raising it to the mode adopted by the decree. Had that right been known and urged, it might not have been resisted. If the decree had been moulded by the principles of the case of *Tennent's heirs v. Patton*, and the indubitable doctrine applicable to the proceeds of the sale made by the defendants of part of the land, (which were subject to the control of the court below,) the decree would have directed the application of those proceeds, unconditionally, to the part satisfaction of the debt, and provided for the satisfaction of the balance out of the rents and profits; and it is by no means clear that the defendants would have preferred such a decree to the decree which was pronounced.

It is beneficial to the administration of justice, and will tend to discourage litigation, that this court should cherish a course of practice whereof numerous examples are fur-

nished by its decisions, which refrains from reversing a decree or judgment on points not foreseen or contested in the court below, when the party might have had the benefit of them there if he had there suggested them, and when the opportunity of making the suggestion in the court below, and getting the benefit of it there, still remained at the time he sought his appellate remedy; especially, when the point arises out of the exercise of a privilege of such party, when it is doubtful, whether or no he would have exercised the privilege if he had been fully apprized of it, and when a reversal is not necessary to enable this court to save the full benefit of that privilege to him. Such is this case in all respects: it is plain, that there was no controversy between the parties as to the manner of raising the money; that the decree being interlocutory, the appellants had full opportunity to apply for a modification of it before the sale could take

110 place under it, if \*they preferred a decree so modified to the one which was rendered; that it is nowise apparent that they would have preferred, or will now prefer, such a modification of the decree; and that if they have such a preference, this court may give them the benefit of it without reversing the decree. The benefit of such preference may be saved to them, by reserving to the court below, the power which it possessed at the time the appeal to this court was allowed, of so modifying the decree, as to direct the unconditional application of the money under the control of the court, to the partial satisfaction of the appellee's claim, and to provide for the payment of the balance out of the rents and profits of the lands devised, which by the decree as it now stands are subjected to sale, provided such a modification of the decree shall be asked by the appellants or by the appellee before the sale takes place, and provided the rents and profits will discharge the debt in a reasonable time.

I am therefore of opinion, that the decree should be affirmed with costs, and the cause remanded, with directions to the court of chancery to make such a modification of the decree as I have suggested, if it be asked in due time by either party, and if the balance of the debt may be satisfied out of the rents and profits within a reasonable time.

PARKER, J., concurred.

CABELL, J. I also concur in the opinion of my brother Stanard upon all the points determined by it. But, contrary to the opinion intimated by him, I incline to think, that the 17th section of the statute of limitations is applicable to a judgment recovered against a testator or intestate in autre droit, as well as to a judgment against him in his own right. However, it is not necessary to decide the point, and I desire it to be understood that I do not mean to give an opinion upon it.

111 \*TUCKER, P. The bill was originally filed against the administrator of Moses Mann, to recover from his estate the amount of a judgment rendered against him in his lifetime as executor of Andrew Hamilton. The heirs were afterwards made

parties, as there seemed likely to be a deficiency of personal assets of Moses Mann's estate. The bill charges a wasting of the assets of Hamilton, and devastavit by Moses Mann, in failing to pay the judgment against his testator Hamilton's estate.

It is objected, that the devisees of Mann were not chargeable under the executor's bond, as there was no ascertained debt due from him at the time of his death. This objection cannot prevail. The statute does not require, that the demand shall be ascertained, in the sense here intended. It does require, indeed, that the action whereby a devisee shall be charged, shall be an action of debt; and accordingly it has been decided, that a devisee cannot be charged under the statute in an action of covenant. But it never has been questioned, that debt will lie against a devisee upon a bond with collateral condition; and it has been even suggested by a learned writer, that it is advisable sometimes to take a bond with condition: to be void if the vendor has good title &c. in order to guard against the effect of his devising away his real estate: the penalty, he says, would be a debt recoverable under the statute. *Sugd. Law Vend.* 418. The statute, indeed, quoad the action of debt, places the heir and devisee on the same footing; and I have never heard it doubted, that debt would lie against an heir on a bond with collateral condition, merely because the damages to be assessed for its breach were not ascertained. The case before us, though instituted in equity, where alone the personal and real representatives could be convened, is, in effect, an action of debt, and ought to be so treated. The creditor might have sued on the bond at law, and thrown the charge on the devisee, without any inquiry

112 \*whether there was any personal estate out of which the demand could be paid. It was for the benefit of the devisees, and agreeable to the principles of the court of equity, that instead of this suit at law, he should resort to the court of chancery, in order to exhaust the personal assets before charging the devisees. That court, therefore, should concede to him the rights and the remedies which he would have had, if he had pursued a less forbearing and equitable course towards the devisees.

The next objection is the statute of limitations. It can have no application, I conceive, in this case. I am of opinion, that the statute did not begin to run from the appointment of the administrators Le Grand and others. That appointment was a nullity, as Moses Mann did not die intestate; and though payments made to the administrators might have been good, (*Allen adm'r &c. v. Dundas*, 3 T. R. 125,) yet the court of probate could not divest the executor's right. *Toll. Law Ex'ors* 120. Nor could the creditor have instituted any efficient proceeding for the revival of a suit or judgment against the administrators; since upon the revocation of their letters of administration, the suit must have abated, and never could have been revived and continued against Lewis Mann the administrator with the will annexed. The two administrations could not

unite, the first being, quoad the last, a mere nullity. I think, therefore, in considering this question, we must regard it as if there never had been administration granted to Le Grand and others in 1822. If so, the statute began to run from October 1823, and so offers no bar, as the suit was brought early in 1828.

I will add, that I have a strong impression, that the statute has no application to an action of debt suggesting a devastavit, nor to an action on the administration bond. For the action suggesting a devastavit is not an action on the judgment. It is 113 an action for the tort—the \*wasting.

The plea to it may be not guilty. It is likened to a criminal prosecution. The judgment is not the gist, it is but inducement. 1 *Ld. Raym.* 1503; 1 *Chitt. Plead.* 477. It will not alone maintain the action. There must be proof of a wasting, either by a return of nulla bona or otherwise. It is moreover a demand against the executor personally, whereas the judgment was not against him, but his testator's goods. For these reasons, I strongly incline to think, that the effect of the clause in question is not to protect Moses Mann's estate against an action for the waste, but to protect the administrator de bonis non of Hamilton against an action of debt or scire facias to revive the judgment against him.

I see no other objection to the decree that requires remark, except that a sale of the lands should not have been decreed, until it appeared, that the debt could not have been discharged in a reasonable time out of the rents and profits. This objection would, I conceive, have been fatal to the decree had it been final; but as it is only interlocutory, I concur with my brother Stanard that it may be modified, and that the decree should be affirmed with costs, and the cause remanded, with directions to apply the fund in the power of the court, unconditionally, to the satisfaction of the plaintiff's demand, and if that prove deficient, to provide (if it be asked) for the payment of the balance out of the rents and profits of the lands, if adequate thereto within a reasonable time, and if not, then to decree a sale of so much of the land as will suffice to satisfy the balance due.

Decree affirmed with costs, and cause remanded to the circuit court of Greenbrier, "with directions to that court, (if the appellants or appellee should, before the said decree shall be executed by a sale under its provisions, ask it) to modify the said 114 decree, so as to direct \*unconditionally the application of the funds subject to its order, to the satisfaction of the appellee's claim, and to provide for raising the residue of that claim, if any, out of the rents and profits of the land directed to be sold, instead of raising it by sale, if such rents and profits will pay the balance in a reasonable time; and if not, to raise it by sale."

Collins's Adm'x v. Row.

February, 1839, Richmond.

(Absent BROOKE, J.)

Assumpsit—Promise of Executor—Evidence.\*—In

\*See monographic note on "Executors and Admin-

assumpsit against an executor, in his individual character, for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery, of a promise by the defendant to pay for the goods out of his testator's estate, and of assets sufficient for that purpose, the plaintiff may recover although the promise was not in writing.

In the county court of King and Queen, the administratrix of Thomas Collins declared in assumpsit against Francis Row, otherwise called Francis Row executor of George D. Shackelford that, in consideration that Collins had, in his lifetime, at the request of the defendant, sold and delivered to him divers goods, wares and merchandise, for the use and benefit of the widow and legatees of his testator, the defendant promised Collins in his lifetime to pay him the price of the goods &c. when thereto required. At the trial upon the plea of non assumpsit, the plaintiff having given evidence of the sale and delivery of the goods to the defendant for the use of widow and legatees, of a promise by the defendant to pay for them

out of his testator's estate, and of  
115 assets \*sufficient for the purpose in the defendant's hands,—the defendant thereupon moved the court to instruct the jury, "that if they believed, from the evidence, that the promise of the defendant was that the goods should be paid for out of the estate of his testator, and not out of his own estate, he was not bound by such promise unless the same was in writing." The court refused to give the instruction; and the defendant excepted. The jury found a verdict for the plaintiff for 121 dollars 23 cents damages, with interest &c. and the court rendered judgment thereon, for the damages and interests so found, and the costs of suit.

Upon a supersedeas to that judgment, the superior court reversed the same with costs, and remanded the cause to the county court, with directions "to give the instruction prayed by the defendant on the former trial, if the plaintiff should give evidence of goods &c. delivered to the family of George D. Shackelford, or of the value or amount of assets of said Shackelford which came to the hands of the defendant his executor."

On the petition of Collins's administratrix, this court awarded a supersedeas to the judgment of the superior court.

Johnson, for the plaintiff in error.

Claiborne, for the defendant in error.

PER CURIAM. Judgment of superior court reversed, and that of county court affirmed.

The 1st section of the act to prevent frauds and perjuries, 1 Rev. Code, ch. 101, p. 372, enacts, "that no action shall be brought whereby to charge any executor or administrator upon any special promise to answer any debt or damages out of his own estate, or whereby to charge the defendant upon any special promise to answer for the debt, default or

istrators" appended to Rosser v. Depriest, 5 Gratt. 6, and monographic note on "Frauds, Statute of" appended to Beale v. Digges, 6 Gratt. 582.

miscarriage of another person, unless the promise upon which such action shall be brought, or some memorandum or note thereof, shall be in writing."

# 116 \*Tazewell Governor, for Maynard's Ex'x, v. M'Candlish and Others.

March, 1839. Richmond.

(Absent PARKER and STANARD, J.)

**Pleading and Practice—Declaration—Debt on Bond—Assignment of Breaches.**—In debt in a circuit court, upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is, that the chancery court having, in a suit therein pending in which the relator was defendant, made an order directing the marshal to take possession of certain slaves (averred to be the property of the relator) and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, "to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit, remaining in the office of the circuit court." On general demurrer to the declaration, HELD, the assignment of the breach is defective in substance; the title of the relator to demand and receive the hires from the marshal not being sufficiently set forth.

Debt, in the circuit superior court of James City and Williamsburg, in the name of Littleton W. Tazewell governor of the commonwealth, suing at the relation of Elizabeth Lawrence executrix of Eleanor Maynard deceased, against William M'Candlish and five others, obligors in the official bond given by M'Candlish as marshal of the late superior court of chancery for the district of Williamsburg.

The declaration set forth the bond, which was in the penalty of 20,000 dollars, with condition that M'Candlish should pay over all moneys which he might receive by virtue of his office, to the persons entitled to receive the same, and should discharge faithfully all the other duties appertaining to the said office, as long as he should continue in

117 the same. Seven breaches of \*the condition were assigned. In each of them it was set forth, that on the 19th of July 1822, the said superior court of chancery, in a suit between Richard Blow plaintiff and the said Eleanor Maynard defendant, then pending therein, but since determined, awarded an injunction to restrain the defendant from selling or removing certain slaves in her possession until the further order of the court, and directed the marshal to take possession of the slaves, and (in case the defendant should not, within ten days, give to the plaintiff bond with security in double their value) to hire them out until the end of the

\*The principal case is cited with approval in State v. Hall, 40 W. Va. 463, 21 S. E. Rep. 762.

See monographic note on "Debt, The Action of" appended to Davis v. Mead, 13 Gratt. 118, and monographic note on "Official Bonds" appended to Sangster v. Com., 17 Gratt. 124.

year, and from year to year afterwards until the further order of the court. And then

1. The first assignment alleged, that in pursuance of the said order the said marshal took possession of the slaves, the property of the said Eleanor Maynard, but did not perform the other duties required of him by the said order, but so improperly and unfaithfully conducted himself in the premises, that the hires and profits of the slaves for the residue of the year 1822, and for the years 1823 and 1824, amounting to 720 dollars, were totally lost to the said Eleanor Maynard, to whom the said hires and profits belonged, and who was entitled to receive them from the said marshal, as by reference to the record and proceedings in the said suit, remaining in the clerk's office of the said circuit superior court of law and chancery, would more fully appear.

2. The second assignment alleged, that in pursuance of the said order the said marshal took possession of the slaves, the property of the said Eleanor Maynard, and hired them out until the end of the year 1822, and afterwards for the years 1823 and 1824, and for the hires, amounting to 720 dollars, took bonds, notes and securities, which he converted to his own use, whereby all the hires were lost to the said Eleanor Maynard, to whom the said hires, and the said bonds, notes and securities taken therefor, belonged, as by  
118 reference to \*the record and proceedings in the said chancery suit, remaining in the office of the said circuit superior court, would more fully appear.

3. The third assignment alleged, that in pursuance of the said order the said marshal took possession of the slaves, the property of the said Eleanor Maynard, and hired them out, and received and collected the hires, amounting to 720 dollars, which said hires belonged to the said Eleanor Maynard, who was entitled to receive them from the said marshal, as would more fully appear on reference to the record and proceedings in the said chancery suit, remaining in the office of the said circuit superior court; but that the said marshal did not pay over the said hires to the said Eleanor Maynard, though requested to do so, but converted the same to his own use, whereby they were totally lost to the said Eleanor Maynard in her lifetime, and to her executrix since.

4. The fourth assignment alleged, that in pursuance of the said order the said marshal took possession of the slaves, the property of the said Eleanor Maynard, and hired them out, and received and collected the hires, amounting to 720 dollars, which said hires belonged to the said Eleanor Maynard, who was entitled to receive the same, as by the record and proceedings in the said suit, remaining in the office of the circuit superior court, would more fully appear; that afterwards the said superior court of chancery made an order requiring the said William M'Candlish, who had been removed from the office of marshal, to deposit the amount of the said hires in bank to the credit of the court in the said cause, and to render a report of all his transactions under the previous order of the 19th July 1822, as would more

fully appear on reference to the record and proceedings in said suit, remaining &c. but that the said M'Candlish did not deposit the amount of the said hires in bank, nor  
119 render a report of his \*transactions, as required by the said order of the court, but wholly failed and refused to comply with the requisitions of the same, and so improperly and unfaithfully conducted himself in the premises, that the said hires were wholly lost to the said Eleanor Maynard, to whom they belonged, and who was entitled to receive them, as would more fully appear by reference to the record and proceedings in the said chancery suit, remaining &c.

5. The fifth assignment alleged, that in pursuance of the said order of the 19th July 1822, the said M'Candlish, marshal as aforesaid, took possession of the slaves, the property of the said Eleanor Maynard, and hired them out, and took bonds, notes and other securities for the hires, which amounted to 720 dollars, to which said bonds &c. the said Eleanor Maynard was entitled, as would more fully appear on reference to the record and proceedings in the said chancery suit, remaining &c.—that afterwards the said superior court of chancery made an order that the said M'Candlish, who had been removed from the office of marshal, should render a report of all his transactions under the previous order of the 19th of July 1822, and deliver all bonds, notes or other securities for the hire of any of the said slaves, to the marshal of the court, to be collected by him, as on reference to the record and proceedings in the said suit, remaining &c. would more fully appear; yet the said M'Candlish neither rendered a report of his transactions aforesaid, nor delivered the said bonds &c. or any of them to the marshal, as required by the order aforesaid, but wholly failed and refused to comply with the requisitions thereof, whereby the said hires, and the said bonds &c. taken therefor, were wholly lost to the said Eleanor Maynard, to whom they belonged, and who was entitled to receive the said bonds &c. as by reference to the record and proceedings in the said suit, remaining &c. would more fully appear.

120 \*6. The sixth assignment alleged, that in pursuance of the said order of the 19th July, 1822, the said M'Candlish, marshal as aforesaid, took possession of the slaves, the property of the said Eleanor Maynard, and hired them out, but took no bonds, notes or security of any kind for the hires, as, in the faithful discharge of his office, and in the execution of the said order, he ought to have done, whereby the said hires, amounting to 720 dollars, were wholly lost to the said Eleanor Maynard, to whom they belonged, and who was entitled to receive the same and the bonds &c. which should have been taken therefor, as by reference to the record and proceedings in said chancery suit, remaining &c. would more fully appear.

7. The seventh assignment alleged, that in pursuance of the said order of the 19th July 1822, the said M'Candlish, marshal as aforesaid, took possession of the slaves, the

property of the said Eleanor Maynard, and hired them out, taking bonds, notes or other securities for the hires, and afterwards, without any order of the court authorizing him to collect the said hires, did collect and receive the same, amounting to 720 dollars, and gave discharges and acquittances therefor, and delivered up the bonds &c. to the hirers who had executed the same, whereby the said hires were wholly lost to the said Eleanor Maynard, to whom they belonged, and who was entitled to receive the same and the bonds &c. so taken therefor, as by reference to the record and proceedings in the said suit, remaining &c. would more fully appear.

The declaration concluded with averring nonpayment of the penalty of the bond, to the plaintiff, or to either of his predecessors in office.

The defendants demurred generally to the whole declaration, and to each and every assignment of breaches therein set forth. On argument of the demurrers, the court held that the law thereupon was for 121 \*the defendants, and rendered judgment that the relator take nothing by her bill, and that the defendants recover against her their costs. To which judgment a supersedeas was allowed by the court of appeals.

Harrison, for the plaintiff in error.

Leigh, Johnson and Daniel, for the defendants in error.

TUCKER, P. I am of opinion that the judgment in this case should be affirmed, the declaration being radically defective, as it shews no right of action in the relator. The material facts set forth in the declaration shew the following case:

In the suit of Blow v. Maynard, an injunction was awarded, whereby, under certain circumstances, M'Candlish the marshal of the court was directed to take into his custody certain slaves, which were in the possession of and claimed by the relator's testatrix, and to hire them out from year to year until the further order of the court. The marshal took possession of the slaves. The declaration, after setting out these matters in detail, proceeds to set out the gravamen of the case in seven different ways: 1. That the marshal, though he took possession of the slaves, failed to perform the other duties required by the order, whereby the hires were lost. 2. That he took bonds, and converted them to his own use. 3. That he collected the hires, but did not pay them over to the testatrix. 4. That he collected the hires, and refused and failed to pay them into the bank, though ordered to do so. 5. That he failed to deliver the bonds to his successor, as he was ordered to do. 6. That he failed to take any bonds. 7. That he delivered up the bonds to the hirers, and gave acquittances for them, so that they were altogether lost to the relator's testatrix. The action is brought upon the official bond of the marshal, and at the instance of Elizabeth Lawrence executrix of Eleanor Maynard, to whom it is averred the slaves 122 belonged, \*and who, it is averred at the conclusion of each assignment of breaches, was "entitled to receive the amount

of the hires" from the said M'Candlish, "as by reference to the record &c. would more fully appear."

To this declaration the defendant filed a general demurrer, which of course only brings in question the substantial character of the declaration. I am of opinion that it is defective in substance, in this, that it nowhere shews any title in the relator to sue. It alleges, indeed, that her testatrix was entitled to receive the amount of the hires from M'Candlish, "as appears by the record;" but that record forms no part of the pleadings, and is not indeed even a record of the same court. It does not then appear from the declaration, that she was entitled to demand the hires from M'Candlish, or that he was bound to pay her, or would have been justified in doing so. He was a public officer of the court, receiving funds which he was to retain until further order. It was incumbent, then, to shew such order distinctly, in that breach which complained of nonpayment. And as to those which complain of a failure to pay the hires into bank, or to deliver over to the succeeding marshal the bonds taken for the hires, these disprove the right of the testatrix to receive them, since they shew no final disposition of them in her favour. If there be any order in the chancery cause awarding the hires, or the bonds and securities, to Eleanor Maynard, that order should have been distinctly set out. The existence of such an order, and the failure to obey it, is the gist of the plaintiff's action. The official bond indeed is sued on, but the breach is the gist; for without a breach, there is no cause of action. Now, the breach in this case consists in failure to obey some order to pay over the money or deliver over the bonds. Of course the order is of the gist of the action. Now where a record is of the gist of the action, it must be 123 shewn with certainty; \*as in an action of debt upon a judgment. 1 Chitty's Plead. 355. So too it is a general principle, that it is not enough that the party hath right, but such right must be disclosed in the record, so as to enable the judges to pronounce upon it. Hobart's Rep. 233. Thus, it is not enough for the party here to aver "a title to receive, as appears by the record," but it should be shewn how she had title, that the court might see whether it was a good title or not. If, for example, the defendants had made default, how could judgment have been entered for the plaintiff, upon the mere allegation that she was entitled, as appeared by a record not in court? How could the court see whether the record did or did not give title, without a distinct statement in the declaration of the order relied on? And how, upon this general and indefinite statement, could there be an issuable plea of no such record? That plea denies the existence of a record set out. Here, none is set out. And the plea of no such record would not be an answer to the allegation that the relator was entitled. Moreover, whatever her title to the hires, she had no right of action against the officer, unless he was ordered to pay. Her title to the money was not therefore sufficient. An



order or decree was essential, declaring that title, and directing the officer to pay over the funds to her, or into bank, subject to her order.

The case of Jones v. Jones, not reported, is said to decide this case, though I do not think such a precedent is necessary to sustain this decision, which is founded on general and well received principles. The judgment is right in principle; but having given costs generally, without directing them to be levied de bonis testatoris, it must for that cause be reversed with costs.

PER CURIAM. The court is of opinion that the circuit court erred in giving judgment for costs to be paid de bonis propriis: therefore the judgment is reversed

124 \*with costs. And this court, proceeding to render such judgment as the said circuit court ought to have given, is of opinion that the matters of law arising upon the defendants' demurrer to the plaintiff's declaration are for the defendant; therefore it is further considered that the plaintiff take nothing by his bill, and that the defendants go &c. and recover &c. their costs in the circuit court expended.

## 125 \*Rochelle v. Rochelle.

March, 1839, Richmond.

WILL—Memorandum of—Probate—Case at Bar—Before the statute of March 4, 1835, went into operation, a decedent, being attended in his last illness by a scrivener whom he had requested to write his will, told him that he did not wish him to write the will at that time, but desired him to make a memorandum by which it should thereafter be prepared. The scrivener accordingly, under the direction of the decedent, wrote down in pencil, on a small piece of paper, a memorandum in the following terms: "To Mrs. Rochelle in fee, Emeline and child Charlotte, Phoebe, Washington, Tine and Lizza, all my beds and furniture, carriage and harness. All loaned during widowhood, real and personal. Discretionary with ex'or, for good reason, to sell negro. Mary Frances, Martha Eliza to be educated and clothed. At the death of Mrs. Rochelle having no child by me, the whole to my brother's children (horse Bullet to Jno. Turner) the plantation and hands to remain as at present. Harry and Jerry to be kept at the carpenter's trade. My lands to belong to John and Wm. and girls to receive more negroes." This memorandum, when concluded, was read to the decedent, who looked over and examined the same, and said it was right. The scrivener then left him, promising to return on the third day, but was accidentally detained until the fourth; and when he got back, the decedent was dead. On the failure of the scrivener to return at the appointed time, the decedent mentioned to another person that he had given him the heads of his will, and expressed great anxiety for his arrival, saying, that if he would come and fix his business, he should die perfectly satisfied; that his will was not all the business he wanted with him. The memorandum being offered for probate as a will of personalty, HELD, such probate should be refused.

The county court of Southampton, at July term 1835, admitted to probate, as the last

will and testament of William L. Rochelle deceased (so far only as to pass personal estate) an instrument of writing in pencil, in the following terms:

"To Mrs. Rochelle in fee Emeline and child Charlotte, Phoebe, Washington, 126 Tine and Lizza, all my beds and \*furniture, carriage and harness. All loaned during widowhood, real and personal. Discretionary with ex'or, for good reason, to sell negro. Mary Frances, Martha Eliza to be educated and clothed. At the death of Mrs. Rochelle having no child by me, the whole to my brother's children (horse Bullet to Jno. Turner) the plantation and hands to remain as at present. Harry and Jerry to be kept at the carpenter's trade. My lands to belong to John and Wm. and girls to receive more negroes."

This instrument was propounded to the county court for probate by Frances Rochelle. The probate was opposed by Ann Rochelle, the widow of the decedent; and from the sentence of the county court, she appealed to the circuit superior court of law and chancery.

On the hearing of the appeal, two witnesses were examined, and their testimony spread upon the record.

1. S. Parker testified, that he was at the decedent's house on Sunday the 1st of March, at which time the decedent was very ill, and confined to his bed. During the evening of that day, decedent told the witness that he wished him to do some writing for him. Witness expressed his perfect willingness to do so, but suggested that it would be better to defer the business until the next morning. He remained all night with the decedent; who, the next morning again introduced the subject, and remarked that he wished the witness to write his will. However, he did not urge the witness to write the will at that time; and it was agreed between them, that the witness should write it the next day, or the next time he visited the decedent. He did visit him again, on the following Wednesday; when decedent again spoke to the witness about writing his will. Witness asked whether he should have a table prepared for the purpose, in the room where decedent was then lying? Decedent answered, that he did not wish the witness to write his will at that time; but desired

127 \*him to make a memorandum, by which the will should thereafter be prepared. Much conversation then took place between them, as to the disposition which decedent intended to make of his property, and the mode in which he wished it to be managed. In the course of this conversation, decedent said that he would not, upon any consideration, die without a will; that there were many considerations inducing him to make one: and he then stated, as reasons why he ought to make a will, that he did not wish Mr. Land, his brother in law, to enjoy any part of his estate, and that he had always promised his sister Fanny to educate her two little girls; one of whom was then living with the decedent, and going to school at his expense. In the same conversation, decedent expressed a wish to appoint



the witness his executor. He also stated, that he had had timber cut to build a dwelling house, and wished the house to be built; that he did not wish the land attached to the plantation on which he lived to be cleared, but merely that the branches &c. within the enclosure should be cleared; that he desired the land he owned in Sussex, which was principally in woods, to be cleared; and that he wished the witness to be allowed full and adequate compensation for his trouble,—meaning, as the witness supposed, compensation for settling the estate. Witness then left the decedent, and went into another room, in which there were several persons. There he found a small piece of paper, which he carried into the room where the decedent was lying, and proceeded immediately to make out, in pencil, under the direction of the decedent, the memorandum by which the will was to be prepared; which memorandum is the same writing now in controversy. After the witness had prepared the memorandum, he took a seat on the bedside, and read the same to the decedent; who, at the same time, looked over and examined it. Witness asked him if it was right; to which he

128 \*replied that it was. At the time of preparing the memorandum, decedent was in his perfect senses, and competent to make a will. It was understood by decedent that the witness had to go the next day to Sussex county court, and he would not return to decedent's house until the evening of the ensuing Friday. In consequence of bad weather, the witness was unable to return on Friday; and on Saturday, when he arrived at the decedent's house, he found him dead. At the time of writing the memorandum, there was no ink (as the witness understood) in the room, though there may have been ink in the house. The decedent explained to the witness, that by the name "Mrs. Rochelle," mentioned in the memorandum, he meant his wife; by the names "Mary Frances" and "Martha Eliza," therein mentioned, he meant the two daughters of his brother Nathaniel; by the name "Jno. Turner," therein mentioned, he meant John A. Turner; and by the names "John" and "Wm." therein mentioned, he meant the two sons of his said brother Nathaniel. This brother was dead at that time. The decedent had another brother, who had never been married. The witness stated, that he should have prepared the will pursuant to the memorandum, uninfluenced by the conversation which had previously taken place between the decedent and himself, except that he should have concluded the will with a clause appointing an executor, but leaving a blank for the executor's name, as he did not himself wish to qualify, though he believes the decedent expected and desired him to do so: that in writing the will, he should not have imbodyed any direction that the woodlands in Southampton should not be cleared, or that a dwelling house should be built by the executor, out of timber which the decedent had caused to be prepared for the purpose; because no such directions were contained in the memorandum, and the witness regarded that as the only

129 proper authority to \*be pursued in preparing the will. He further stated, that when he wrote down in the memorandum the words "beds and furniture," he asked the decedent what he meant by them; to which the decedent replied, that he meant his beds and all his household furniture.

2. G. Rawlings testified, that having gone on Thursday to see the decedent, he found him very sick in bed, but in his perfect senses. Decedent told the witness, that he had given Mr. Parker the heads of his will the day before, and that Mr. Parker was to be there with the will on the next day. On Saturday the witness again visited the decedent; who remarked to the witness on his arrival, that "he was compelled to die." Some time afterwards, he expressed great surprise at Mr. Parker's absence, and anxiety for his return, saying, that if he would come and fix his business, he (the decedent) would die perfectly satisfied; that his will was not all the business he wanted with Mr. Parker; but that he must go and leave it all, for that he should not live until night. The decedent did not inform the witness in what way he intended to dispose of his property, nor what directions he had given to Mr. Parker for making out the memorandum or heads of his will. Decedent, at the time of his death, had been married about two years. He had then no child born; but he left his wife pregnant, and about two months afterwards she was delivered of a child, which was still living.

The circuit court affirmed the sentence of the county court; and on the petition of Ann Rochelle the widow of the decedent, a judge of this court allowed her an appeal from the judgment of affirmance.

Leigh and Johnson, for appellant. The memorandum admitted to probate in this case is clearly invalid as a nuncupative will, for the statute requires that every such will shall be proved by two witnesses, and

130 here \*but one of the witnesses was even acquainted with the provisions of the paper. If it be established at all, it must be established as a will in writing. Now, whenever a paper is offered for probate as a will, the court must be satisfied that it contains the final and fixed determination of the decedent as to the matters therein specified, without contemplating any modifications of them to be afterwards made. *Allen v. Manning*, 2 Addams 490; *Montefiore v. Montefiore*, Id. 354; 2 Eng. Eccl. Rep. 394, 340; *Devereux v. Bullock*, 1 Phill. 60; 1 Eng. Eccl. Rep. 35; *Jameson v. Cook*, 1 Haggard 82; In the goods of *Herne*, Id. 222; 3 Eng. Eccl. Rep. 36, 93; *Reay v. Cowcher*, 2 Hagg. 249; 4 Eng. Eccl. Rep. 100. That the memorandum here does not express the fixed and final determination of the decedent as to the disposition of his property, but was merely designed as notes to prompt the memory of the writer in drawing up the will according to the decedent's intent declared in the previous conversation, is manifest from the character of the paper on its face and from the testimony in the cause. 1. It is written in pencil; a circumstance shewing, *prima facie*, that the provisions are merely delib-

erative, not final. In the goods of Dyer, 1 Hagg. 219; Hawkes v. Hawkes, Id. 321; Edwards v. Astly, Id. 490, 3 Eng. Eccl. Rep. 92, 139, 216.—2. The dispositions are uncertain, and only capable of being rendered certain by parol evidence of the intent of decedent as declared in conversation. Thus the parol evidence alone explains what persons were meant by the designations "mrs. Rochelle"—"Mary Frances, Martha Eliza"—"John and Wm." The executor is vested with discretion "to sell negro;" but whether the intent was to give him the power of selling one only, or all of the negroes, is manifestly uncertain. The estate is given to mrs. Rochelle during widowhood; yet it is afterwards provided that at her death, having no child by the decedent, the whole shall go to his brother's children: and it is

131 \*uncertain whether the children of the deceased brother alone are meant by that designation, or children of both the brothers. The girls are "to receive more negroes;" but nothing is said as to the number, sex or age of the negroes that each of the girls is to receive. From the cases of Green v. Skipworth, 1 Phill. 53; Wood v. Wood, Id. 357, 1 Eng. Eccl. Rep. 32, 101; Montefiore v. Montefiore (before cited); Macclae v. Ewing, 1 Hagg. 317, 3 Eng. Eccl. Rep. 137, and Cogbill v. Cogbill, et al., 2 Hen. & Munf. 467-525, it may be collected, that the court cannot admit to probate a paper whose interpretation, though plain as to some of the legacies, is so doubtful as to others, that it is uncertain what the testator meant thereby. Nor can a paper be admitted to probate, when, in order to explain its meaning, it is necessary to resort to parol evidence such as would not be admissible to explain a will after probate. 7 Bac. Abr. 338.—3. The paper upon its face appears to be imperfect and unfinished, and the evidence incontestably proves that it does not contain the whole will of the decedent. It contains a bequest to mrs. Rochelle of all his "beds and furniture;" and these words import only beds and bed furniture; yet it appears by the testimony, that the decedent meant to bequeath to her his household furniture. By the expression "girls to receive more negroes," it is impossible to conceive that the decedent intended a final and complete disposition; it indicates nothing more, in præsenti, than his general purpose to give a further bounty, leaving the amount and component parts of the gift to be specified afterwards. Moreover, in the conversation with Parker, the decedent expressed his wish to appoint him executor; his wish that one plantation should be cleared, and the other not; and his wish that a dwelling house should be built out of the materials he had prepared for the purpose: yet the notes are wholly silent on all these points. Now, although

an unfinished paper may under some  
132 circumstances \*be admitted to probate, yet the presumption of law is strong against every such paper, and the court must be satisfied, by the strongest possible evidence, that the intention of the decedent to give the legacies specified was fixed and

final, that he never abandoned that intention, and that he was prevented by the act of God from proceeding to the completion of his will. Sir John Nicholl in Reay v. Cowcher, 4 Eng. Eccl. Rep. 112, and in Devereux v. Bullock, 1 Id. 35, in both of which cases unfinished papers were propounded for probate, and rejected. In Johnston v. Johnston, 1 Phill. 447, 1 Eng. Eccl. Rep. 159; it is said by the same judge to be now clearly settled, that in respect to an unfinished paper, though followed by sudden death, the interval must be accounted for, and it must be shewn that the testator adhered to the intention, but was prevented from finishing it. In Griffin v. Griffin, 4 Ves. 197, in note; Sandford v. Vaughan, 1 Phill. 39; Bayle v. Mayne, 3 Id. 504, 1 Eng. Eccl. Rep. 28, 462, and Antrobus v. Nepean, 1 Addams 399, 2 Eng. Eccl. Rep. 152, the papers propounded were rejected because the interval was not accounted for. It cannot be said, in any proper sense, that the decedent here was prevented by the act of God from completing the dispositions which he had declared his intention to make. His death was not sudden. He was conscious of its approach; and though it took place shortly after the time appointed for Parker's return, the interval was amply sufficient for making his will, and it does not appear that any other circumstances existed to prevent his doing so. In Montefiore v. Montefiore (before cited) sir John Nicholl says: "The rule which I take to operate in case of every unfinished paper is this: Can the court infer, that by pronouncing for it, it will carry into effect what it collects, from all the circumstances of the case, to have been the decedent's wish? In that event, it will be its duty to pronounce for it; but surely not, if it  
133 sees reason to believe that, \*by so doing, it will defeat or counteract instead of giving effect to that wish." Here the memorandum contains the declared wishes of the decedent as to the disposition of both his lands and his personalty; the two subjects are mixed up together: but the contemplated disposition of the realty must at all events fail, not being declared in legal form; and there is every reason to believe that by establishing the paper as a will of personals alone, the intentions of the decedent will be defeated altogether, instead of being effected in part. 4. The evidence is complete to shew that the decedent, at the time the notes were prepared, had no intention of then making his will. He told Parker that he did not wish him to write his will at that time, but desired him to make a memorandum by which the will should be afterwards prepared. And when Parker failed to return at the appointed time, he expressed his uneasiness at the prospect of dying without a will, and his consciousness that he had made none.

Macfarland and Rhodes, for the appellee. To constitute a valid will of personals, it is only necessary to prove testamentary capacity, and final volitions expressed in writing, either by the decedent himself, or by some other person under his authority and during his life. Neither signature nor attestation is

necessary. Even if it shall appear that the act propounded as a will was not designed per se as such, but was merely done towards the making of a will, as notes or instructions, yet if it contains the final intentions of the decedent, which he was prevented by an act of God from investing with a more solemn form, it will be admitted to probate as his will; and this, even though the instructions, after being reduced to writing, were never seen by the decedent, or read to him. *Cogbill v. Cogbill et al.*, 2 Hen. & Munf. 467; *Green v. Skipworth*, 1 Phill. 53; *Wood v. Wood*, 1 Id. 370; *Huntington v. Huntington*, 2 Id.

213; *Sikes v. Snaith*, 2 Id. 351; *Lewis v. Lewis*, \*3 Id. 109; *Allen v. Manning*, 2 Addams 490; *Burrows v. Burrows*, 1 Hagg. 109; *Manly v. Lakin*, Id. 130; *Mas-terman v. Maberly*, 2 Id. 235; *Mitchell v. Mitchell*, Id. 74. Here, the testimony establishes that it was the fixed and final determination of the decedent to make all the provisions specified in the paper. He desired Parker to make a memorandum by which his will should be prepared; the memorandum was made under his direction, read over to him, examined by him, and pronounced to be right; he afterwards told Rawlings, that he had given to Parker the heads of his will, and that Parker was to be there with the will on the following day; and when Parker disappointed him by failing to return on that day, he expressed his concern at the disappointment: shewing throughout, that he considered the memorandum as containing the substance of his will, and dying without ever having intimated the slightest dissatisfaction with the provisions therein made, or any purpose of changing any one of them. It is impossible that finality of intention should be more strongly evidenced than it was in this case. As to the objection that the provisions of the memorandum are obscure and uncertain,—no such objection applies to them, in point of fact: they import a disposition of the decedent's whole estate among his relatives, in a manner reasonably certain and intelligible. But whether this be so or not, is of no importance in a court of probate, which has only to enquire whether the paper propounded as a will purports to make a disposition of the decedent's estate, and contains what he intended and considered as the expression of his final volitions on the subject. The objection of obscurity and uncertainty often lies as strongly against papers clearly admissible, and in fact admitted, to probate, as it possibly can against the paper here propounded. It is further objected, that this paper is fatally defective, because, admitting it to contain final volitions of

135 the decedent \*as far as it goes, it does not contain his whole will as to the disposition and management of his property. But, first, the objection is not sustained by the evidence: for it appears that the expression "beds and furniture," in the memorandum, is the very language which the decedent employed in dictating to Parker; and as to the omissions, noticed by the counsel for the appellant, of several other matters upon which the decedent, in the conversation with Parker, had expressed his wishes, it may be

remarked that the memorandum, after being concluded without mentioning those matters at all, was examined and approved by the decedent, and therefore the inference is, either that he never intended to include in his will any directions upon those points, or that he abandoned that intention, because he deemed it (as in truth it was) of very little importance. Secondly, admitting that the paper does not contain all the provisions which the decedent intended to make, it by no means follows that it must therefore be rejected. The rule is, that if the will, so far as it goes, imports undisputed bequests, and there is no reason to doubt that the testator intended such bequests at all events, they will not fail because he intended to make additional provisions, but died without executing such intention. This is well settled. *Cogbill v. Cogbill et al.*, 2 Hen & Muuf. 467; *Musto v. Sutcliffe*, 1 Eng. Eccl. Rep. 368; *Nathan v. Morse*, Id. 465; *Ingram v. Strong*, Id. 260; *Rockell v. Youde*, Id. 381; *Wood v. Wood*, Id. 101. Nor is it any objection to the probate of the paper here, that it imports a disposition of real estate as well as of personal, and is not so executed as to constitute a valid will of lands. It is every day's experience, as indeed it is an elementary proposition of law, that an instrument, clearly insufficient as a will of lands, and yet purporting to dispose of lands, may be established as a good will of personals. Lastly, it is objected that the

136 decedent did not intend this instrument \*as his will. It is sufficient to reply, that instructions for a will are never designed to constitute, per se, the will itself: yet the cases already cited establish conclusively, that wherever a decedent has been prevented by the act of God from executing a will in solemn form, for which he has given instructions, those instructions, if reduced to writing before he died, will operate as fully as the will itself could have done. The evidence proves nothing more than the fact (wholly unimportant, under the authority of the cases referred to) that this paper is not the identical instrument which the decedent intended to leave as his will, but that he purposed to execute one more formally drawn up, containing the same provisions, and perhaps a few in addition, of little importance in themselves, and nowise altering or affecting those which appear in the memorandum. What he said to Rawlings on the day of his death seems, indeed, to evince his own belief that the memorandum was not a sufficient expression of his will,—that the law required a more formal instrument; but if he was mistaken in that impression, and had done all that the law required to constitute a valid will of personals, his ignorance that he had done so is surely no ground for rejecting the paper.

BROOKE, J. I think it impossible that the notes for a will in this case, though read to the sick man, and pronounced by him to be right, as is proven by Parker the scrivener, were meant by him to contain the will, the final will he intended to make. The notes were no doubt intended as an outline of his will. There are not materials enough in them for a final will. It was not intended to be

left conclusively to the scrivener to make more specific disposition of the property than was to be found in the notes. For example, would it be intended to be left to him, under the expression "girls to receive more negroes," to decide how many more, and

137 \*of what age and sex, each of the girls was to receive; or to explain other obscure clauses in the notes? I think not. Parker, the witness and scrivener, says, the testator told him he did not wish him to write his will at that time, but desired him to make a memorandum by which his will was thereafter to be prepared. He then proceeded to make the memorandum under the direction of the testator; then read it to the testator, who looked over it, and said it was right. The scrivener then went away, promising to return on Friday; evidently that the deceased might again have it in his power to explain his meaning in the very vague and unfinished clauses in the memorandum. The other witness, Rawlings, speaks of his great anxiety that the scrivener should return before he died. He said, if Parker would come and fix his business, he would die satisfied. If he had supposed that the notes contained his whole and final will, and wanted nothing but form, he could not have been so anxious that the scrivener should return. I know that there are cases quoted by counsel from Eccles. Rep. the decisions of sir John Nicholl and other judges, that have gone farther than this case. But this court has not adopted those cases, especially the cases in which the notes were not read over to the deceased, nor the instructions, after being reduced to writing, seen by him. Suppose the scrivener had substantially given form to the notes in pencil, and returned with the draught to the deceased; it is not possible to believe that he would have executed it as his will, without change in several particulars. In coming to the conclusion that the notes do not contain the will of the testator, I do not put the case on the ground that the notes are too obscure, or that they are too uncertain for a will (because wills regularly proved are often so) but on the ground that the testator, though he said they were right, did not intend that they should, if expanded into

form, be the final disposition of his 138 property. \*I cite none of the numerous cases on the construction of wills, for though they are to be resorted to for rules of construction, they furnish no light to guide us to the intention of a testator. Nor do I put the case on the ground that the real and personal estates are so commingled, that as the notes cannot be proved as to the real estate, it would defeat the intention of the deceased if they were admitted to probate as to the personal estate; (because there are cases in which a will has been admitted to probate as to the personal estate and not as to the real, by which the testator's whole plan of provision for his family has been defeated;) but on the ground that the notes were not designed by the deceased to include his final will as to the disposition of his property.

I think the judgment must be reversed.

TUCKER, P. This case has been argued

with very great ability, and the court is much indebted to the diligence of counsel for collating all the cases calculated to throw light upon its difficulties. Among other authorities, we have had an array of all the ecclesiastical decisions; an advantage which was denied to the court in some of our own cases, decided before the publication of those reports. Yet I apprehend they will be found not to have gone farther than the reported cases in the courts of common law. As long ago as the reign of Henry 8, when the first statute of wills was passed, the most latitudinous construction was given to the power of devise. That statute provided that "every person should have power to give, dispose, will, and devise by will in writing, or otherwise by act executed in his lifetime, all his manors, lands" &c. The courts (upon the principle, I presume, of construing liberally a remedial statute) went to very great lengths in establishing imperfect wills. They seem to have considered a literal compliance

with the statute sufficient, and if 139 \*the substance of the devise was proved satisfactorily, and it was reduced to writing, no matter by whom, provided it was in the testator's lifetime, they held it good. Accordingly, as long ago as the time of lord Coke, a will was held good where a lawyer took only short notes with a design to reduce it into form, which he afterwards did, but the deviser died before it was read to him. *Brown v. Sackville*, Dyer 72, note; *S. C. Anderson* 34. The great mischiefs and frauds to which this loose mode of disposition gave rise, led, in the reign of Charles 2, to the statute of frauds and perjuries, prescribing the formalities and ceremonies in the devise of lands, which still prevail. By a subsequent clause of the same statute it was declared that no nuncupative will should be good, except such as were made and proved according to the requisitions of the statute. This was equivalent to declaring that no will of personals should be valid unless it was in writing, or executed with the solemnities required in the case of nuncupative wills. Now, while the statute of Henry 8, was an enlarging statute, this statute of Charles was a restraining statute, and should have been construed upon opposite principles; and the rather, as the mischiefs arising from the loose practice under the former constituted the very ground of enacting it. Yet it must be confessed that the courts have gone to the utmost limits of the former decisions, and at this day, in the english ecclesiastical courts, instructions for a will, given with a design that they should be reduced to form, would be held and taken to be a good will, though never read to or approved by the testator, provided it should appear that he was prevented from completing the will in the form which he designed, by the act of God. I do not think our courts have gone so far, but on the contrary they seem to have rejected notes for a will, though dictated by the dying man, where it did not appear that they had been read over and approved by him. *Mason*

140 v. \*Dunman, 1 Munf. 456. In doing so, they have certainly adhered to the spirit of the statute, though they have

departed from english authority. For the object of the statute, in requiring writing, was to prevent the fraud and perjury which may so easily be perpetrated where the wills of testators are left to the slippery memory of witnesses. But how is this effected if the writing is never seen, read or approved? What is such a will, after all, but a nuncupative will reduced to writing in the testator's lifetime; a will depending altogether upon the memory and the veracity of one, instead of two or three witnesses? for with us, one witness has been held sufficient to establish a written will of personalty. How are we assured, except by the oath of one man, that he has not mistaken, even if he has not designedly misrepresented, the decedent's meaning? Writing was designed, among other things, to give assurance that the will should not be mistaken; but this important object is frustrated, if it be deemed unnecessary that the instructions should be read over to the testator. I think, therefore, our courts wisely went back to the statute, instead of following the ecclesiastical courts. Happily the question, since our recent act, has ceased to be of much importance, and fortunately too, even in this case, it is unnecessary to take it up. For here the notes or instructions were written according to dictation, and were afterwards read over, examined, and approved by the testator.

The question in this case is of a very different character. It is contended by the appellant that the paper propounded is not a testamentary paper; that it is not a will; that it does not embody the provisions designed by the testator in reference to his estate; that it was not looked to as so embodying them, either by the decedent or the scrivener, but that it contained hints only, designed by the scrivener for his own direction, leaving much that was essential in the testator's directions to \*be  
141 filled up from memory. On the other hand it is contended that the paper itself is the true last will of the decedent, and as such was properly admitted to probate.

In order to sustain this memorandum as the decedent's will, it is not necessary that he should have designed the identical paper to be his will. Where the transaction takes place in extremis, the instructions for a will may be taken to be the will itself, however plainly it may appear that the design was to draw out the notes into form, and to execute such draught as the last will and testament. For if the decedent's will be final, settled, and completely declared by the instructions, the failure to complete his design of executing a more formal draught will in general not be important. But the paper propounded must be, first, his final determination at the time, as to the disposition of his estate. If his mind was not then made up, the instrument cannot be his will; for we cannot conceive of the exercise of will, where a party has not made up his mind. 2dly, it must also be complete, that is to say, it must contain the whole will of the testator; subject however to this modification, that if a particular bequest stands altogether independent, it may be sustained, although other intended

bequests have not been reduced to writing before the testator expired. As where he directs a slave to be given to A. and another to B. they being strangers to his blood, and the bequest to A. is reduced to writing, but the testator dies before that to B. can be so, the former will be good though the latter is void. But this can only be where what is not reduced to writing is not complicated with what is, for if it be, then the whole is void. As if the bequest be of a slave to A. upon condition, there, if the bequest be written, but the testator die before the condition is reduced to writing, the whole is void. Butler v. Baker, 3 Co. Rep. 31. So (I conceive) if, in contemplation of a distribution by \*will of his estate among his  
142 children, the decedent directs so many slaves to be given to his eldest son, and so many to his second son, &c. and the first bequest is reduced to writing, and he dies before the others are or can be written down, the whole is void; because all the bequests are so linked together that they cannot be separated without violence to the decedent's intention; for if the bequest to the eldest is held valid, he will have his full portion by the will, and will then be entitled to a full share of the estate undisposed of, as distributee. The whole of the bequests thus complicated constitute, therefore, an integer; they must all be reduced to writing, or all will be void. And so too, I conceive, if land be devised to an only son, and slaves to the value of the land to an only daughter, the two bequests must go together. They must be regarded as a unit. For if that to the daughter is effectual, while that to the son fails, the daughter will not only have the slaves bequeathed, but half the land also, against the express wishes of the testator. It is true that if he execute such a will, and the execution be defective as to the realty, but good for personal estate, there is no remedy; but where the paper to be set up as a will has in fact never been executed as such, and was not indeed designed identically to be the will; where it is proposed to set it up merely with the purpose of effectuating the intentions of the decedent, the impossibility of effectuating the whole, and the certainty of defeating his real wishes by setting up a part, is a conclusive objection to giving validity to that part. 3dly, it may safely be affirmed, I think, that if, when the deceased gives instructions for his will, which are written down, he declares that it shall not be his will until it is reduced to form and duly executed by him, the instructions themselves could not be propounded as a will. The case would be analogous to that of a nuncupative will, which is not good as  
143 such, if the testator at the \*time declares that it shall not be his will unless reduced to writing. 7 Bac. Abr. 307. 4thly, if this be so, then it seems to follow that if a decedent give instructions for a will of lands, as well as personalty, and direct it to be reduced to form in order that he may execute it, it ought to be presumed that he did not design the instructions to be his will, since they could not operate to effectuate his whole will; and 5thly, it would

seem clear that where a decedent gives instructions in writing for a will of lands and personalty, the provisions of which are so complicated with each other that a part cannot be carried into effect without violence to the general design, it must be presumed he intends that the instructions themselves shall not be his will. For it is reasonable to suppose he would prefer that the whole should fail, rather than that the great purpose of his will should be defeated, and a gross inequality established among those for whom he intended equal benefit.

The application of these principles to the case at bar will inevitably lead to a decision against the will. For the circumstances of the case tend strongly to prove that the brief pencil notes taken by Parker, though made out from the conversation he had just held with the testator, and read over and approved by him, were intended to be qualified and rendered intelligible by the aid of Parker's memory of that conversation—that they were not final instructions for a will, but short memorandums to draw the will by, assisted by the developments of intention just before communicated to Parker, and that if he had returned with the will written substantially in accordance with the notes, and with no other change than in the form of the paper, it would not have been executed by a rational testator.

Again, this paper, not being executed as a will of lands, is not the final determination of the testator's mind respecting his 144 estate. It is clear from the paper \*itself that he designed to pass his lands, and it is therefore clear that the drawing out the will at length, and the due execution of the draught directed to be made, was not merely form, but it was substance. It was an act which he designed in order to render that will complete, which without it was incomplete. The realty and personalty throughout are so blended and linked together, that you cannot tear them apart without the grossest violation of the testator's intention. Thus, all the estate real and personal is loaned to Mrs. Rochelle during life. Then it is provided that Mary Frances and Martha Eliza shall be educated and clothed. This of course is a charge upon the widow, as the whole estate is given to her. Now, the testator might very well have intended this charge upon his wife in respect of her enjoying both the lands and personalty, though it may be a very unreasonable burden, and one of which he did not dream, if she gets the slaves alone. So again, it is clear he had it at heart to keep the plantation and hands together: yet if this will is established, the hands go to the wife during widowhood, and the land to the heirs. So again, the whole estate, in one event, is to go to his brothers' children; the boys to take the land, and the girls to have as many more slaves in their shares as would be equal to the value of the land. But establish this will, and the girls get the slaves to the value of the land, and if the brothers' children are the heirs of the testator, they will get half the land also. Can this be said to be the testator's will? Is it not plain that under the pretext of effectuating

his will, we are called on to violate his every intention? Is it not plain that we are invited to set up a paper as his will, which he did not design as such, which was in truth incapable of declaring his will, (since, for want of due execution, it cannot be read as to the realty,) and which he intended should be substituted by an instrument so drawn out and executed as

145 \*to effectuate all his intentions? The very cases which have been cited shew, that where the effectuating what has been reduced to writing would conflict with the general scheme and plan of disposition, and be incompatible with the general intent, it cannot be regarded as the testator's will. "The rule," says Sir John Nicholl, "which I take to operate in every unfinished paper is this: Can the court infer, that by pronouncing for it, it will carry into effect what it collects, from all the circumstances of the case, to have been the deceased's wish? In that event it will be its duty to pronounce for it; but surely not, if it seems reason to believe that by so doing, it will defeat or counteract, instead of giving effect to that wish." *Montefiore v. Montefiore*, 2 Eng. Eccl. Rep. 343. And again, in the goods of Herne, 3 Id. 95, he says: "The presumption of law in every unfinished paper is, that the deceased never did intend it to take effect in its unfinished form; and that presumption is always held to be strengthened, when the paper, as in the present instance, purports to dispose not only of personal, but also of real property, as to which it clearly must be insufficient." In such case indeed the presumption may be rebutted by testimony of the recognition of the paper as his will, notwithstanding its incapacity to pass lands; but without such evidence, the presumption against it must prevail. For "the presumption of law is against every testamentary paper not actually executed by the testator, and so executed as it is to be inferred, on the face of the paper, that the testator meant to execute it." 2 Eng. Eccl. Rep. 342. And this presumption, we see, is strengthened where it purports to dispose of real estate. Now in the present case the presumption, instead of being repelled, is strongly sustained. The whole testimony proves that the paper in question was never designed by

testator or scrivener to be the will 146 itself. \*It is distinctly declared to have been a mere memorandum by which the will was to be written; and the testator said of it, that he had given to Parker the heads of his will for the purpose of writing his will, and that Parker was to be there on Friday with his will. As his disease advanced and he felt his end approaching, his anxiety for the arrival of Parker became extreme; he stated that he was surprised he had not come; that if he would come and fix his business, he would die perfectly satisfied. He added, indeed, that his will was not all the business he wanted with him, but that he must go and leave it all, for that he should not live till night. I am perfectly satisfied from this testimony, that the testator looked to the execution of the will he had directed Parker to draw, as necessary to

prevent his dying intestate, and that the memorandum was not in that form in which he purposed "that his will should be, as an operative testamentary paper." See *Jameison v. Cooke*, 3 Eng. Eccl. Rep. 38. To me indeed it appears perfectly clear that a memorandum for a will purporting to dispose of real and personal estate, so blended as to be incapable of separation without thwarting the general intention, never can be considered as a good will, in the absence of execution or express recognition of it as such. For it is conceded that the paper propounded must contain the fixed and final determination of the deceased, and that the paper, as admitted, must effectuate and not thwart his wishes. But that can never be where the devises of realty and personalty are blended together, and so dependent on each other, that the effectuation as to the personalty, and the failure of the will as to the realty, must altogether defeat the objects of the testator. Such is the case here; and I am therefore clearly of opinion to reverse the sentence, and to refuse the probate to the memorandum, even as a will of personalty.

147 \*The other judges concurring, judgment reversed. And this court proceeding &c. is of opinion that the said paper writing is not the true last will and testament of the said William L. Rochelle deceased. Therefore, motion of defendant to admit the same to record overruled, with costs in circuit court.

#### Literary Fund v. Dawson and Others.

March, 1839, Richmond.

(Absent STANARD,\* J.)

**Wills—Charitable Bequest—Uncertainty of Beneficiary.**—A testator, by the 16th clause of his will, desires that the balance of his estate be used by his executors for the purpose of erecting three seminaries of learning. Two of them are directed to be on particular tracts of land owned by the testator, and the other on a tract to be procured near a particular place. Then the clause proceeds as follows: "Said tracts of land, as also the one to be procured, to forever remain for the use and benefit of the said seminaries of learning. Said seminaries to be called by such names as my executors may think proper, and to be calculated for about 30 students, and the necessary buildings for

\*He had been counsel for some of the parties interested.

**Wills—Charitable Bequests—When Void for Vagueness and Uncertainty as to Intended Beneficiaries.**—The principal case is cited in *Carpenter v. Miller*, 3 W. Va. 176; *Com. v. Levy*, 23 Gratt. 40; *Seaburn v. Seaburn*, 15 Gratt. 433; *Stonestreet v. Doyle*, 75 Va. 364; *Protestant Episcopal E. Soc. v. Oburchman*, 80 Va. 766, 768.

The principal case and many other Virginia cases upon this subject are cited and discussed in *Kaln v. Gibboney*, 101 U. S. 363, 25 L. Ed. 815. See opinion of Woods, J., in *Wilson v. Perry*, 29 W. Va. 169, 1 S. E. Rep. 302.

See monographic note on "Charities" appended to *Kelly v. Love*, 20 Gratt. 124.

**Same—Same—Corporation to Be Created by Statute.**—The principal case is cited in *Kinnaird v.*

teachers, which I suppose may be erected for about 10000 dollars each. Should my estate fall short, the improvements to be in proportion to it; should it produce more, the overplus to be for the benefit of the said seminaries, in equal proportions, to be used for the education of such youth as is not able to pay teacher's fees." After a suggestion as to the course of education to be adopted at the schools, the clause concludes with these words: "At any of said seminaries, my relations to be admitted as students, free of tuition fees." **HOLD**, the devise and bequest are too indefinite and uncertain as to the beneficiaries, and are, for that cause, void.

**Same—Same—Same—Alternative Provision.**—The 17th clause of the will is as follows: "Should my executors fail to carry into effect said 16th devise for seminaries of learning (which I hope and 148 trust they will not) then the real and \*personal estate devised for said objects to be used by my executors in constituting a part of the literary fund of the state of Virginia, and two thirds of the interest on it to be used by the school commissioners for the county of Albemarle, in the same way the school fund allotted for the said county is used. The other one third of the interest on it to be appropriated and used by the school commissioners for the county of Nelson, in the same way. And from time to time as the legislature may think advisable, the principal may be used for like objects, for the benefit of the said counties, in same proportions as the interest is directed to be used. An act of assembly for said object, supposed can be obtained." The devise and bequest in this clause being adjudged by the circuit court to be void, that decree reversed by the court of appeals, and the bill dismissed as to the president and directors of the literary fund; but without prejudice to the rights of the parties, or to their assertion of them hereafter, in the event of a failure to procure the necessary act of assembly within the period limited.

At a court held for Albemarle county on the first of June 1835, the will and codicil of Martin Dawson were admitted to record. The will contained, besides other provisions, the following clauses:

"16th. It is my will and desire that the balance of my estate real and personal be used by my executors for the purpose of erecting three seminaries of learning: one on my tract of land called Belle Air; one on my tract of land around the town of Milton, my lots in said town to be taken as a part; one in the county of Nelson, as near the

*Miller*, 25 Gratt. 120, for the proposition that wherever a devise or bequest is made to a corporation, to be afterwards, within a period not too remote, created by law for the purpose of carrying into effect a charitable intention of the testator, expressed in his will, the same may be good and valid as an executory devise or bequest, and will become absolute and executed, if, and when, such a corporation shall be created accordingly. The principal case is cited in *Kinnaird v. Miller*, 25 Gratt. 123; *Stonestreet v. Doyle*, 75 Va. 365; *Page v. Rives*, Fed. Cas. No. 10,666. See 2 Min. Inst. (4th Ed.) 444. See *Literary Fund v. Dawson*, 1 Rob. 402, and note.

**Same—Alternative Provision—Failure of Principal Bequest.**—The principal case is cited in *Dunlop v. Harrison*, 14 Gratt. 257, 259. For sequel to the principal case, see *Literary Fund v. Dawson*, 1 Rob. 402.



graveyard in this mentioned, as a proper site can be procured: said tracts of land, as also the one to be procured, to forever remain for the use and benefit of the said seminaries of learning. Said seminaries to be called by such names as my executors may think proper—and to be calculated for about thirty students, and the necessary buildings for teachers, which I suppose may be erected for about ten thousand dollars each. Should my estate fall short, the improvements to be in proportion to it; should it produce more,

the overplus to be for the benefit of the  
149 \*said seminaries, in equal proportions, to be used for the education of such youth as is not able to pay teacher's fees; and I should be greatly gratified, if, in the course of education adopted at the said schools, a certain proportion of each day could be appropriated to labour of some kind or other, for which object said plantation is very well calculated. This mode of education seems to me necessary in this country. At any of said seminaries, my relations to be admitted as students, free of tuition fees.

"17th. Should my executors fail to carry into effect said 16th devise, for seminaries of learning, (which I hope and trust they will not,) then the real and personal estate devised for said objects, to be used by my executors in constituting a part of the literary fund of the state of Virginia, and two thirds of the interest on it to be used by the school commissioners for the county of Albemarle, in the same way the school fund allotted for the said county is used. The other one third of the interest on it to be appropriated and used by the school commissioners for the county of Nelson in the same way—and from time to time as the legislature may think advisable, the principal may be used for like objects, for the benefit of the said counties, in same proportions as the interest is directed to be used. An act of assembly for said object, supposed can be obtained."

The 21st and last clause of the will was as follows: "I do hereby constitute and appoint my friends Henry T. Harris, William C. Rives, Alexander Rives and William W. Dawson executors to this my last will and testament, who, my said executors, are hereby authorized to dispose of all my estate, both real and personal, not in this will otherwise disposed of; such sale not to take place in less than twelve months after my death, except the perishable parts. I would advise that my executor H. T. Harris attend to the seminary of learning in the county of Nelson, and the emancipation of my slaves;

150 \*my executors W. C. & A. Rives attend to the seminaries of learning in this county; and that my executor William W. Dawson attend to the payment of legacies."

Henry T. Harris, Alexander Rives and William W. Dawson qualified as executors, but the two first never acted as such.

In May 1836, Benjamin Dawson and others filed a bill, claiming, amongst other things, that the devises and bequests contained in the 16th and 17th clauses of the will are void, and making the executors who qualified, and the president and directors of the literary fund, along with other parties, defendants.

After the service of the process upon the executors, the powers of Henry T. Harris and Alexander Rives were revoked, and the suit as to them was, on their motion, dismissed. William W. Dawson, the other executor, answered the bill, stating his willingness to carry into effect, so far as may be in his power, his testator's intentions as declared in the said two clauses, and expressing his reliance on the equitable powers of the court to protect the trust from failure through the want of trustees.

The president and directors of the literary fund answered, saying they were advised that should the bequest contained in the 16th clause be, for any reason, deemed void, the 17th clause was ample and sufficient to vest in them, for the purposes therein mentioned, the balance of the real and personal estate of the testator which should remain after satisfying the several bequests contained in the previous clauses of the will.

The cause came on to be heard the 14th of October 1837, when the circuit court pronounced an opinion declaring (amongst other things) the devises and bequests contained in the 16th and 17th clauses to be void for the vagueness and uncertainty of the charity and the beneficiaries thereof, under the authority of the cases of Gallego's executors *v.* The Attorney General, 3 Leigh 450; and Janey's ex'or *v.* Latane &c., 4 Leigh 327.

151 \*From the decree made by the circuit court, the president and directors of the literary fund obtained an appeal.

The cause was argued in this court by the attorney general for the appellants, and Johnson and Thompson for the appellees.

BROOKE, J. I think the 16th and 17th sections of the will plainly give the property destined for the establishment of schools, to the executors, and not to the literary fund. If the plan for the establishment of the three schools contemplated in the 16th section could not be carried into effect, then the provision in the 17th section authorizes the executors to use the fund in constituting a part of the literary fund of the state of Virginia, to be used by the school commissioners of Albemarle and Nelson in the manner and proportions specified, and from time to time as the legislature may think advisable. This, I think, refers both to the principal and interest in the fund. The whole argument, then, to prove that the literary fund was a corporation incapable to take the fund has no application to this construction of the will. Giving to it the construction contended for, I think none of the cases cited would, under the laws constituting the literary fund, and incorporating the public officers having the direction and management of it, authorize them to take the fund for the objects designated by the will. That corporation seems to have been constituted for the purpose of administering the literary fund according to the several laws and its charter, and to be responsible for the administration of that fund only, or such other funds as by law it might be authorized to take. If then the executors in a reasonable time can procure such a law; if the legislature shall (in the words of the will) think it advisable to pass



such a law as will authorize the corporation to take the \*fund bequeathed to the executors by the will, on the terms of the will; there will be no difficulty in carrying into effect the intentions of the testator. It is on these grounds that I concur in the opinion delivered by the president.

TUCKER, P. Upon mature consideration of this will, I am of opinion that its true construction removes every difficulty, and renders unnecessary the consideration of various questions made in the cause.

First, I shall remark that according to my apprehension, here is no direct devise to the literary fund. The effect of the will is to devise the estate real and personal to the executors, for they are to "use it in constituting a part of the literary fund." The testator does not himself constitute the estate a part of it, for he had in effect preferred another disposition, and it was only in failure of that, that this destination was given to it. Hence he finds it necessary to vest the power of disposition in the executors. They are to constitute the estate a part of the literary fund. And the exercise of this power implies a devise to them for the purpose declared.

Secondly, I understand the last sentence of the clause, in these words, "an act of assembly for said object, supposed can be obtained," as extending to the whole clause, and not merely to the provision for the use of the principal. 1. Because it stands in a separate and distinct sentence, equally applicable to the whole as to part of the clause. 2. Because it was equally necessary for the whole as for part. 3. Because, as to the use of the principal, a legislative act had been already, in effect, adverted to, by the words "from time to time as the legislature may think advisable;" for their resolution as to that matter could only be declared by an act of assembly.

153 \*Thirdly, by whom is the act to be obtained? Clearly by those to whom the trust is confided of constituting the estate a part of the literary fund; that is, by the executors.

Thus understood, the will is equivalent to a devise of his real and personal estate to the executors, in trust for the purpose of procuring an act of assembly with the necessary provisions for constituting the funds devised a part of the literary fund, in strict conformity with the terms, provisions and conditions of the will. By such an act of assembly, all the difficulties suggested by the fertile mind of the counsel will be avoided, and the benevolent intentions of the testator carried into complete effect. And as this act is to be obtained by the executors, the contingency of its passage is within a life or lives in being, and therefore not too remote. The case is thus very much the same with that of *The Sailor's Snug Harbour*, 3 Peters 100.

I am of opinion that the decree should be reversed, so far as respects the declaration that the devise in the 17th clause of the will is void; and that the bill should be dismissed with costs as to the president and directors of the literary fund, without prejudice to the rights of the parties, or their assertion of

them hereafter, in the event of the failure to procure the necessary act of assembly within the period limited.

The decree of the court of appeals was as follows:

"The court is of opinion that so much of the said decree of the circuit court as declares that the devise in the seventeenth clause of the will of the testator is void, is erroneous. Therefore it is decreed and ordered that the said decree, so far as the same is above declared to be erroneous, be reversed and annulled, and that the appellee who is an executor, out of the estate of his testator in his hands to be administered, and the other appellees in their own right, do pay 154 unto the appellants \*the costs expended in the prosecution of the appeal aforesaid here. And the court proceeding to pronounce such decree, in lieu of that part reversed as aforesaid, as the said circuit court ought to have pronounced, it is further decreed and ordered that the bill, as to the appellants, be dismissed, and that the appellees who were plaintiffs in the said circuit court do pay unto the appellants their costs by them in the said circuit court expended. But this decree is to be without prejudice to the rights of the parties, or to their assertion of them hereafter, in the event of the failure to procure the necessary act of assembly within the period limited."

Note.—Since this decision, an act of assembly has been passed concerning the estate of Martin Dawson, which will be found in the session acts of 1840-41, ch. 26, p. 52.

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\*Ware v. Stephenson.

April, 1830, Richmond.

(Absent PARKER,\* J.)

Witness—Assumpsit.†—In assumpsit for goods furnished a third person, such person is a competent witness for the plaintiff.

Demurrer to Evidence—Facts Established—How Ascertained.‡—Upon a demurrer by the defendant to the plaintiff's evidence, the court, to ascertain what facts the evidence establishes, must look to the whole of it.

\*He decided the cause in the court below.

†Witness—Assumpsit.—The principal case is cited in *Dishazer v. Maitland*, 12 Leigh 533. See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

‡Demurrer to Evidence—Effect.—The language of JUDGE STANARD in the principal case, as to the effect of a demurrer to evidence, is quoted with approval in many subsequent cases both in Virginia and West Virginia. See the principal case cited in *Trout v. Virginia & Tenn. R. R. Co.*, 23 Gratt. 638; *Richmond, etc., R. R. Co. v. Moore*, 78 Va. 97; *Southwest Imp. Co. v. Andrew*, 86 Va. 279, 9 S. E. Rep. 1015; *Clark v. Richmond, etc., R. R. Co.*, 78 Va. 712; *Union Steamship Co. v. Nottinghams*, 17 Gratt. 120; *Miller v. Ins. Co.*, 8 W. Va. 533; *Heard v. Railway Co.*, 26 W. Va. 458.

In *Heflebower v. Detrick*, 27 W. Va. 21, the court said: "As the defendant introduced no evidence, the effect of his demurrer to evidence is to allow full credit to all the competent evidence of the plaintiff, and to admit all the facts directly proved by, or that

**Same—Same—Same—Inferences.**—Upon such demurrer. In ascertaining the facts established by any one witness, every thing stated by him, as well on his cross examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by the answer to another. And where, from one statement considered by itself, an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another.

**Statute of Frauds—Guarantee—Collateral Undertaking.**—Where the defendant's undertaking is for a consideration to be received by, or articles to be supplied to a third person, if the transaction be such that the third person is responsible to the person who supplies the articles or from whom the consideration proceeds, the undertaking is

a jury might fairly infer from it. In drawing these inferences as to what the evidence, whether direct or circumstantial and presumptive tends to prove, it is incumbent on the court to adopt those most favorable to the demurree provided they be not forced, strained or manifestly repugnant to reason. *Hansbrough v. Thom*, 8 Leigh 147; *Whittington v. Christian*, 3 Rand. 358; *Miller v. Ins. Co.*, 8 W. Va. 515; *Ware v. Stephenson*, 10 Leigh 164; *Trout v. Va. & Tenn. R. R. Co.*, 23 Gratt. 619."

The principal case is cited in *Richmond, etc., R. Co. v. Williams*, 86 Va. 167, 9 S. E. Rep. 990. See *foot-note* to *Richmond, etc., R. R. Co. v. Anderson*, 31 Gratt. 812. See *Green v. Judith*, 5 Rand. 1; *Stephens v. White*, 2 Wash. 208.

**Same—Review by Appellate Court—Test.**—Where there is a demurrer to evidence, and the question in the appellate court is, whether or not a fact ought to be taken as established by the evidence either directly or inferentially in favor of the demurree, the test is, whether the court would set aside the verdict, had the jury on the evidence found the fact. If the verdict so finding the fact would not be set aside, such fact ought to be considered as established by the evidence demurred to.

The principal case is cited for this proposition in *Fowler v. B. & O. R. R. Co.*, 18 W. Va. 583; *Richmond, etc., R. Co. v. Anderson*, 31 Gratt. 820; *Michael v. Roanoke Machine Works*, 90 Va. 498, 19 S. E. Rep. 261; *Trout v. Virginia & Tenn. R. R. Co.*, 23 Gratt. 630; *Miller v. Ins. Co.*, 8 W. Va. 534; *Heard v. Railway Co.*, 26 W. Va. 458; *Richmond, etc., R. R. Co. v. Moore*, 78 Va. 97.

See generally, monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

**§Statute of Frauds—Collateral Undertaking.**—Where the consideration of a defendant's undertaking or promise is for money or property to be furnished to or received by a third person, if the transaction be such that the third person remains responsible to the person who furnishes him with such money or property, or from whom the consideration proceeds, such promise or undertaking is collateral, and under the statute of frauds will not bind the defendant, unless it be in writing. *Radcliff v. Poundstone*, 23 W. Va. 733, citing the principal case; *Wagoner v. Gray*, 2 Hen. & M. 608; *Cutler v. Hinton*, 6 Rand. 509; *Noyes v. Humphreys*, 11 Gratt. 636.

The principal case is cited in this connection, in *Riffe v. Gerow*, 20 W. Va. 468, 2 S. E. Rep. 107; *Noyes v. Humphreys*, 11 Gratt. 645, 646.

See *foot-note* to *Noyes v. Humphreys*, 11 Gratt. 636, and monographic note on "Frauds, Statute of" appended to *Beale v. Digges*, 6 Gratt. 582.

collateral, and under the statute of frauds will not bind unless it be in writing.

**Case at Bar.**—Question upon the evidence, in an action for goods furnished a third person, whether or no such third person was responsible to the plaintiff.

**Assumpsit** in the circuit court of Frederick county, by Joseph F. Stephenson against Josiah W. Ware, upon an alleged promise by the defendant to pay the plaintiff for any goods he might furnish out of his store to one Jacob Vogdes. Plea, the general issue.

At the trial, the plaintiff, after proving the absence of Vogdes from the commonwealth, offered his deposition in evidence, and the defendant objected that Vogdes was incompetent on the ground of interest, but 156 the objection was overruled, and the defendant excepted to the opinion.

The plaintiff then read in evidence to the jury the deposition of Vogdes, with an account thereto annexed of the plaintiff against the defendant, commencing the 4th of May 1833, which account amounted, on the 30th of June 1834, to 399 dollars 60 cents, and on the 22d of August 1834, to 445 dollars 96 cents. In answer to the first four questions of the plaintiff's counsel, Vogdes deposed that he was a house joiner and carpenter, and was at work at colo. Ware's building (the defendant's) from the date of the first article in the account for a period of from nine to twelve months; that he had examined the account and found it correct; that he was a stranger in the neighbourhood, and became acquainted with Stephenson about five weeks previous to the commencement of the account.

The fifth and sixth questions, and the answers thereto, were as follows: "5th question. What induced you to run up said account, and on whose authority was it commenced? State all you recollect of the origination of the account. Answer. I was frequently solicited by mr. Stephenson to divide my custom with the merchants of the place, and I told mr. Stephenson I must consult colo. Ware first, which I did, and colo. Ware and myself went to mr. Stephenson and had a conversation with him at the door of the store. Colo. Ware stated to mr. Stephenson that I was engaged on a building for him, and would want to be furnished with different articles out of his store, and that he (Ware) could not pay him for the articles until next harvest come one year. Mr. Stephenson assented to it, and received my orders for goods from that time until within three months of the finishing of colo. Ware's building. 6th question. Upon whose promise or undertaking to pay for the goods in said account, were they furnished by mr.

Stephenson? Answer. I was induced 157 to believe they were furnished upon colo. Ware's agreement to pay for them. I was a stranger, and did not think mr. Stephenson would credit me, but it was to come out of the money which colo. Ware would owe me at the finishing of his building."

Upon the cross examination, there were the following questions and answers: "7th question. Will you state whether the arti-

cles charged in the account you have alluded to were got for your own use and benefit? Answer. Yes, sir; for the benefit of myself, my family and hands. Question. In the conversation you have spoken of at the store door, was the understanding of the parties that mr. Ware was to stand as security for you? Answer. That was the way I understood it, and that mr. Ware was to pay for the goods out of such moneys as might be due when the building was finished, and that mr. Ware was to be my paymaster, and to reserve it out of such money as might be due me, upon a settlement with mr. Ware when the building was done. Question. Did you understand that mr. Ware was to pay the account whether there should be any money due to you on settlement or not? Answer. Certainly not. Question. Whilst the account you have mentioned was accruing, did mr. Stephenson frequently or at any time apply for payment of it, or to draw orders on mr. Ware in his favour, for money on that account? Answer. Yes, mr. Stephenson did frequently apply to me for orders on colo. Ware, and I think I gave him an order. He frequently applied to me to endeavour to secure the payment of the account by drawing an order for the account on mr. Ware, which if he would accept, it would be all right. Question. Had mr. Ware any authority to pay any part of the account without your direction to apply the money which might be due to you on settlement to such payment? Answer. No, sir, he had not, nor had he any right to accept an order

158 from me unless he chose to do so. At the commencement of the work, it was understood that mr. Ware would not accept my orders unless he chose. Question. Was the account kept against you in the first instance? Answer. I cannot answer distinctly as to that. I am under the impression that the account was kept against me. I know the account in mr. Stephenson's ledger was headed with my name. The orders for goods were drawn by me, and, I think, the account kept against me. Question. Whose debt was it which grew out of the account? Answer. As I got the goods for my own use and that of my family and hands, I always considered it my debt, and mr. Ware as my security.—Had you not a conversation with mr. Stephenson about the time of finishing mr. Ware's building, about the account, and did not mr. Stephenson agree to indulge you? Answer. I had a conversation with mr. Stephenson on the afternoon of the finishing mr. Ware's building, and stated to him I had settled with colo. Ware, and that I was not able to pay all of his account; that I was very sorry that I could not pay him the whole account, but I was willing to give him my note for the balance, as I had done with the other merchants of the town. Mr. Stephenson then replied to me that he did not consider the debt mine, but the debt of colo. Ware, and refused to take my note. I then told mr. Stephenson that I would be in that country again in the spring, to work, and that I would use the utmost of my endeavours to see him paid; but he never did say he would indulge me. Question. Will you

state whether mr. Stephenson made very frequent applications to you, to endeavour to get the debt due to him on the said account secured to him in mr. Ware's hands, or through mr. Ware? Answer. Mr. Stephenson frequently applied to me for orders to mr. Ware, and I stated to mr. Stephenson that they would not be accepted by colo. Ware. He (Stephenson) told me his claim ought to be secured in colo. Ware's hands."

159 \*The witness, upon a reexamination by the plaintiff's counsel, deposed that the contract between him and Ware was, that he (Ware) was to pay the witness money, provided he had it at the time that the witness might apply to him for it, and that he was willing to get the witness, out of any of the stores, any articles that would answer for the witness and his hands. Witness was to wait with colo. Ware for any money that might be due him after the building was finished, until it should be convenient for colo. Ware to pay it; but Ware was to use every exertion to pay the witness off when the building was finished. The work, when it was finished, amounted to 2250 dollars. Colo. Ware paid the witness that sum during the progress of the building and after it was done, or assumed the payment after the building was done.

The plaintiff's counsel proved the handwriting of Vogdes to an order in these words: "Berryville, Sept'r 30, 1834. Colo. Jos. Ware. Sir, you will oblige me by paying mr. Joseph F. Stephenson the account of plank furnished you. Jacob Vogdes"—and offered the said order as evidence; but the court rejected the same; to which opinion the plaintiff excepted.

Another witness, John W. Luke, deposed that he had lived with the plaintiff, as clerk and salesman in his store, from the 20th of August 1833, and, from that date until the close of the account, sold to Vogdes the greater part of the articles mentioned in the account. The account was kept in the name of Vogdes. Witness was under the impression that the credit was given to the defendant and not to Vogdes, because he (Vogdes) was a stranger in the neighbourhood, had no property there, and there were notes or bonds of Vogdes brought there by others from Loudoun, and offered for sale at a discount. There were kept at the same time, on the books of the plaintiff at his store, an account against the defendant, and Stribling, \*in the name of Ware and Stribling, and an account against the two misses Stribling, for all of which the defendant was looked to by plaintiff for payment.

Another witness, Treadwell Smith, deposed that Vogdes came as a stranger to the neighbourhood of plaintiff and defendant. Witness had been informed by a friend of his in Baltimore, that said Vogdes had taken the benefit of the insolvent oath in that city, and was cautioned not to trust him. Witness did not know whether plaintiff was aware of Vogdes's insolvency. Witness did not speak of it, nor did he believe that Vogdes's cir-

cumstances were generally known in the neighbourhood.

The defendant demurred to the evidence introduced before the jury. The jury found a verdict for the plaintiff for 399 dollars 60 cents, with interest from the 1st of August 1834, subject to the opinion of the court on the demurrer. And the circuit court rendered judgment on the demurrer for the plaintiff. To which judgment a supersedeas was allowed.

The cause was argued in this court by Leigh for the plaintiff in error, and Robinson for the defendant in error.

I. Leigh insisted that Vogdes was not a competent witness; *Waggoner v. Gray's adm'rs*, 2 Hen. & Munf. 612. It is an attempt to swear himself out of responsibility for the debt, and to throw it in the first instance on Ware.

Robinson said, the remark of judge Roane in *Waggoner v. Gray's adm'rs* was only this, that it would be of dangerous consequence to permit Slaughter to recover a debt of his own, by his own testimony. Slaughter was in debt to Waggoner, and deposed that Gray was in debt to him, and he (Gray) agreed to pay Waggoner, and Waggoner agreed to credit Slaughter. The objection was that Slaughter would be discharged from Waggoner's claim, if Waggoner recovered from Gray's administrators, but would still be liable to Waggoner, if Waggoner failed to

161 \*recover from Gray's administrators.

Slaughter might indeed sue Gray's administrators, but he could not recover against them on his testimony. The objection therefore was that Slaughter was doing indirectly what he could not do directly, viz. recovering a debt of his own, by his own testimony. But here, Vogdes is not recovering a debt from Ware, either directly or indirectly. And the recovery by Stephenson will in no manner promote his interest. It is true that if Stephenson fails to recover from Ware, he may sue Vogdes; but on the other hand, if he recovers against Ware, Ware may sue Vogdes. *Fancourt v. Bull*, 1 Bingham's N. C. 681; 27 Eng. Com. Law Rep. 542.

II. Upon the demurrer to evidence, Leigh observed, that the old distinction taken by lord Mansfield between a promise to pay for articles before delivery, and a promise afterwards, was overruled. *Mawbrey v. Cunningham*, cited in 2 T. R. 80; *Jones v. Cooper*, Cowp. 227; *Matson &c. v. Wharam*, 2 T. R. 80; *Anderson v. Hayman*, 1 H. Black. 120; *Watkins v. Perkins*, 1 Ld. Raym. 224; *Keale v. Tempe*, 1 Bos. & Pul. 158. The doctrine now is that if the person for whose use the goods are furnished be liable at all, the promise must be in writing. *Cutler v. Hinton*, 6 Rand. 509. Now here, the court must come to the conclusion that Stephenson might have maintained an action against Vogdes. Though Ware had other accounts, the goods were charged not to him but to Vogdes. On the part of Ware, there was nothing more than a stipulation that the fund in his hands should be applied to pay the debt. If there be variance between some parts of the evidence and others, the court must take it altogether, and draw from

the whole such inferences as a jury might draw. The evidence of Vogdes on his cross examination, though contradictory, must be taken as a qualification of what he had previously said. He understood that Ware was to stand as surety. Stephenson so understood; for he made frequent 162 \*attempts to get orders on Ware. He obtained one order, which was not accepted. If the liability of Ware was direct, why did Stephenson raise the account against Vogdes? Why did he attempt to get orders from Vogdes? Luke says, he was under the impression that the credit was given to the defendant; but it is nothing more than an impression, for Luke did not hear the conversation between Ware and Stephenson.

Robinson referred to *Chase v. Day*, 17 Johns. Rep. 114; *Towne v. Grover*, 9 Pick. 306; *Bird v. Gammon*, 3 Bingham. N. C. 366; 32 Eng. Com. Law Rep. 366, 369, and *Dixon and others assignees of Moore v. Hatfield*, 2 Bingham. 439; 9 Eng. Com. Law Rep. 471, which last case, he said, was very apposite, West had undertaken to do carpenter's work upon a house and find all materials, but wanting credit or funds to procure timber, Hatfield agreed to pay Moore £50. for timber out of the money that he had to pay West, provided West's work was completed; and upon this agreement Moore supplied the timber. The court were clear that this was not a collateral but a direct undertaking. Here the circumstances are very similar, and conduce to shew that Ware's undertaking was direct. Vogdes was a stranger in the neighbourhood, and came there insolvent. He was at work on Ware's building. And Ware and Vogdes went to Stephenson and had a conversation with him. Ware stated that Vogdes would want articles out of Stephenson's store, and he (Ware) could not pay for them until next harvest come one year. Stephenson assented, and delivered goods until within three months of the finishing of the building. Vogdes states that being a stranger, he did not think Stephenson would have credited him. He believes the goods were furnished upon Ware's agreement to pay for them, but the payment was to come out of the money which Ware would owe him upon the contract between them. In a subsequent part of his deposition, he states that

163 \*contract was 2250 dollars. Luke too is under the impression that the credit was given to Ware. Leaving out the evidence upon the cross examination, every thing goes to shew that the credit was given to Ware. This inference is not rebutted by the fact that the account was entered on the books in the name of Vogdes. For Ware had various accounts, and it was convenient to keep the amount on account of Vogdes separate, that he might afterwards get it on a settlement with Vogdes.

The principle is well settled, that a demurrant admits all the facts that could reasonably be inferred by a jury from the evidence given by the other party, and waives all the evidence on his part which

contradicts that offered by the other party. This principle ought to be applied to the evidence on the cross examination. That evidence should be disregarded so far as it contradicts the evidence on the general examination. Besides, the evidence upon the general and cross examinations may be reconciled by treating the words surety and paymaster as synonymous. And so Vogdes regards them. To say that the debt was his and Ware the surety for it, he considers the same as saying that Ware was paymaster to Stephenson, and he (Vogdes) was to pay the debt on a settlement with Ware. As to Stephenson's applying for orders, that may be explained in two ways. One reason was to get prompt payment; the other, to have written evidence.

STANARD, J. The objection to the admissibility of the evidence of Vogdes was properly overruled. He stood entirely indifferent between the parties litigant, or if he had any interest, that interest was against the party who offered him as a witness. If Stephenson failed in the suit against Ware, Vogdes remained responsible to Stephenson, and if he succeeded, Vogdes would be certainly responsible for an equal amount to Ware, and might perhaps be also  
164 liable to Ware for the costs of \*this suit. This possible liability for the costs of this suit if it resulted in a recovery against Ware, might have been an objection, if the witness had been offered by Ware, and Stephenson had objected, but is wholly unavailable in the mouth of Ware.

The demurrer to evidence presents a more serious if not a more difficult question. The assumpsits set out in the declaration are direct and original, not collateral. The necessity of shewing such an assumpsit by the proof is twofold. The proof of a collateral liability for goods sold and delivered to another would not support the declaration, though the undertaking were in writing; and if it would, the undertaking in proof being oral, the statute denies a right of action on it. Does the evidence prove a direct and original, or a collateral undertaking? In ascertaining the facts proved directly or by inference, we must not be unmindful of the effect of a demurrer to evidence. By it the demurrant allows full credit to the evidence of the demurree, and admits all the facts directly proved by, or that a jury might fairly infer from, the evidence. And in determining the facts inferrible, inference most favourable to the demurree will be made, in cases in which there is a grave doubt which of two or more inferences shall be deduced. In such cases it would not be sufficient that the mind of the court should incline to the inference favourable to the demurrant, to justify it in making that inference the ground of its judgment. Unless there be a decided preponderance of probability or reason against the inference that might be made in favour of the demurree, such inference ought to be made. The demurrer withdraws from the jury, the proper triers of facts, the consideration of the evidence by which they are to be ascertained; and the party whose evidence is thus

withdrawn from its proper forum is entitled to have it most benignly interpreted by the substitute. He ought to have all the benefit that might  
165 have resulted from a decision \*of the case by the proper forum. If the facts of the case depend upon circumstantial evidence, or inferences from facts or circumstances in proof, the verdict of a jury ascertaining these facts would not be set aside, merely because the court might have made inferences different from those made by the jury. To justify the grant of a new trial, when it depends on the correctness of the decision between different inferences to be drawn from the evidence, it would not suffice that in a doubtful case the court would have made a different inference. The preponderance of argument or probability in favour of this different inference should be manifest. When the question is whether or no a fact ought to be taken as established by the evidence, either directly or inferentially, in favour of the demurree, I do not know a juster test than would be furnished by the enquiry, would the court set aside the verdict, had the jury, on the evidence, found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered established by the evidence demurred to.

In the case in judgment, the evidence was all parol, and adduced by the plaintiff. In ascertaining the facts established by it, we must look to all of it, and especially in ascertaining the facts established by any one witness, every thing stated by him, as well on his cross examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by his answer to another; and when from one statement considered by itself an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another. Under the guidance of these principles I proceed to the enquiry, does the evidence demurred to prove, directly or inferentially, a direct and original undertaking on the part of Ware to pay for the goods Stephenson might furnish to  
Vogdes?

166 \*To support the affirmative, reliance is mainly placed on the answers of Vogdes to the fifth and sixth questions on his examination in chief. By neither of these answers is an assumpsit of any kind directly proved. Ware stated the relation between himself and Vogdes, from which he was to become the debtor of Vogdes, and Vogdes's want of supplies from Stephenson's store, and that he (Ware) could not pay Stephenson until after harvest. An assumpsit on the part of Ware of some kind is fairly inferrible from this statement taken by itself, but what that assumpsit was is not directly stated. Now, that assumpsit might have been a direct and original undertaking by which Ware alone became the debtor for the supplies to Vogdes, or it might be an assumpsit to see Stephenson paid, or it might be an undertaking to retain in his hands, of the money for which he might become the debtor of Vogdes, as much as was necessary to pay the debt that Vogdes might

contract with Stephenson, and apply it in discharge of the debt. If the facts of the case depended on this isolated view of the evidence, I should, on the principles before stated as applicable to demurrers to evidence, consider it the duty of the court to select, of these implications, that most favourable to the demurree, because such might not unreasonably be the implication of the jury; though the latter part of the answer to the sixth question would incline me to adopt the last of the above stated implications. But the first of the implications, (which is the only one that would justify a judgment in favour of Stephenson on the demurrer,) is directly confronted not only by facts stated by the witness, but by the strong presumptions which flow from other unquestioned facts. In answer to different questions, he states that he understood Ware was to stand security for him; that Ware was to pay for the goods out of the money that might be due witness when the building was finished; and if on a settlement no money was due from Ware, he was not

167 to \*pay the account. These facts directly repel the idea that the undertaking of Ware was original and unqualified: and this is corroborated by fair if not necessary implication from the facts, that Stephenson applied to Vogdes to deal with him, that Vogdes was charged on the books of Stephenson with the articles supplied him, and that Stephenson frequently applied to Vogdes for orders on Ware, and obtained one for the amount of his account against Vogdes. The statements in Vogdes's evidence, that he supposed Ware was to be paymaster, and of the witness Luke of his impression that the account was raised on the credit of Ware, which were relied on in argument by the appellee's counsel are quite compatible with the supposition that the undertaking was collateral; and so I think it must be regarded by the court.

Whatever doubts may at one time have existed respecting the undertakings within the scope of the first section of the statute of frauds, it has long since been definitively settled that when the undertaking is for a consideration to be received by, or articles to be supplied to, a third person, if the transaction be such that the third person is responsible to the person who supplies the articles, or from whom the consideration proceeds, the undertaking is collateral, and if oral is not binding. *Matson &c. v. Wharam*, 2 T. R. 80; *Cutler v. Hinton*, 6 Rand. 509. The doctrine of *Matson &c. v. Wharam* has never, since it was decided, been effectually questioned in the courts of Westminster. In the case at bar, I think it clear beyond doubt, that whatever might have been the undertaking of Ware, Vogdes was responsible to Stephenson. No one would, I presume, doubt that if Vogdes were the defendant in this action, Stephenson, on the evidence in this case, would be entitled to judgment.

My opinion therefore is that the judgment is erroneous and ought to be reversed, and judgment entered on the demurrer to evidence, for the demurrant.

168 \*CABELL, J., concurred.

BROOKE, J. My first impression of this case on the argument was, that the assumpsit to pay for the goods to be delivered to Vogdes, the party who received them, was a direct assumpsit, and not an alternative or collateral assumpsit, within the statute of frauds; and a very minute examination of the evidence set out in the demurrer has confirmed that impression. Vogdes, to whom the goods were to be delivered, was a house-carpenter and joiner, an entire stranger in the place, and in debt, as appears by the evidence of Luke, who says he was under the impression that the credit for the said account was given to the defendant and not to Vogdes because he was a stranger in the neighbourhood, without property there, and because there were notes or bonds of said Vogdes brought there by others from Loudon and offered for sale at a discount. This is strong evidence that Vogdes was not the party intended to be credited by the plaintiff. But let us see what Vogdes himself says. He says that he was a stranger in the place; that he was engaged in building a house for the defendant, which, it appears, cost 2250 dollars; that the plaintiff and others solicited him to deal with them, (no doubt, on the credit of the money he was to receive for the house from the defendant Ware); that he said he must consult colo. Ware. He then states the conversation that passed between the plaintiff and defendant. He says, colo. Ware stated to Stephenson the plaintiff, that the witness was engaged in building for him, and would want to be furnished with different articles out of his (Stephenson's) store, and that he (Ware) could not pay him for the articles until next harvest come one year; to which Stephenson the plaintiff assented. This, I think, was manifestly not an alternative promise to pay the debt of another, in the words of the statute. Vogdes seems to have been no

169 \*party to it, and of course was not intended to be bound by it. He was standing by, and was to receive the articles. He was not consulted as to the time of payment. The promise was not collateral to any undertaking of his, but, I think, a direct promise by Ware to pay for the articles. In a suit against Vogdes, could he be charged in the terms of the promise made by Ware? I think not. To the sixth question put to him, upon whose promise to pay for the goods in said account were the articles furnished? his answer was, "I was induced to believe they were furnished upon colo. Ware's agreement to pay for them." But I lay no stress upon this, or any other of the opinions of the witness. I rely upon the facts only that he states. He was an ignorant, though, from his testimony, a very honest man. He goes on: "I was a stranger, and did not think Mr. Stephenson would credit me, but it was to come out of the money that colo. Ware would owe me at the finishing of the building." In answer to another question, "In the conversation you have spoken of, was the understanding of the parties that Mr. Ware was to stand as security for you?" he says, "That was the way I understood it." In another place he says, "Mr. Ware

was to be my paymaster and to receive it out of such money as might be due me on settlement." All this and much more may be descanted on, but I rely on the terms of the promise made by the defendant to the plaintiff when the latter assented to deliver the articles to Vogdes. There is a great deal of cross examination, but no answer that contradicts the facts stated by him as to the terms of the promise made by the defendant to the plaintiff to pay for the articles to be delivered. The witness's opinions as to the effect of those facts are not facts, nor contradictory of those facts. As to the orders on Ware which he gave the plaintiff, they prove nothing as to the contract. One of them (which was rejected by the judge)

170 was drawn on \*account of some plank furnished by Vogdes to the defendant.

Other orders in favour of the plaintiff on the defendant are spoken of by Vogdes; but these orders, if for money due by the defendant to Vogdes, and if accepted and paid (which is not pretended) would not discharge the assumpsit of the defendant but for their amount, to which the plaintiff could not object, as every creditor is willing to receive his money even before it is due. Vogdes, in another part of his evidence, says that the plaintiff told him he did not consider the debt to be his, but the debt of Ware the defendant, and refused to take his note for the amount; but the account was kept in the books of the plaintiff in the name of Vogdes. This would be a strong circumstance to prove that the plaintiff held Vogdes bound for the amount, but for the explanation given by Luke, the witness who kept the books. He says, there were other accounts kept in the books, in the names of others for whom Ware the defendant was held solely bound, which were not objected to by the defendant.

In all this evidence there is nothing to prove that Vogdes was expressly or impliedly bound to pay for the articles delivered to him by the plaintiff on the assumpsit of the defendant to pay for them, or to change the character of his assumpsit as stated by Vogdes. The contract of Vogdes was with Ware the defendant to build him a house, and not with the plaintiff. It is a well settled principle that where the party to whom goods are delivered on the promise of a third person to pay for them, is bound to pay for them, the assumpsit is not direct but collateral, and, if not in writing, within the statute of frauds: and the converse of the principle is also settled. In the case before us, I think it very clear that Vogdes was not bound to pay for the articles delivered to him. On the evidence in the demurrer, I think that a jury ought to have found a verdict for the plaintiff, and that no new trial ought to have

171 \*been awarded, if asked for. If the terms of the contract had been less strong, yet on the ground of the utter improbability that, in the circumstances of Vogdes as proved by the evidence, the plaintiff would have given him any credit, I think such a verdict ought not to have been set aside. I have examined many of the cases, but shall only quote one, to prove that the assumpsit of Ware the defendant was a direct assumpsit,

and not a collateral promise within the statute of frauds. It is the case of Dixon and other assignees of Moore v. Hatfield, an action of assumpsit on the following agreement: "I Richard Hatfield do agree to pay Mr. J. Moore £50. for timber &c. out of money that I have to pay Wm. West, provided West's work is completed." At the trial before Best, chief justice, it appeared that West had undertaken, for a certain sum, to complete the carpenter's work on the house in question, and find all the materials, but being delayed for want of credit or funds to procure timber, it was supplied by Moore, on the defendant's signing the above agreement. The jury found a verdict for £50. and Vaughan, serjeant, moved for a rule nisi to set it aside, on the ground (among other objections) that the agreement was in effect a guarantee to pay Moore in the event that West failed to pay him, and if it was a guarantee, the consideration for the defendant's undertaking was not sufficiently expressed. But the court were clear that this was not a collateral but a direct undertaking, and the rule was refused. It is true, the agreement in this case was in writing; but I quote it to shew the character of the assumpsit of the defendant in the case before us. The circumstances of the two cases are very similar. The person for whom the agreement in the case cited was made, wanted credit: so in the case before us. In England, the statute of frauds requires a consideration though the promise be in writing; under our statute, all that is

172 direct \*and not collateral, not a guarantee, and then no writing is necessary.

Compare the words of the agreement in Dixon and others v. Hatfield, with the words used by Ware the defendant and addressed to the plaintiff, as proved by Vogdes, and I think it impossible to doubt that his assumpsit to pay for the articles to be delivered by the plaintiff to Vogdes was a direct and not a collateral promise.

On the whole, I think the judgment of the court below was correct and ought to be affirmed.

TUCKER, P. I concur in reversing the judgment, and entering judgment for the defendant on the demurrer to evidence.

Judgment of circuit court reversed, and judgment entered for the demurrant to evidence.

#### Pownal v. Taylor.

April, 1839, Richmond.

[84 Am. Dec. 735.]

(Absent PARKER\* and BROOKE, J.)

Conveyance—Consideration—Support of Grantor—Case at Bar.—The owner of a tract of land conveys it to his nephew in fee, subject to the maintenance

\*He decided the cause in the court below.

†Conveyance—Consideration—Support of Grantor.—The principal case is cited in Lowman v. Crawford, 99 Va. 692, 40 S. E. Rep. 17; Bates v. Swiger, 40 W. Va. 426, 21 S. E. Rep. 876.

See monographic note on "Deeds" appended to Flott v. Com., 12 Gratt. 564.

A reservation or charge upon land, in a convey-

and support of the grantor and his sister. The deed contains a covenant by the grantee for such maintenance and support, and declares that the land is to be bound therefor, into whose hands soever it may come. But the deed does not state that it is upon condition that such maintenance and support be furnished, nor is there any clause providing for a reentry by the grantor. **Held**, the provision for maintenance and support constitutes merely a charge upon the estate, which may be enforced in equity, not a condition for

173 \*breach of which the grantor can reenter as of his former legal estate.

**Special Verdict—When Aided by Clerk's Certificate—**

**Case at Bar.**—A special verdict finds that a person having an estate in land, conveyed the same by deed of trust of a particular date, which deed it finds was duly recorded, and sets forth the same in *hæc verba*. The action being ejectment by a plaintiff claiming under the grantee, against a defendant claiming under the grantor, it is material that the deed of trust should have been recorded prior to the other conveyance. Upon the deed of trust so found in *hæc verba*, there is endorsed a certificate of the clerk of the county court, that on a specified day (which in fact is the day the deed was made) the same was presented in the office, acknowledged by all the parties, and admitted to record. **Held**, although, upon the finding alone, there might have been doubt as to the time of the recording, yet the clerk's certificate upon the deed may properly be looked to for the purpose of removing that doubt, and does effectually remove it.

**Adverse Possession—Conveyance by Trustee;—Case at**

**Bar.**—After a deed of trust upon land is made and recorded, the land is conveyed by the grantor, and then by his alienee to another. Whereupon the first grantor removes from the land, and the last alienee removes to it. While this last alienee is residing on the land, the trustee in the deed of trust goes upon it, sells it according to the provisions of the trust, and conveys it to the purchaser. In ejectment by the purchaser from the trustee against the purchaser under the grantor, a special verdict finds the facts before stated, but

ance, for maintenance for life, is valid though no amount be fixed. *Bates v. Swiger*, 40 W. Va. 426, 21 S. E. Rep. 876, citing the principal case; *Brawley v. Catron*, 8 Leigh 523.

**Adverse Possession—Principal Case Distinguished.**

In *Layne v. Norris*, 16 Gratt. 243, the court refers to and distinguishes the principal case; *Williams v. Snidow*, 4 Leigh 14; *Purcell v. Wilson*, 4 Gratt. 16, in the following language: "These cases," said the court, "depend on this principle; that a possession not adversary in its commencement will be presumed not to be adversary in its continuance, unless and until the presumption be repelled, by proof that the party in possession claimed to hold adversely to the other party and with his knowledge. But the principle does not apply to this case."

**Trustee—Title of under Deed of Trust.**—The principal case is cited in *Sulphur Mines Co. v. Thompson*, 26 Va. 316, 25 S. E. Rep. 232, for the proposition that the trustee in a deed of trust takes a legal, though a defensible title, and a deed from him to a purchaser conveys an absolute estate in a court of law, whether the conditions of the trust deed have been complied with or not, though a different rule prevails in a court of equity. See *Taylor v. King*, 6 Munf. 368; *Harris v. Harris*, 6 Munf. 367.

does not find that, at the time of the conveyance by the trustee, there was adverse possession. **Held**, the conveyance by the trustee is valid.

Ejectment, in the circuit court of Hampshire, in the name of Richard Goodtitle lessee of Thomas Taylor against John J. Pownal. A special verdict was returned, whereby the jury found—

1. That John Pownal senior was the owner of the tract of land in controversy, and being seized thereof in fee, on the 7th of March 1817 conveyed it by deed to John Pownal junior of George, who resided upon the land, as did the grantor; which deed was duly recorded. The deed was then found in *hæc verba*. The parties are John Pownal senior and John Pownal junior, the son of George. It recites that it has been agreed between the parties, the said John Pownal senior

174 being old, \*and he and his sister, who have all along lived together, not being now well and able to attend to the concerns

of a farm, that the said John Pownal senior, as well to secure a maintenance, free from labour and anxiety, to himself and his said sister Elizabeth, as to bestow his charity upon the said John Pownal junior his nephew, and to make him his heir, shall convey all his property both real and personal to the said John Pownal junior, except so much thereof as shall amount to the sum of 70 pounds, which the said John Pownal senior intends to keep to be at his own disposal, and the said John Pownal junior of George hath agreed to maintain and comfortably support the said John Pownal senior and his said sister Elizabeth Pownal, in meat, drink, washing, lodging, and clothing suitable for persons of their time of life, also to take care and provide for them every thing necessary when sick, with proper nursing and attendance, medicine &c. and to furnish them each with a horse suitable for them to ride whenever they wish to ride out or abroad, and also they are to have the use of the negro boy now belonging to said John Pownal senior, to wait upon them and make their fire, and do for them other necessary things. And then the deed witnesses that the said John Pownal senior, in consideration of the premises, and in further consideration of love and affection, hath granted, bargained and conveyed, and by these presents doth grant, bargain and convey unto said John Pownal junior the said tract of land, and also all the personal estate of said John Pownal senior of every kind, except to the amount of 70 pounds Virginia currency, which the said John Pownal senior reserves to be at his own disposal hereafter, by will or otherwise; habendum to John Pownal junior, his heirs and assigns forever, "subject nevertheless to the said maintenance and support of said John Pownal senior and Elizabeth his sister, during their natural lives, as herein before mentioned, and as shall further be

175 herein after mentioned." \*Then follow these clauses: "And the said John Pownal junior, on his part, doth covenant and promise to and with the said John Pownal senior, that he will well and truly support, maintain and provide for the said John Pownal senior and



Elizabeth his sister, in good and sufficient meat, drink, washing and lodging, and decent clothing, so as to keep them in every respect in ease and comfort, as far as it is possible, and as far as their health or constitution may require, and also to nurse and take care of them when sick, with all proper tenderness and attendance, medicine and medical aid, if necessary. Their clothing is to be decent, and the said John Pownal senior and Elizabeth Pownal are to have the negro boy Dave to wait upon and make fires for them, and otherwise attend them as they may wish. The said John Pownal junior is also to furnish the said John Pownal senior and Elizabeth Pownal with suitable horse creatures to ride whenever they may choose. And should the said John Pownal senior depart this life before the said Elizabeth Pownal, the said Elizabeth is to have full liberty to live wherever she may think fit, and said John Pownal junior is still to support her as aforesaid in all respects. And should the said John Pownal junior depart this life before both or either the said John Pownal senior or Elizabeth his sister, then the heirs and executors of said John Pownal junior to be bound for the performance. And the said land and personal property is bound therefor, into whosoever hands it may come. It is also bound now in the hands of the said John Pownal junior. But in all other respects, and after the decease of said John Pownal senior and Elizabeth Pownal, the said John Pownal junior is to have and hold the said lands and property to him, his heirs and assigns, free from the claim or claims of all persons whatsoever forever."

2. That John Pownal of George, while so residing on the land, conveyed the same  
176 to Asa Everett, as trustee \*for the use of the lessor of the plaintiff, by deed of bargain and sale dated the 4th of October 1825, which deed the jury also find was duly recorded, and set forth the same in hæc verba. It is upon trust that if the said John Pownal shall fail to pay and satisfy the sum of 350 dollars which he is indebted to Taylor, and the interest thereon, in twenty days after the date of the deed, Everett shall sell publicly, for ready money, the lands and goods conveyed, after advertising the same for ten days at the courthouse door in Romney. Endorsed on the deed is a certificate in these words: "Hampshire county, to wit: Be it remembered that on the 4th day of October 1825, this indenture was presented in the office, acknowledged by all the parties thereto, and admitted to record. Teste, John B. White, C. H. C."

3. That John Pownal of George conveyed the land to John Pownal senior by deed of bargain and sale dated the 16th of December 1825, which deed the jury also find was duly recorded, and set forth the same in hæc verba. After reciting the conveyance of the 7th of March 1817, and the consideration thereof, it proceeds as follows: "But from events unpropitious to said John Pownal the son of George, and unforeseen misfortunes, the said John son of George now finds himself no longer in condition to comply with his undertaking in said deed mentioned or to

support or accommodate the said John Pownal senior and his said sister, who are old and incapable of maintaining and supporting themselves; and it being reasonable that the means of their support, to which they are justly entitled, should be given back again to the said John Pownal senior, and the said John Pownal senior having agreed, should this be done by the said John Pownal of George, that he will relieve the said John Pownal of George from all further liability and responsibility on that account"—thereupon the property is bargained, sold, reconveyed, released and confirmed by the said John Pownal of George to the said John Pownal senior.

177 \*4. That John Pownal senior conveyed the same land to John J. Pownal the defendant, by deed dated on the same 16th of December 1825, which deed the jury find was duly recorded, and set forth the same in hæc verba. It is substantially like the deed of the 7th of March 1817.

5. That John J. Pownal, within a month after the conveyance to him, removed to the land and has resided upon it ever since; and that John Pownal son of George, within a week after said conveyance, removed from the land and has ever since been out of possession.

6. That John Pownal senior again conveyed the land to John J. Pownal the defendant, by deed dated the 6th of June 1826, which deed the jury find was duly recorded, and set forth the same in hæc verba. This deed, for the consideration of 125 dollars, conveys the absolute fee, with a covenant that the grantor has good right to convey.

7. That Everett the trustee, after having advertised the land for ten days pursuant to the requisitions of the deed to him, went upon the land, and sold the same upon the premises, in the manner prescribed by said deed, at which sale Thomas Taylor, the lessor of the plaintiff, became the purchaser at the price of 40 dollars; that at the time of this sale, John J. Pownal the defendant and John Pownal senior, together with Elizabeth Pownal, who is named in the deed mentioned in the first finding, were residing on the land.

8. The advertisement is found in hæc verba. It mentions that the sale will be on the 10th day of the present month, and is dated June 21, 1826.

9. That Everett the trustee had no further possession of the land, than as set forth herein, when he went to make the sale; and that after the sale he left the land, and has not had possession of it since.

10. That Everett conveyed the land to Thomas Taylor, the lessor of the plain-  
178 tiff, by deed of bargain and \*sale dated the 9th of March 1831, which deed the jury find was duly recorded, and set forth the same in hæc verba. After reciting the deed of trust of the 4th of October 1825, it states that Everett, at the request of Taylor, having advertised the time and place of sale agreeably to the directions of said deed, proceeded to sell the said tract of land and premises to the highest bidder at public auction, when Taylor became the purchaser at

the sum of —; and thereupon conveys the said land and premises to the said Taylor.

11. That John Pownal of George did maintain and provide for John Pownal senior and Elizabeth Pownal, but not in a comfortable manner, or in the manner stipulated by the conveyance of the 7th of March 1817.

12. That John Pownal senior died between four and five years before the date of the verdict, (which was found the 9th of October 1832,) and that Elizabeth Pownal died three years before the said verdict, and that they resided upon the land with the defendant John J. Pownal until their deaths and were maintained by him.

If, upon the facts found, the law should be for the plaintiff, the jury find for the plaintiff the land described in the deeds, and one cent damages. If the law should be for the defendant, then they find for the defendant.

The circuit court, being of opinion that the law was for the plaintiff, gave judgment accordingly; and to that judgment a superseas was allowed.

The cause was argued in this court by Johnson for the plaintiff in error, and Leigh for the defendant in error, upon the following points made by the former:

1. That the grant of 1817, if it operated to convey the legal title to the grantee at all, conveyed that legal title upon the express condition of support, maintenance and care, the failure to render which was at common law a breach of the condition, for which the grantor might reenter upon the estate.

179 The breach found by \*the jury, therefore, justified the entry of John Pownal senior, and the reconveyance by John Pownal junior was equivalent to such entry, and operated to confirm the estate in fee in John Pownal senior, so as to revest him of his original right and avoid the mesne incumbrance.

2. That the conveyance to Everett is void as to John Pownal senior, and the plaintiff in error as claiming under him, because it is in violation and fraud of the provisions of the original grant, and because it is not found by the jury to have been recorded before the reconveyance to John Pownal senior, and neither he nor the plaintiff in error is proved to have had notice of it.

3. That at the date of the conveyance to the lessor of the plaintiff, the plaintiff in error was in the actual adversary possession of the land, and the trustee out of possession, so that nothing would pass by that deed.

In the argument of these points, the following authorities were referred to: On the first, *Bach. Abr. title Conditions*, letters A and B. On the second, *Taylor v. King*, 6 *Munf.* 358, and *Harris v. Harris*, 6 *Munf.* 367. On the third, *Baird v. Tabb*, 3 *Call* 475; *Birbright lessee of Hall v. Hall*, 3 *Munf.* 536; *Rowletts v. Daniel*, 4 *Munf.* 473, and *Newman v. Chapman*, 2 *Rand.* 93.

STANARD, J. The deed from John Downal senior to his nephew John conveyed the land therein mentioned to the grantee, and the provision of that deed by which it is declared that the property thereby conveyed should be subject nevertheless to the maintenance of the grantor and his sister Eliza-

beth, did not operate as a condition under which the grantor could, on the failure of the grantee to furnish the maintenance which he had stipulated to furnish to the grantor and his sister, lawfully reenter on the land and reinvest in himself the legal title therein. This and other provisions of the deed import no more than that the property should be and remain charged as a security for the due performance of the

180 \*grantee's covenant to furnish maintenance. Such is the only rational interpretation of the provision that the property should be subject to the maintenance and support, and bound therefor, into whosever hands it might come. Such language imports a lien on property in the hands of the grantee and his assigns, not a condition by which the title to that property is to be extinguished, and with it the lien thereon.

The special verdict finds that the deed of trust of the 4th of October 1825, from John Pownal junior to Everett, was duly recorded, but does not specify the time of recording; and it is objected that as the statute does not prescribe any time for the recording of such instruments, but deprives them of efficacy against creditors and subsequent purchasers without notice until recorded, no sufficient title is shewn under that deed to overreach the rights derived under the subsequent deeds of John Pownal junior and John Pownal senior. The jury having found that the deed was duly recorded, in a case in which the antagonist title depends on a subsequent conveyance from the same grantor, the argument is very strong to support the proposition that the necessary intendment from such a finding, or rather that the only interpretation of such a finding, is that the recording took place before the subsequent deed was executed; that the recording found by the jury of this deed must be considered as found in relation to the hostile claim asserted under the subsequent deed, and that the only sense in which it could be duly recorded in respect to the subsequent conveyance is, that it has all the efficacy in respect to the subsequent conveyance that could be derived from recording it. I however give no final opinion on this point. The most that could be made out of the objection would be to render the verdict in this respect ambiguous, and a venire de novo necessary. But this result ought not to take place here. The jury find the deed in *hæc verba*, and it appears 181 that the deed so \*found, and in evidence before the jury, has on it the clerk's official certificate of the fact and time of recording. I see no valid objection to a reference by the court below, or by this court, to that certificate, to ascertain the date of the recording of the deed, for the purpose of removing the ambiguity, if any, which the finding that the deed was duly recorded leaves in respect to the date of the recording.

It is objected that the conveyance made by Everett to the purchaser at the sale under the deed of trust is nugatory, because the land at the date of the conveyance was in the possession of the grantee of John Pownal

senior, and such possession, it is contended, was adverse, and disabled the party out of possession from conveying. The effect of this objection, if available, is not to protect any right shewn to be in the objector, but to disable the party having the title from conveying it. It should therefore distinctly appear to be warranted by the finding of the jury. It is a sufficient answer to this objection to say that the verdict does not find that the possession of the plaintiff in error was an adverse possession. His possession simply is found, and it is not fit that he should be allowed to say that the act which may be rightful, and is not found to be otherwise by the verdict of the jury, is tortious, for the purpose of frustrating the otherwise effectual conveyance of the party having title. The most that can be said is, that on the facts found, the jury might have found the possession to be adverse. This however has not been done, and it is at least problematical whether it ought to have been done. The possession of John Pownal junior after the deed of trust was not tortious, nor could he have alleged it to be so, to disqualify the trustee from conveying. He was tenant at sufferance, and his possession was consistent with the right conveyed by the deed of trust. The possession of those coming in under him

182 with notice of the deed of trust, was impressed with the \*same attributes, and had the jury been asked to find expressly that their possession was adverse, it would have been indispensable to shew that that possession was obtained without notice of the deed of trust. *Newman v. Chapman*, 2 Rand. 93. Even this fact of want of notice is not found, if it could properly have been found in the face of the fact that the deed of trust had been duly recorded some weeks before the subsequent conveyances were executed. The entry of Everett to make the sale does not appear by the verdict to have been opposed, nor his title to make it controverted, by the occupants of the land, and their possession thereof is not found to be adverse, or in hostility to the right so asserted and exercised by him. There is no doubt of the correctness of the proposition that though the occupant trace his title to the grantor under whom the plaintiff in ejectment claims, he may shew that his possession is adverse, so as to enable him to take the benefit of the statute of limitations, and, under particular circumstances, to disable the party evicted from conveying. But no such case is found by this verdict, and I am therefore of opinion that the objection to the efficacy of the conveyance from Everett is not well founded.

On the whole, I am of opinion to affirm the judgment of the circuit court, with costs.

CABELL, J., concurred in the opinion that the judgment should be affirmed.

TUCKER, P. The omission in the special verdict to find expressly on what day the deed of trust was recorded, being obviated by the certificate of the clerk endorsed on the deed, which shews that it was recorded on the day of its date, all other difficulties in the case are easily got over.

Thus, there is nothing, I think, in the

position that the provision for support 183 and maintenance constituted \*a condition, for the breach of which the grantor might reenter. It was a charge, not a condition. It was a declaration of a beneficial interest or a trust, which might be enforced in equity, but which was perfectly consistent with the existence of the fee in the grantee. The distinction is well understood between a declaration of use and a condition. A feoffment, *ea intentione*, does not make a condition, unless an express reentry be limited. It creates a trust or confidence, which may be enforced in equity. 1 Bac. Abr. 631. If it were a condition, the reentry for breach of it would defeat the estate, and with it the charge or beneficial interest. Thus, in the case before us, the land is made subject to the support of the grantor and his sister. She, accordingly, instantly acquired a beneficial interest, which she might have enforced by bill in equity. But if the provision is a condition, then, for the breach, the grantor might reenter, defeat the estate, reinvest himself with his original title, and annihilate the vested interest which had been by his own solemn act conferred upon Elizabeth his sister. This cannot be, unless the grantor had expressly reserved the right to reenter, upon failure of the grantee to fulfil the purposes of the grant.

The second position of the counsel is not more tenable. The deed of trust was no violation of the provisions of the grant. It was in subordination to them, and the creditor, and all persons claiming under his deed of trust, took subject to the charge or incumbrance created for the support of the grantor and his sister. And even were it otherwise, the legal title passed by the deed, and the remedy was only in equity. *Taylor v. King*, 6 Munf. 358; *Harris v. Harris*, 6 Munf. 367.

The next objection is that the deed of Asa Everett the trustee was inoperative, by reason of the adverse possession of the defendant. The fallacy of this position is obvious. John Pownal senior had conveyed to his 184 \*nephew, subject to a charge declared upon the face of the deed. The nephew, thus invested with the fee, incumbers it with a deed of trust, which is of course subordinate to the prior charge. He then reconveys to John Pownal senior, who, having constructive notice of the trust, takes subject to it. He then conveys the estate, thus subject to the trust, to John J. Pownal the defendant, who in like manner takes subject to the trust. The trustee entered and sold without objection, and when he so entered, the possession must be adjudged to have been in him. *Hob. 322*; *Litt. §701*. The possession of the defendant could not be adverse. He was but the purchaser of the equity of redemption. He had purchased with notice of the trust, and therefore subject to it. The possession of his grantor was the possession of the trustee, as they stood in the relation of mortgagor and mortgagee. He must therefore be taken to hold the possession, as his grantor held it, for the mortgagee. Having but an equity, he will not be taken to hold adversely without some tortious act, and none such appears. His possession was consistent with the credit-

or's title. I am aware of no case in which it has been held that the right of a creditor by deed of trust to enforce his lien by sale, has been defeated by a conveyance to a purchaser of the equity of redemption, with full notice of the previous trust. On this ground, I am of opinion that the deed of the trustee was operative and valid; and I prefer to rest the case on this principle, without resorting to others upon which it might be sustained. It may be remarked, however, that as the jury have not expressly found an adverse possession, the court cannot infer it. *Taylor v. Horde*, 1 Burr. 113; *Hall v. Hall*, 3 Munf. 536. To presume it, would be to presume, without evidence, that the defendant had committed a wrong; and this too for the purpose of defeating the legitimate exercise, by the lawful owner, of that most essential right of \*property, the power of alienation. The utmost strictness in the finding should always be required of him who desires to defeat his adversary's just rights, merely by proof of his own tort. See *Wheaton's Selw. N. P.* 553.

I am of opinion to affirm the judgment. Judgment affirmed.

#### 186 \*Rose's Adm'x v. Burgess.

April, 1830, Richmond.

**Detinue—Limitation of Action—Fraud—Retention of Possession of Mortgaged Property.**—Certain persons having become the sureties of an executor in his executorial bond, a deed is made by him mortgaging slaves to them, upon condition that if he shall faithfully perform in all things his office of executor, then the deed shall be void; but the deed contains no clause providing that possession shall remain with him until default in the performance. The mortgagor, after the date of the mortgage, is in possession of the slaves for more than five years. Whereupon a creditor of his procures the slaves to be taken under execution and sold. And then, in less than five years after they are so taken, an action of detinue is brought by the mortgagees against a purchaser at the sale under the execution. **Held**, 1. the action is commenced in due time; and 2. the fact of possession remaining with the mortgagor five years without demand made and pursued by process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with the possession, and liable to the creditors of the person in possession.

**Appellate Court—Point First Raised in.**—An opinion being given by the circuit court that the action is barred by the act of limitations, the opinion is excepted to, and the bill of exceptions setting forth the evidence contains (among other things) a deed which, it is alleged in the court of appeals, shews the action to have been brought by improper parties. **Held**, this point, not having been made in the court below, cannot be passed upon by the appellate court.

**Scire Facias—Revival of Suit—Case at Bar.**—Pending an action of detinue at the suit of four plaintiffs, one of them dies, and a scire facias is awarded to revive the action in the name of his executor: **Held**, the scire facias was improvidently awarded.

Action of detinue, commenced in the circuit court of Rappahannock on the 15th of April

1834, by Mary S. H. Rose administratrix of Robert Rose, James S. Pickett administrator of Daniel Withers, Samuel Porter and Martin Porter, against Frances Burgess.

The declaration contained two counts in the common form, one alleging that the plaintiffs were possessed \*of the slaves demanded, as of their own proper slaves, and delivered them to the defendant, to be again delivered to the plaintiffs when required; the other alleging that the plaintiffs, being possessed of the slaves as of their own proper goods and chattels, casually lost the same, and they came to the possession of the defendant by finding. Plea, the general issue.

Pending the action, Martin Porter one of the plaintiffs died, and on the motion of the surviving plaintiffs and of Lewis Porter the executor of the said Martin Porter, a writ of scire facias was awarded them to revive the suit in their names. At a subsequent term, the scire facias being returned duly executed, and the defendant failing to shew any sufficient cause to the contrary, it was ordered that the action stand and be revived in the names of the surviving plaintiffs and of Lewis Porter executor of the deceased plaintiff Martin Porter, and be in their names proceeded in to a final judgment.

At the trial, the plaintiffs gave in evidence a deed made the 23d of October 1821 by Jesse Withers, conveying to Mary S. H. Rose administratrix of Robert Rose, Daniel Withers, Samuel Porter and Martin Porter, several tracts of land and sundry slaves, "upon condition nevertheless, for that whereas the said James Withers the testator of the said Daniel Withers, Robert Rose the intestate of the said Mary S. H. Rose, Samuel Porter and Martin Porter, with others, are liable as the securities of the said Jesse Withers as one of the executors of Samuel Porter deceased; now if the said Jesse Withers shall well and truly account for all the estate real and personal, and all sums of money and assets, which have or may hereafter come to his hands as executor of the said Samuel Porter deceased, and shall pay to the devisees, legatees, distributees and creditors of the said Samuel Porter deceased all such sums of

money or estate as they or any of them are entitled to \*demand or receive, and shall well and truly indemnify and save harmless the said Mary S. H. Rose administratrix of Robert Rose, and the heirs and distributees of said Robert Rose, and the said Daniel Withers executor of James Withers, and the heirs, devisees, legatees and distributees of said James Withers, and the said Samuel Porter and Martin Porter, their heirs, executors, administrators and assigns, of and from all sums of money, costs and damages which they or any or either of them may pay or be liable for on account of the securityship aforesaid, and if the said Jesse Withers shall in all things faithfully and truly perform his office of executor of Samuel Porter deceased, then these presents shall be void and of no effect." On the back of the deed were certificates shewing that it was duly recorded on the 25th of October 1821.

It appeared in evidence that the plaintiffs

are such of the mortgagees mentioned in the deed as are now alive, and the legal representatives of such as are dead, and that they claim the slaves mentioned in the declaration by virtue of the said deed, for the purposes therein expressed.

The claim of the defendant was as follows: On the 30th of November 1829, a writ of fieri facias was sued out of the superior court of chancery at Fredericksburg, against the goods and chattels of Jesse Withers, for money which Frances Burgess had recovered against the said Jesse Withers executor of Samuel Porter deceased. This execution was levied by the marshal upon a part of the slaves mentioned in the deed, and the sale thereof being forbidden, the plaintiff gave an indemnifying bond: whereupon the sale was made in January 1830, and the defendant, through her agent, purchased some of the slaves and obtained possession of the same. The slaves mentioned in the declaration are the slaves of which the defendant so obtained possession, or the increase of the females thereof.

189 \*The circuit court instructed the jury that if they should find, from the evidence in the cause, that the said Jesse Withers after executing the deed of the 23d of October 1821, continued to hold possession of the said slaves, from the date of the said deed until they were seized and sold by the marshal, by no other title except such as may be inferred from the terms of the said deed, the statute of limitations is a bar to the recovery sought to be had in this action, and therefore they should find a verdict for the defendant, although this suit was instituted within five years after the said sale. To this opinion the plaintiffs excepted, and their bill of exceptions set forth the evidence as above stated. A verdict being found for the defendant, judgment was rendered upon the same; and thereupon a supersedeas was awarded.

The cause was argued in this court by William Green and Robert E. Scott for the plaintiffs in error, and Leigh and Patton for the defendant in error.

The counsel for the plaintiffs said, that if the proposition laid down by the judge of the circuit court be true, it must be either because the lapse of five years would enable the mortgagor himself to defeat the mortgagee's action of detinue, under the statute 1 Rev. Code, ch. 128, § 4, p. 488; or because his creditors would thereby obtain a right to satisfaction out of the property, under the statute Id. ch. 101, § 2, p. 372.

1. The provision of the statute of limitations in relation to detinue is analogous to the provision relating to a right of entry, or, in other words, to the action of ejectment. This analogy is so strong, that as the defendant in ejectment need not plead the statute, *Blanch. on Lim.* 170, 171; *Clay v. Ransome*, 1 Munf. 454, and as his possession gives him a title on which, as plaintiff, he might recover, *Stokes v. Berry*, 2 Salk. 421;

*Doe v. Cooke*, 7 Bingh. 346, so in detinue the defendant need not plead the statute, *Elam v. Bass's ex'ors*, 4 Munf. 301, and his possession gives him a

title on which, as plaintiff, he might recover; *Newby's adm'rs v. Blakey*, 3 Hen. & Munf. 57. Now in England it is settled, and seems never to have been seriously doubted, that as between a mortgagor of real estate in possession and his mortgagee, the statute of limitations does not run, not even in regard to a term for years or chattel interest; *Hatcher v. Fineaux*, 1 Ld. Raym. 740; *Hall v. Doe*, 5 Barn. & Ald. 687; 1 Dow. & Ry. 340,—because, under such circumstances, the mortgagor is sometimes tenant for years, and sometimes most strongly tenant at will, to the mortgagee. *Smartle v. Williams*, 1 Salk. 245; *Keech v. Hall*, 1 Dougl. 22; *Patridge v. Bere*, 5 Barn. & Ald. 604, and a note at the end. Indeed the same point has been already decided, on the same reasoning, by the court of appeals in *Newman v. Chapman*, 2 Rand. 93. The reasoning is equally applicable to mortgages of personality. The mortgagor of personality, in possession of the subject, holds by the mortgagee's consent, and not adversely to him, and may be considered in the light of a loanee, between whom and the lender the act of limitations never runs. *Boyd v. Stainback*, 5 Munf. 305. The argument from analogy is aided by the decision of the court of appeals in *Ross v. Norvell*, 1 Wash. 14, where the principles of the law of mortgages in relation to realty were applied to the redemption of mortgaged slaves held by the mortgagee after five years had elapsed.

II. There is in the English law nothing similar to the proviso contained in 1 Rev. Code, ch. 101, § 2, p. 372. This enactment was intended to apply to the case of persons who set up a claim to property apparently belonging to the person in possession, under pretence of having lent that which before belonged to them to the person so in possession, or of having given it with certain reservations, and not to deeds of trust 191 or mortgages \*of personality, where the party in possession is the person to whom the property originally belonged, and to whom it still belongs in equity, subject to the lien created by the mortgage or deed of trust. But if these are to be considered cases within the act, on the ground that the party holding the legal title suffers the party who has the equitable title to remain in possession, then what the act requires is sufficiently evidenced by the recording of the mortgage, which shews that the possession of the mortgagor is by virtue of the equitable title remaining in him. Unless this construction be adopted, mortgages and deeds of trust upon slaves to secure the payment of money will be inadequate securities after five years from the time of their being recorded; contrary to the universal understanding of the country. And this idea receives confirmation from the act requiring all deeds of trust and mortgages whatsoever to be recorded. It may be said that the loan act does not apply to deeds of trust and mortgages for the payment of money, but only to a deed containing such provisions as the mortgage in this case. But it seems to defy the utmost ingenuity to take a mortgage or deed of trust

for the payment of the most clearly liquidated sum, on demand, out of the statute, if it be held to apply to any mortgage or deed of trust at all, though its object be to save the mortgagee from the most complicated liability, which will require the longest time to settle. The question is not as to the simplicity of the transaction, but whether the transaction is a loan within the act; and there must necessarily be the same determination in both cases, as it is a loan in both or in neither. But, in truth, the debt secured by the mortgage or deed of trust may be payable by instalments, some of which may not be due in 20 years; and yet, in the absence of fraud, such a deed would be good.

For the defendant in error it was said, that this mortgage contains no provision  
192 for the mortgagor's remaining \*in possession. The right of possession of the mortgagees, as well as their legal title, was as complete immediately as at any time afterwards, and they might have brought their action of detinue against the mortgagor the day after the execution of the mortgage, as well as 13 years afterwards. *Faulkner's adm'x v. Brockenbrough*, 4 Rand. 245. The right of action having existed so soon as the mortgage was made, the time began then to run, and possession from that time for five years operated to give a legal title. *Newby's adm'rs v. Blakey*, 3 Hen. & Munf. 57; *Elam v. Baas's ex'ors*, 4 Munf. 301. These cases establish that a possession of five years during which the owner had right of action, without any other evidence that the possession is adverse, will operate to give title, unless the other party shall prove that there was some agreement as to the possession, consistent with his title, which deprived him of the right to sue. In short, the possession of personal property is always presumed to be under claim of title, and adversary to all the world. This principle is affirmed by lord Eldon in *Lady Arundel v. Phipps*, 10 Ves. 444. The supposed analogy between the limitation of the action of detinue and of a right of entry does not exist. The nature of the subjects is essentially different. Personal chattels pass by delivery; real estate by deed only, and in this country the deed must be recorded. Possession is prima facie evidence of title to personal estate; not so as to real. A very large portion of the personal property in the country, including slaves, is held by its owners with no other evidence of ownership than the possession of it. From the nature of the subject, then, the tenant or occupier of real estate mortgaged by himself may well be presumed to hold by permission of the mortgagee, because it would be a violent presumption to suppose that he ousted his mortgagee: whereas, in the case of personal chattels, there is nothing in the policy of the law to require such an inference. But  
193 \*even in respect to mortgages of real estate, the authorities do not sustain the proposition in the broad terms in which it is contended for on the other side. Generally the cases have been between the mortgagee and lessees of the mortgagor, without any question arising upon the lapse

of time. There is, however, one case cited (*Hatcher v. Fineaux*, 1 Ld. Raym. 740.) in which it seems to be admitted by lord Holt that a possession of 20 years, unattended by any act recognizing the mortgagee's continued title, would, under the statute of limitations, bar the mortgagee.

II. If the mortgagor be a tenant at will or at sufferance, it is in effect the case of a loan, and then the question arises under the clause in the statute of frauds concerning loans.

The general policy of this statute undoubtedly is to prevent any person in possession by permission of the real owner from holding out false colours to the world, so as to deceive creditors; and no matter what is the form of the arrangement by which the legal owner reserves to himself the right to resume possession, and to the possessor the privilege of holding subject to that right, unless the agreement be plainly spread upon the record so as to give notice to every body, the continued possession of five years is, by the statute, conclusive proof of fraud as to creditors. In this case, the mortgage might have contained such a declaration of loan, or permission of possession; but there is nothing of the sort. It does not contain the provision, so common in deeds of trust and mortgages, that the grantor may remain in possession until default of payment or nonperformance of condition. And nothing less than such a clause will answer either the terms or the policy of the statute. The cases of *Gay v. Mosely*, 2 Munf. 543, and *Garth's ex'ors v. Barksdale*, 5 Munf. 101, shew how strongly and strictly this statute has been enforced.

194 \*III. The counsel for the defendant in error called the attention of the court to what they said was a clear misjoinder of parties. The plaintiffs introduced a deed conveying a joint legal interest to Mary S. H. Rose administratrix of Robert Rose, Daniel Withers, Samuel Porter and Martin Porter. Of these grantees, Withers died before the action was brought, and the action is not by the surviving grantees alone, but by the survivors and the representative of the decedent. Moreover, upon the death of the plaintiff Martin Porter pending the action, instead of its being abated as to him and proceeded in at the suit of the surviving plaintiffs, there was a revival in the name of Martin Porter's executor.

STANARD, J. I concur in the opinion that will be delivered by the president. Upon the questions presented by the exception to the instruction given by the court below, his reasoning, I think, fully sustains his conclusions, and any thing from me would be superfluous.

I will, however, notice an objection, not taken in the court below, but urged in this, to the supposed misjoinder of the parties plaintiffs. It is presented thus. The exception taken to the opinion of the court touching the effect of the statute of limitations on the title to the property in question, shews that the plaintiffs offered in evidence a deed of mortgage, by which the slaves sued for were conveyed to three of the plain-

tiffs and Daniel Withers the intestate of the other plaintiff James S. Pickett; and the defendant in error here insists that it is hence manifest the plaintiff Pickett does not claim *suo jure* and cannot join with the other plaintiffs, and that the court below should have entered judgment of nonsuit. This objection is not tenable. 1st, The deed of mortgage is before this court for the purpose only of presenting the question  
 195 on which the court below \*was called on to instruct the jury, and the matter in evidence from which that question arose. It cannot be looked to for the purpose of bringing in judgment other questions which might have been raised on it but were not, especially one incompatible with the instruction sought for by the party in whose behalf the objection is now made in this court; *Newsom v. Newsom*, 1 Leigh 86; *Barrett v. Wills*, 4 Leigh 114. 2ndly, If there was a misjoinder of parties, it was not the duty of the court *ex officio* to notice it. The nonsuit could not be entered but at the instance of the defendant, and he cannot object here that that was not done in the court below, which was not asked for by him, and which could not have been done but at his instance. 3rdly, Though this court should take cognizance of the objection, and could properly look to the deed of mortgage as the foundation of it, it ought not to sustain it. It does not appear when Daniel Withers died. If he died while the slaves were in the possession of Jesse Withers and consequently in that of the mortgagees, his representative became a tenant in common of the slaves with the surviving mortgagees, and was tenant in possession, as the possession of one joint tenant or tenant in common is the possession of all. Tenants in common may join in personal actions, and must join in a suit to recover an indivisible personal chattel. *Litt. § 321*; *Co. Litt. 196b, 197a, 198a*. So in replevin, tenants in common must join. *Buller's N. P. 53*; *Co. Litt. 145*. An executor possessed of a personal chattel, and losing possession thereof, may sue to recover it without stating his representative character. He may sue to recover it *suo jure*; and if he describes himself as executor, it may be treated as *descriptio personæ*. There seems no stronger objection to the union of such an executor with surviving tenants in common, to recover their possession of a personal chattel, than  
 196 there would be if he had become a tenant in common \*by any other title. If, because one tenant in common of an indivisible chattel is an executor, he is disabled from joining in the action, then, as the other cannot sue alone for the entire thing, both would be deprived of remedy to recover the specific property.

TUCKER, P. Upon the first question made in this case, there can be no reasonable doubt. It is contended that the demand of the plaintiff is barred by the statute of limitations; and as the suit was commenced within five years after the seizure and sale of the slaves, the position can only be maintained on the hypothesis that the possession of Withers the mortgagor was adverse to the

mortgagees. But this hypothesis is contrary to every notion of a mortgage, and of the relations of mortgagor and mortgagee. Whether the mortgage be of real or of personal property, the retaining possession by the mortgagor is never looked upon as adversary to the mortgagee. If the subject be real, he is looked upon as a tenant at sufferance, whose possession is never held adversary to his landlord: if it is personal, he retains the possession from the implied character of the transaction. It is, in its nature, but a charge—a lien or incumbrance upon the property, for the security of the payment of money, or the performance of conditions (as in this case) at a future day. Until that time, it is implied, and sometimes it is so expressed, that possession shall remain with the mortgagor. Were it otherwise, it would be the case of a pledge, not of a mortgage. Were it otherwise, the transaction might be void for failure to deliver possession, under the doctrine of *Edwards v. Harben*, 2 T. R. 587. But whatever doubts might exist in England as to this matter (see *Ryall v. Rolle*, 1 Atk. 165,) they no longer exist here. In *Clayborn v. Hill*, 1 Wash. 177, this court held that a mortgage of personalty, if duly recorded, was valid although the mortgagor retained possession  
 197 session \*of the property. This decision is again recognized in *Glasscock v. Batton*, 6 Rand. 78. And in the case of *U. States v. Hooe*, 3 Cranch 73, 88, chief justice Marshall, delivering the opinion of the court, asserts the same principles. After referring to the case of *Hamilton v. Russel*, 1 Cranch 310, as to absolute bills of sale, he says: "But the difference is a marked one between a conveyance which purports to be absolute, and one which, from its terms, is to leave the possession in the vendor. If in the latter case the retaining of possession was evidence of fraud, no mortgage could be valid. The possession universally remains with the grantor, until the creditor becomes entitled to his money, and either chooses or is compelled to exert his right." In *Hamilton v. Russel*, 1 Cranch 310, 316, he also says, "The recording acts do not comprehend absolute bills of sale among those where the title may be separated from the possession, and yet the conveyance be valid if recorded;" implying thereby, that a recorded mortgage of personalty would be valid though the mortgagor retained possession. All this can only be upon the supposition that the retaining of possession is consistent with the true character of the deed, and with the universal understanding that the mortgagor is to hold the possession by the permission of the creditor, until he makes default. The holding possession at the will of the creditor is then not adversary but permissive, and no protection under the statute of limitations can ever be acquired from such holding, until, by lapse of time, payment is presumed; and when that is done, the possession is taken to be adversary from the supposed date of payment, or a release is presumed to have been executed by the mortgagee, by reason of the discharge of the demand or the fulfilment of the stipulations.



But though, by the character of the transaction, the mortgagor is permitted to retain possession at the will of the mortgagee, he does not stand upon the footing of  
198 \*a loanee under the statute of frauds.

He holds not by loan, but, by the character of the stipulation between the parties, his original possession remains undisturbed. No creditor or purchaser is deceived or defrauded. It is the duty of the party who would trust the mortgagor on the credit of the property thus left in his possession, to look to the record; and there he would see, not indeed a recorded loan, but a recorded mortgage of the property itself. I am of opinion, therefore, that the second point made in the cause is unsustained, and that the defendant is not more protected by the statute of frauds than by the statute of limitations.

Lastly, it is objected that in this case there is a misjoinder of persons claiming in their representative character, with others claiming *suo jure*. Whether the fact be so or not is matter of doubt, as the words indicating the representative character have been possibly used merely as *descriptio personæ*. If we could refer to the mortgage upon this point (which I doubt) we should find indeed that the executor of one of the mortgagees is plaintiff. But still, as the point was not made in the court below, and as the objection may be more properly made upon the subsequent trial, if the exhibition of the title shall sustain it, I do not think we can notice it here. It would conflict with the principle settled in *Newsum v. Newsum*, 1 Leigh 86, and *Barrett v. Wills*, 4 Leigh 114.

There is however, I think, one error in the proceedings, which this court should correct. It is the revival of the proceedings in the name of Lewis Porter. The law on this subject I take to be, that if the parties were joint tenants, the remedy survived, though under our statute the right did not (see *Gow on Partn.* 172, 173, 174); and so the cause ought to proceed in the name of the survivors. And as to tenants in common, they may and must join in an action for the recovery of an indivisible subject, 3

Bac. Abr. 705, but if one dies, the  
199 \*remedy survives; Co. Litt. 189a. And this from necessity; for the executor of the decedent cannot join with the survivors, since the plaintiffs would then claim by several rights and titles, and if they failed, the judgment against them would be several. Moreover, the subject of the action being one and indivisible, the wrong is of course a joint wrong, and the remedy is therefore joint and consequently survives. The *scire facias* then was improvidently awarded, and should be set aside, together with the proceedings thereupon.

Judgment reversed with costs, verdict set aside, and cause remanded for a new trial, "on which the instruction given on the former trial is not to be repeated." And order awarding *scire facias*, and all the proceedings thereon, set aside, and *scire facias* quashed.

## Maunder's Adm'r v. M'Phail.

April, 1839, Richmond.

**Will—Description of Legatee Uncertain—Parol Evidence.**—An inhabitant of Norfolk having, by his will, given all his negroes "to the agent of the new colonization society in Africa," to do as he pleases with them, parol evidence is admitted to fill up the description of the person intended by the testator; and it appearing by the evidence, that the society meant is the American colonization society for settling free persons of colour in Africa, that J. M. is the agent, residing in Norfolk, of that society, and that he is the person intended,—decree made, declaring him entitled to the slaves, and the increase of the females since the testator's death.

Noah Maund of the county of Norfolk made his will in 1829, by which, after giving to William Maund, the son of Marcein and Agnes Maund, all his land and houses, he made the following bequest:

200 "Item, I give all my negroes to the agent of the new colonization society in Africa, to do as he pleases with them, Primus, Harry, Eady, Sam, Elcey, Kider, Charles, Wilcher and Ben. These he can take charge of after my death."

The testator then gave unto his trusty friend Thomas Hodges 500 dollars to execute his will, and gave all the rest of his property, after his just debts were paid, to be equally divided between Mary Jarvis and Mary Jolliff; the latter being his cousin. He appointed Hodges executor of his will; hoping, he says, "it will be received and recorded as I rote it with my own hand. Though it may not be in right form, it is my hole will and desire."

The will was admitted to record, and Hodges qualified as executor, but died soon afterwards, and then administration *de bonis non* with the will annexed was granted to James Wilkins.

A bill was exhibited in the circuit court of Norfolk county, against Wilkins as ad-

**\*Will—Uncertainty as to Name or Description of Legatee—Corporations.**—The principal case is cited in *Wilson v. Perry*, 29 W. Va. 197, 1 S. E. Rep. 323, for the proposition that where the name or description of the legatee is erroneous, and there is no reasonable doubt as to the person intended to be named or described, the mistake will not defeat the bequest; and this rule applies as well to a corporation as to a natural person.

**Same—Latent Ambiguity—Extrinsic Evidence.**—Where a latent ambiguity has been established by evidence *dehors* the will, extrinsic evidence may be received to remove the ambiguity and to show the real intention of the testator. The principal case is cited for this proposition in *Hawkins v. Garland*, 76 Va. 156, 44 Am. Rep. 162. See *Roy v. Rowzie*, 25 Gratt. 590, and *note*; *Wilson v. Perry*, 29 W. Va. 190, 1 S. E. Rep. 303; *Senger v. Senger*, 81 Va. 687.

Where there is a latent ambiguity in a written instrument, it may be explained by parol testimony; or where the terms used in the instrument have not a definite legal signification, the custom of the trade, or the acts of the parties, may be resorted to, for the construction of them. *Bowyer v. Martin*, 6 Rand. 525.



ministrator, by John M'Phail, charging, that the society meant by the description of the new colonization society in Africa, is the american colonization society for settling free persons of colour in Africa; that at the time the will was made, and for some years previously, and at the time of filing the bill, the complainant was the agent of the society contemplated by the testator, and the only agent in that part of the country; that the complainant's residence is in the borough and county of Norfolk, where he has lived for many years; that he was personally acquainted with the testator, and had conversed with him, in the borough of Norfolk, not long before his death, on the subject of the colonization society; that the testator meant him by the description "agent of the new colonization society in Africa;" that since the slaves came to the possession of Wilkins as administrator, he has hired them out,

201 and received large sums on \*account of the hires; that neither the slaves nor their hires are wanted for the payment of debts, but nevertheless the administrator has refused to deliver up the slaves and pay over the hires. The complainant, disclaiming any intention of seeking to recover the slaves for the purpose of holding them in bondage, insisted on having them surrendered to him, that he might, as soon as practicable, send them to Liberia, whither he believed they were intended by the testator to be sent. Besides a decree for the slaves and their increase, he asked an account of the hires, and a decree for what might appear due on taking it.

Wilkins, by his answer, denied the existence of any such society as that mentioned in the will, and required proof that there is any agent thereof, capable in law of taking the slaves.

Richard Kain deposed, that he was acquainted with the testator for upwards of forty years; that he was much with him until about four weeks before his death, and saw him several times during those four weeks; that within seven or eight weeks before the testator's death, and also within three or four weeks, he had conversations with the testator respecting the manner in which he intended to dispose of his slaves; that the testator stated to him that he wished them to be freed and sent away to the new colonization society, by John M'Phail taking charge of them, as he was acting in the line of that business; that the testator farther stated that he had so directed in his will, and desired the deponent, if he was the longest liver, to attend to it, as he knew his heirs would try to upset the will, if possible. This witness mentioned farther, that it was known generally in the neighbourhood that John M'Phail of Norfolk was the agent of the american colonization society, and the testator told him that he had talked to M'Phail upon the subject.

202 \*Thomas G. Broughton, editor of the Norfolk Herald, deposed that M'Phail advertised in the Herald, from November 1827 to September 1833, as agent of the american colonization society; that the

object of the society was to remove free people of colour to Africa; that in 1829, the society was a new undertaking in that section of the country, and might with propriety have been described by a resident of that section of the country as a new colonization society in Africa; that in the deponent's printing establishment, since 1827, M'Phail has been considered the agent, residing in Norfolk, of the society, and he has been generally so reputed in this section of the state; that no other person has been recognized as agent, to his knowledge or belief; and he considers the expression "the agent of the new colonization society in Africa," used in the testator's will, as descriptive of M'Phail.

The circuit court declared its opinion to be, that according to the true construction of the will, and the testimony in the cause, the complainant was entitled to the slaves before mentioned, and the increase of the females since the testator's death; and decreed that an account be taken of their hires since they came to the possession of the defendant, and, if either party should desire it, an account also of the transactions of the defendant as administrator of Maund.

From this decree an appeal was allowed.

Harrison, for appellant. Parol evidence cannot be admitted to explain the testator's meaning, to such an extent as is proposed here. Its admission would transcend the principle laid down by chancellor Kent in *Mann v. Mann's ex'ors*, 1 Johns. Ch. Rep. 234. For here it is not attempted to prove that M'Phail is agent of the new colonization society in Africa: but the object of evidence is to shew that the society itself is

erroneously described; that a society 203 was intended \*which is known by another name; and that M'Phail is the agent of that other society. He referred, for the general doctrines on this subject, to 1 Roper on Legacies 131, 3, 140, 42, 146, 7, and Powell on Devises 476, 7, 477, 8, 490, 497, and to *Thomas v. Thomas*, 6 T. R. 671, to shew that evidence of the testator's declarations is inadmissible. As to the testimony of Broughton that M'Phail advertised as agent, that, he said, was only evidence of M'Phail's own acts. If M'Phail was the agent described and intended, the fact might have been proved by other and better evidence.

Robinson, for appellee. This court has decided that a bequest of slaves to a particular person by name, in trust to send them to Africa, to the colony at Liberia, is a valid bequest. *Elder v. Elder's ex'or*, 4 Leigh 252. Here, however, the object only appears in the description of the person to whom the bequest is made. The bequest of the slaves is to the legatee, to do as he pleases with them. And the only question is whether parol evidence may be received to ascertain what particular individual fills the description. The position that parol evidence is not to be let in except in cases where there is a latent ambiguity, though often laid down, is unsound: such evidence is admitted in other cases, in which there is an ambiguity which cannot otherwise be

removed, and which may, by these means, be clearly and satisfactorily explained. "when" (says sir Thomas Plumer) "the person, or the thing, is designated on the face of the instrument by terms imperfect and equivocal, admitting either of no meaning at all by themselves, or of a variety of different meanings, referring tacitly or expressly, for the ascertainment and completion of the meaning, to extrinsic circumstances, it has never been considered an objection to the reception of the evidence of those circumstances, that the ambiguity was patent, manifested on the face of the instrument." *Colpoys v. Colpoys*, Jacob

204 451; 4 Cond. Eng. Ch. \*Rep. 216.

Evidence will be received to fill up the description of the legatee and shew who was the person intended. 3 Starkie on Evid. title Parol Evidence, p. 1021, and title Will, p. 1695. Starkie lays it down as a general rule that difficulties arising in the application of the terms of a will, from imperfection in the terms of description either of the party to whom the estate is given or of the estate, may be removed by the aid of extrinsic evidence, even although no part of the description be perfectly correct; p. 1021. One of the strongest cases cited by him to this effect is *Beaumont v. Fell*, 2 P. Wms. 141, where there was a mistake in both the christian and surname. In *Price v. Page*, 4 Ves. 680, the legacy was to "— Price, the son of — Price." The claimant was the son of a niece of the testator, and the name of his father and of his grandfather was Price. The question was as to the validity of the bequest, and, if valid, whether the claimant or his father was intended. By the evidence it appeared that the testator contributed to the maintenance of the claimant, placed him with an attorney, and said that he would provide for him, and that he had left him something by his will. Upon this evidence the claimant was declared entitled to the legacy. So here, there is evidence that Maund said he wished the slaves sent away by the new colonization society, by John M'Phail taking charge of them; that he had so directed in his will; that he had talked to M'Phail upon the subject; and there is, besides, evidence that M'Phail was known generally in the neighbourhood as the agent of the american colonization society. The following additional cases were cited and commented upon: *Smith v. Coney*, 6 Ves. 42; *Careless v. Careless*, 1 Meriv. 383; 19 Ves. 601; *Still v. Hosle &c.*, 6 Madd. Ch. Rep. 192; *Eade v. Eade &c.*, 5 Madd. Ch. Rep. 118; *Beachcroft &c. v. Beachcroft &c.*, 1 Madd. Ch. Rep. 430; *Lord Woodhouselee v. Dalrymple*, 2 Meriv. 419. Upon these authorities

205 \*(it was argued) the case is plain upon the will, in connexion with the evidence of Richard Kain. But even if that evidence were out of the case, and if this were a devise instead of a legacy, the description would be sufficiently accurate. There is the american colonization society for colonizing persons in Africa, and M'Phail is the agent of it. There does not appear to be any other colonization society of any similar description. It would be too much to infer that the testa-

tor meant the agent of a society which does not exist. It must rather be intended that he meant the agent of the american colonization society, though there be some little inaccuracy in the description. *Attorney General v. Mayor of Rye*, 7 Taunt. 546; 2 Eng. Com. Law Rep. 213; 1 Powell on Devises 338; *Caine v. Roche*, 7 Bingh. 226; 20 Eng. Com. Law Rep. 111; *Cook v. Danvers*, 7 East 299. It thus appears that even in a devise, where a person is clearly made out to be the individual meant, and there is no other to whom it may be applied, that person will take.

Harrison, in reply. The ground taken on behalf of the appellee is in striking contrast with the evidence in the cause. It is contended that under the will the appellee is to take the slaves as his absolute property, and to support his claim, he adduces evidence which shews that the testator never intended he should take as owner. After the appellee has himself adduced this evidence, a court of equity should not permit him to recover these slaves for his own use. The evidence shews an intent to emancipate, and in a proper case it may be determined whether or no the emancipation has been made in a way which is valid under the statute.

PER CURIAM. The decree is to be affirmed.

## 206 \*Hopewell and Others v. The Cumberland Bank of Alleghany.

April, 1839. Richmond.

(Absent TUCKER,\* P.)

**Subrogation—Rights of Indorsers†—Case at Bar.**—Several persons being bound as sureties for M. in bonds, and others being indorsers of notes for his accommodation at different banks, which notes had come to maturity and been protested for nonpayment, M. by deed of trust, mortgages property to be sold and applied to the indemnification of each and all of the sureties and indorsers, without preference of any over the others, in case they should sustain loss by reason of their suretieships and indorsements; the endorsers of a note held by one of the banks, are discharged from liability by the laches as the bank or otherwise,

\*He decided the cause in the court of chancery.

†**Subrogation—Rights of Indorsers of Negotiable Note—Effect Where Indorsers Are Not Damified.**—

The principal case is cited in *Hauser v. King*, 76 Va. 734; *Barton v. Brent*, 87 Va. 389, 13 S. E. Rep. 29.

It was said in *Hauser v. King*, 76 Va. 735, that the whole opinion of JUDGE PARKER in the principal case proceeds on the implied concession, that if the liability of the endorsers had been fixed and they had not been discharged, the indemnity provided by the deed would have enured to the benefit of the bank.

**Same—Liability of Surety Contingent upon Conditions Not Common to Co-surety.**—In *Hampton v. Phipps*, 108 U. S. 280, 2 Sup. Ct. Rep. 625, the court said: "There may be, indeed, cases in which it would not be inequitable for the debtor himself to make specific pledges of his own property, limited to the personal indemnity of a single surety, without benefit of participation or subrogation; as, when the liability of the surety was contingent upon conditions not common to his co-sureties, and

so that the indorsers of this note are never damaged; while other sureties and indorsers are damaged: upon a bill in equity filed by this bank for participation in the trust fund with the sureties and indorsers who had sustained damage. **Held**, the bank could only claim to be subrogated to the rights of the indorsers of the note which it held; and these having sustained no damage, and so having no claim to participate in the trust fund themselves, therefore the bank has no claim to participate in it.

By a deed of trust executed by James Machir on the 3rd July 1820, and duly recorded in the county court of Hardy—reciting, that John Mullin was surety for Machir in two forthcoming bonds, upon both which executions had been awarded; that Valentine Simmons was surety for Machir in another forthcoming bond, upon which also execution had been awarded; that Philip Carthrae was surety for Machir in an appeal bond upon an appeal to the court of appeals, taken by Machir from a decree of the court of chancery of Winchester against him in favor of the executors of Peter Higgins; that John Hopewell and James Dailey were indorsers for Machir at The Farmers Bank of Virginia at Winchester for a considerable sum, and Edward M'Carty, William Armstrong and Patrick M'Carty had become indorsers of a note for Machir at The Cumberland Bank of Alleghany in Maryland, for the sum of 6000 dollars, upon which suit had been brought against Machir in the circuit court of Hardy—and reciting further, that it was the purpose of the deed to secure the above named sureties and indorsers for Machir "from all or any loss or damage which they or either of them might sustain" by reason of their said suretyships and indorsements—therefore, Machir conveyed to certain trustees therein named, fifteen slaves and sundry other chattels; upon trust, that in case Mullin should be compelled to pay any money on the two forthcoming bonds in which he was bound as surety for Machir, or executions sued out on those bonds should be levied on Mullin's property; or in case Simmons should be compelled to pay any money on the forthcoming bond in which he was bound as surety for Machir, or execution sued out on that bond should be levied on Simmons's property; and in case Carthrae should be compelled to pay any money by reason of his suretyship for Machir in the appeal bond, or suit should be brought on that bond against Machir and Carthrae, and Machir should fail to satisfy

which may never become absolute. *Hopewell v. Bank of Cumberland*, 10 Leigh 206."

**Same—Creditor—Rights of Surety.**—The creditor may be subrogated to the surety's indemnity. To this point the principal case is cited in *Moore v. Johnson*, 34 W. Va. 678, 12 S. E. Rep. 920; *Washington, O. & W. R. R. Co. v. Cazenove*, 83 Va. 744, 8 S. E. Rep. 433.

The principal case is followed in *Bank of Virginia v. Boisseau*, 12 Leigh 387. See monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11, and monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

the decree of the court of appeals; and in case Machir should fail to pay the note on which Hopewell and Dailey were his indorsers at The Farmers Bank at Winchester, when the same should be due and demanded of him, so that, in consequence of such default of Machir, resort should be had by the holder of the note, for payment of the same, or any part thereof, to the indorsers or either of them; "and in case the said E. M'Carty, Armstrong and P. M'Carty, indorsers as aforesaid for the said Machir on a note in the said Cumberland Bank of Alleghany, \*which Machir failed to pay when demanded, should be called upon for the same, or the amount thereof should be demanded from them as indorsers as aforesaid, in consequence of the said Machir's failure of payment thereof;" then, in each and every such case, as it should occur, the trustees, or either of them, should, at the request of the sureties and indorsers before named, respectively, proceed to sell the trust subject, or so much as should be sufficient to pay and satisfy so much money as should be demanded as aforesaid of them, or either of them, and pay the same to the sureties or indorsers respectively; provided, "that no one of the persons for whose benefit the deed was made should have priority or preference over another, but the same should be carried into effect as the liability of the several parties should occur in the manner before stated."

The note of Machir, upon which Hopewell and Dailey were his indorsers at The Farmers Bank at Winchester, was a note for 2970 dollars bearing interest from the 12th December 1820, upon which several judgments were recovered, against Machir, the maker, in October 1822, and against Hopewell and Dailey, the indorsers, in May 1823. Some part of the debt was made on executions sued out on the judgment against Machir and levied on his property; but far the greater part of it remained to be paid by the indorsers.

The note of Machir, on which E. M'Carty, Armstrong and P. M'Carty were his indorsers at The Cumberland Bank of Alleghany, was a note dated the 26th August 1818, for 6000 dollars payable sixty days after date, which came to maturity on the 28th October, and was regularly protested for nonpayment; but it did not appear that any notice of the dishonour of the note was given to the indorsers. The bank brought an action on the note, in 1819, against Machir, the maker, and, after a long contest, recovered judgment against \*him in May 1825, which proved unavailing, for Machir was then insolvent. The bank also brought an action against each of the three indorsers, but suffered nonsuits in those actions in May 1823. What was the obstacle to the recovery against the indorsers, was not stated, and did not distinctly appear.

In the meantime, the decree of the court of chancery in favour of Higgins's executors against Machir having been affirmed by the court of appeals, Carthrae, the surety of Machir in the appeal bond, became liable for a balance of the debt due by the decree, after

applying the proceeds of sale of a parcel of land, which was subjected to the debt, towards the satisfaction of it; and the creditors under the decree commenced proceedings against Machir and Carthrae, to recover the balance due them.

Whereupon, Carthrae, in 1822, exhibited a bill in the superior court of chancery of Winchester, against Machir, the trustees named in the deed of trust of July 1820, Hopewell and Dailey, Machir's indorsers at The Farmers Bank, E. M'Carty, Armstrong and P. M'Carty, Machir's indorsers at The Cumberland Bank, and the other cestuis que trust named in the deed; representing, that all of them had been already fully indemnified from all loss by reason of their suretyships and indorsements for Machir (some out of the trust subject, and some out of other property of Machir applied to the purpose), except the plaintiff Carthrae, and E. M'Carty, Armstrong and P. M'Carty, the indorsers at The Cumberland Bank, but that the debt due to that bank was not recoverable from the indorsers; and praying, that the remaining trust subject should be sold, and the proceeds applied to the indemnification of the plaintiff from his liability as surety of Machir in the appeal bond. Hopewell and Dailey, in their answers to this bill, stated, that the debt due to The Farmers Bank, for which they were bound as Machir's indorsers, had  
210 \*not been paid, nor had they been indemnified against loss on that account

otherwise than by the deed of trust, and that the bank had brought suit against them for the debt, which was yet pending. E. M'Carty, Armstrong and P. M'Carty answered, that suits had been brought by The Cumberland Bank against them as indorsers of Machir on the note for 6000 dollars; that they were advised, the bank could not recover against them in any of the courts of this state, because that bank was a corporation created by another state, and in consequence of the great indulgence extended by the bank to Machir after the note became due; but if they should be held liable for the debt, they claimed the benefit of the indemnity provided for them by the deed of trust. As to all the other cestuis que trust in the deed, made defendants to Carthrae's bill, it appeared by their answers and by an account taken by order of the court in the progress of the cause, that they had sustained no loss by reason of their suretyships for Machir, nor probably would sustain any. And, in May 1823, pending this suit of Carthrae, The Farmers Bank recovered judgment in their suits against Hopewell and Dailey; and The Cumberland Bank suffered nonsuits in their actions against E. M'Carty, Armstrong and P. M'Carty, so that they no longer claimed for themselves any indemnification under the deed of trust.

The court ordered a sale of the trust subject by the marshal, which was made accordingly. And the marshal having paid into court the sum of 3266 dollars collected of the proceeds of the sale, the court directed a commissioner to state an account of the claims of the cestuis que trust under the deed of trust, and to apportion the fund rateably

among them. The commissioner reported, that the debt due to Hopewell and Dailey for their liability as indorsers for Machir at The Farmers Bank, was 3408 dollars 67 cents, and the debt due to Carthrae on account of his suretyship for Machir in the  
211 \*appeal bond, was 874 dollars; and that there were no other parties to be indemnified: that, therefore, the proportion of the fund of 3266 dollars to be paid to Carthrae, was 666 dollars 51 cents, and the proportion thereof to be paid to Hopewell and Dailey, 2599 dollars 49 cents.

Upon the hearing, in 1825, the court, as it appeared that the plaintiff Carthrae, and the defendants Hopewell and Dailey, were the only parties named and provided for in the deed of trust, who had as yet suffered any loss or damage so as to entitle them to demand indemnification out of the trust subject, decreed, therefore, that 666 dollars 51 cents (the rateable proportion of the fund reported to be due to Carthrae) should be paid to Jacob Williamson, the assignee of Carthrae, and 2599 dollars 49 cents (the rateable proportion thereof due to Hopewell and Dailey) should be paid to them, upon Hopewell and Dailey entering into bond to their co-cestuis que trust in the deed, in the penalty of 5000 dollars, with condition to pay them a rateable proportion of the trust fund, in case they should afterwards be compelled to pay any thing as sureties for Machir, as provided by that deed.

After the decree in the above mentioned suit of Carthrae against his co-cestuis que trust had been pronounced, the present suit was commenced; which was a bill exhibited by The Cumberland Bank, in the superior court of chancery of Winchester, against Carthrae and his assignee Williamson, Hopewell and the administrator of Dailey (the indorsers for Machir at The Farmers Bank), E. M'Carty, Armstrong and P. M'Carty (his indorsers at The Cumberland Bank), and all the other cestuis que trust named and provided for in the deed of trust; setting forth the provisions of that deed; the proceedings in Carthrae's suit, the sale of the trust subject by the marshal under the order of

212 the court, and the decree of \*the court dividing the proceeds of the sale, rateably, between Carthrae and the indorsers Hopewell and Dailey; the note of Machir for 6000 dollars, indorsed by E. M'Carty, Armstrong, and P. M'Carty, in succession, to The Cumberland Bank, the failure of Machir to pay the same at maturity, the regular protest thereof for nonpayment, the suit which had been brought thereon against Machir, the maker, the recovery of judgment against him, and his utter insolvency; not alleging, however, that notice of the dishonour of the note had been given to the indorsers, or that the bank had so dealt with it as to hold the indorsers liable for the debt; nor mentioning the suits which had been brought against the indorsers, and the nonsuits which had been suffered therein; but claiming, upon the strength of the deed of trust, that The Cumberland Bank had a right to participate in the trust subject, for satisfaction pro rata of the debt due upon the note it held; and pray-

ing a decree for a rateable proportion of the trust fund.

Hopewell and the administrator of Dailey, in their answers, said, that E. M'Carty, Armstrong and P. M'Carty had been discharged from all liability as indorsers for Machir of the note held by The Cumberland Bank; and the deed of trust having only provided for the indemnification of those indorsers from loss by reason of their indorsement of the note, and the indorsers having sustained no loss, and being exempt from liability to any, they denied that the bank had any right to participate in the trust fund.

It is unnecessary to state the answers of the other defendants.

The judgments of nonsuit in the three actions of The Cumberland Bank against E. M'Carty, Armstrong and P. M'Carty, were exhibited with the answers.

Chancellor Browne, declaring that The Cumberland Bank was entitled to participate in the proceeds of the trust subject mortgaged by the deed of trust of July 213 \*1820, which by the decree in Carthrae's suit had been divided between his assignee Williamson, and Hopewell and Dailey, ordered, that a commissioner should apportion the whole proceeds of the trust subject pro rata among The Cumberland Bank, Williamson, and Hopewell and Dailey. And a further sum of 315 dollars belonging to the trust fund having been paid into court since the decree in Carthrae's suit, the court ordered that sum to be paid to The Cumberland Bank, in part of the sum to which, upon the principle of the decree, it was entitled.

The apportionment was accordingly made and reported by the commissioner; shewing that, under the decree in Carthrae's suit, Williamson, the assignee of Carthrae, had received 420 dollars more than Carthrae's pro rata share of the fund, and Hopewell and Dailey 1625 dollars more than their pro rata share; which sums were to be paid to The Cumberland Bank to make up the rateable proportion to which it was entitled.

Upon the final hearing before chancellor Tucker, he pronounced the following opinion and decree—"The court concurs in the opinion of chancellor Browne, that The Cumberland Bank has title to participate in the fund in question. The court is of opinion, that a deed of trust to indemnify a surety is, in equity, looked upon as a security for the debt, and not as a mere personal favour to the surety; and hence Machir's deed of trust of July 1820, for the purpose (among other things) of securing the M'Carty's and Armstrong against their indorsements, enured at once to the benefit of The Cumberland Bank, and the interest thus acquired existed, even though the indorsers became discharged for want of notice of protest, or otherwise, if such was the fact." Therefore, the court, approving the commissioner's apportionment of the fund, decreed that Hopewell and Dailey's administrator should pay The Cumberland Bank 1625 dollars with interest 214 &c. and that Williamson, the assignee of Carthrae, should pay the bank 420 dollars with interest &c. and that the bank

might take out any proper executions for the same.

From this decree, Hopewell and Dailey's administrator appealed to this court.

Johnson and Leigh, for the appellants, referred to Machir's deed of trust of July 1820, and shewed that, both in its terms and manifest intent, it merely provided an indemnification for the indorsers of the note for his accommodation at The Cumberland Bank, in case (only in case) they should sustain loss by reason of their indorsement. They had sustained no such loss, but, on the contrary, had been discharged (it was immaterial how) from all liability. The bank, therefore, could have no claim to participate in the trust subject, unless the principle declared in the chancellor's decree was correct; namely, that the deed of trust was not merely an indemnification for the indorsers, to the benefit of which the bank, if it had so dealt with the note as to hold them bound, would have been entitled to be subrogated, but it enured to the bank, directly and immediately, as a security for the debt due on Machir's note; so that, though the indorsers were discharged from liability by the laches of the bank or otherwise, and so never became bound to the bank for the debt, nor ever sustained any loss whatever by reason of their indorsement, the bank was yet entitled, in equity, to the benefit of the deed of trust.

They said, the right or a creditor to claim the benefit of counter or collateral security obtained by a surety from the principal debtor, was founded in plain equity, and was not to be controverted; yet the authority to the precise point was very scant. They had found none but the obiter dictum of sir W. Grant in *Wright v. Morley*, 11 Ves. 22, and the short note of the case of *Maure v. Harrison*, 1 Eq. Ca. Abr. 93, pl. 5, and the 215 searches \*of judge Carr, who stated the proposition, arguendo, in *M'Mahon v. Fawcett*, 5 Rand. 529, and of judge Story, who also stated it in his treatise on Equity, § 502, p. 481, had, in truth, discovered no other, as would be seen on an examination of their references. They apprehended, that the principle on which this equity of a creditor in such a case was founded, was quite obvious; but they were not aware, that it had been any where judicially explained.

Let the doctrine as stated in *Maure v. Harrison*, be taken according to the letter, without regard to the principle on which it was founded—"A bond creditor shall, in this court, have the benefit of all counter bonds or collateral security given by the principal to the surety; as if A. owes B. money, and he and C. are bound for it, and A. gives C. a mortgage or bond to indemnify him, B. shall have the benefit of it to recover his debt." The proposition, as they understood it, was, that where there was a surety for a principal debtor, bound for or with him, absolutely bound and continuing so bound, if the surety should obtain counter or collateral security for his indemnification from the principal debtor, equity, in such case, would give the creditor the benefit of such counter or collateral security. But put the case, that one not actually bound for or with a debtor as

surety for the debt, but only apprehending that he might become so bound, should obtain a mortgage from the debtor to indemnify him from the apprehended danger, but, in the event, should never become bound as surety for the debt; could equity, in such case, give the creditor the benefit of such a counter security, which, as to the party who obtained it, was certainly a mere nullity? This, they said, was, in effect, the present case. For the indorsers of the note for Machir's accommodation at The Cumberland Bank, did not contract the obligation of sureties for the debt to the bank: their undertaking was collateral, conditional, ex-

216 tutory—that if \*the bank should use due diligence to get payment of the note from the maker at its maturity, and failing with such diligence to get payment from him, should give the indorsers due notice of dishonour; then they would pay the debt; then they would stand absolutely bound as sureties for it to the bank; else, they should not be bound for it at all. Such being the contract of the indorsers with the bank, they obtained a mortgage from the maker, to avail them for their indemnification, in case the bank had so dealt with the note as to hold them eventually liable for its contents. It was, on their part, a mere measure of precaution. The bank had neglected to take the proper measures to hold them bound: they never became sureties for the debt: they were discharged from the liability against which they were indemnified, and never incurred any loss. The mortgage, therefore, so far as the indorsers were concerned, and to the utmost extent of the purpose for which it was designed, was no longer a subsisting security. Equity could not give it a force and effect beyond its purpose, for the benefit of the creditor by whose own neglect its purpose had been annulled, when the parties for whose benefit it was designed could claim nothing under it for themselves. If, indeed, there had been a special agreement between the bank, Machir the maker, and the indorsers, that Machir should give the bank a security for the debt in the form of an indemnification to the indorsers, that might have given the bank a distinct ground of equity to stand on; though it would still have been very doubtful, whether such a ground was tenable, as against the other cestuis que trust provided for by the deed of trust, if they were no parties to such special agreement. But there was nothing of the kind in the case.

However, they said, the court must ascertain the reason, the principle, on which this equity of a creditor to claim the benefit of counter securities given by the principal debtor to the surety was founded, in 217 order to \*ascertain whether The Cumberland Bank had just claim to the relief which the decree gave it. They insisted, that it was, and could be, no other than the equitable principle of subrogation. The decree declared a distinct principle of equity: that securities given by a principal debtor to his sureties for their indemnification, enured, directly and immediately, to the benefit of the creditor as a security for the debt; and therefore, Machir's deed of trust

enured at once to the benefit of the bank, and the interest it thus acquired existed, even though the indorsers were discharged from liability by the laches of the bank.

They said, this principle declared in the decree was peculiar, and, they thought, wholly new. They could find no colour of authority for it, or, at most, only colour of authority. It might be thought, perhaps, that the reasoning of judge Carr in *M'Mahon v. Fawcett*, 5 Rand. 529, 533, gave countenance to it: but an examination of the judge's opinion in that case would shew, that he did not intend to affirm any such principle; that he had no thought of any principle distinct from the equitable principle of subrogation, which it was his purpose to explain, and to shew its application to the case before him. If any vague expressions escaped him, that seemed to indicate the principle declared by the chancellor in this case, such expressions, on a point which it was nowise necessary he should decide, ought not to be made the foundation of a new and distinct principle of equity. Certainly, no such principle was indicated in the few authorities that had been cited for the equitable claim of a creditor to the benefit of counter securities given by the principal debtor to the surety. The note of the case of *Maure v. Harrison* merely affirmed this equity of the creditor, without indicating the reason on which it was founded. But sir W. Grant, in *Wright v. Morley*, plainly considered it as belonging to the doctrine of

subrogation: he said, "I conceive, 218 \*that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all securities the principal gives to the creditor;" thus placing the equity of the surety, in the one case, and that of the creditor, in the other, on the same ground: and then he proceeded to shew, that the equity of the surety was founded on the principle of subrogation; that "the surety had precisely the same right that the creditor had, and was to stand in his place;" that he "had no direct contract or engagement"—"but only a claim through the medium of the creditor, and was entitled only to stand in his place."

They asked the court to look to the consequences of the principle declared by the chancellor. For instance, if the indorsers, in consideration of value paid them by their co-cestuis que trust, and of another security given them by Machir for their indemnification, had actually released their rights under the deed, and then the bank had by its own laches discharged the indorsers from liability to it, the bank, upon the principle of this decree, would still have had a right to the benefit not only of the second security, but of this mortgage also, though the bank had contracted for no security but the engagement of the indorsers, and though the bank had released the indorsers from their liability, and the indorsers had released this mortgage. For, if this deed enured, directly and immediately, as a security to the bank, the indorsers' release of it could not have divested the rights of the bank under it; and the bank's release of the indorsers from per-

sonal liability would have left their rights under the deed unimpaired. And if the bank having discharged the indorsers from their liability, had neglected to sue Machir upon the note till the statute of limitations had barred their action; still, supposing the bank entitled to claim under the mortgage directly as a mortgagee, it might, at any time within twenty years, come into a court of equity to foreclose.

219 \*Then, considering The Cumberland

Bank as claiming participation in the trust subject mortgaged by the deed of trust for the benefit of Machir's sureties and indorsers therein mentioned, on the equitable principle of subrogation, they said, it was clear that the bank could not be entitled to such relief. A creditor holding the obligation of principal debtor and surety, and having existing right and remedy against both, was entitled, in equity, to be subrogated to the benefit of all counter securities given by the principal to the surety, of which the surety could avail himself for his indemnification; to be subrogated, namely, to the rights and remedies of the surety, who was answerable to the creditor, against the principal, who was answerable not only to him but to the surety also in case he should be charged. In such a case, subrogation only avoided circuity of action. But subrogation could only have place, when the creditor had right or remedy against the surety, for which he could be subrogated to him, and the surety had right or remedy against the principal, to which the creditor could be subrogated. The Cumberland Bank had no right or remedy against the indorsers; and the indorsers, consequently, had no right to participate in the trust fund. Having suffered no loss, and being relieved from all danger of loss, they could claim no indemnification. There were no rights or remedies belonging to either party on which subrogation could operate. It was true that subrogation was not the result of express contract between the parties, but of equity acting upon their relative rights; yet the rights on which equity so acted, must be rights resulting from contract.

Few as the authorities were upon the precise question of subrogation presented in this case, the adjudications on the principle of subrogation, in analogous cases, were very numerous. And, they said, it would

220 be found, that no one could be subrogated to another \*who had himself no right or remedy, and against whom the party seeking subrogation had not and never had any right or remedies: right or remedy actually subsisting: or right or remedy, which, though extinguished at law, was yet subsisting by intendment of equity; as if one bound for a debt with or for another who ought to pay it, should pay the debt, equity regarded the rights and remedies of the creditor against the principal debtor as still subsisting for the benefit of the surety; for there, the creditor once had right and remedy against the principal debtor, and though these were extinguished at law by the surety's payment of the debt, yet, in the view of equity, he extinguished them

only for himself, and for his benefit they should be regarded as still subsisting. By the civil law, the surety, in such cases, had a right to demand of the creditor an actual cession of all his actions against the principal; and the equitable doctrine of subrogation is founded on the same principal, though moulded in a different form. They cited and examined *West v. Belches*, 5 Munf. 187; *Hatcher's adm'r v. Hatcher's ex'or*, 1 Rand. 53; *Tompkins v. Mitchell*, 2 Rand. 428; *M'Mahon v. Fawcett*, Id. 514; *Enders v. Brune*, 4 Rand. 438; *Wright v. Morley*, 11 Ves. 12, 22; *Parsons v. Briddick*, 2 Vern. 608; *Eppe v. Randolph*, 2 Call 238; *Tinsley v. Anderson*, 3 Call 329; *Kinney's ex'or v. Harvey*, 2 Leigh 70; *Ex parte Rushworth*, 10 Ves. 414; *Robinson v. Wilson*, 2 Madd. C. R. 434; *Lidderdale v. Robinson*, 12 Wheat. 594; *Cheeseborough v. Millard*, 1 Johns. Ch. Rep. 409.

The cause was argued by Stanard for the appellees, with great earnestness and with his usual ability; but the reporter, having opened the case for the appellant, was compelled to be absent during Mr. S.'s argument, and no note of it was preserved, that would enable him to do justice to it, or even to state the grounds on which he endeavoured to maintain the correctness of the decree.

221 \*PARKER, J. This case, although very elaborately argued and with great ability, seems to me to lie within a narrow compass.

There can be no question of the right of a creditor to be substituted to any counter bonds or other securities given by the principal debtor to those bound with him as his sureties. The only case I have met with directly deciding that principle is that of *Maure v. Harrison*. The same principle, however, is asserted in several other cases, as one perfectly well established, and is referred to by the elementary writers as not at all questionable. The case of *Wright v. Morley* was one of a surety seeking to avail himself of a specific fund assigned by the principal debtor for the payment of an annuity, and Sir W. Grant said "that as the creditor is entitled to the benefits of all the securities the principal debtor has given to his sureties, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor;" thus reasoning from the first proposition, as a postulate requiring no support from authority. Nor has the doctrine been denied in the argument of the case at bar; it is conceded, that if a surety is bound for the debt, and is indemnified by the principal debtor, the creditor may pursue the indemnity, in exoneration of the liability of the surety. And this arises not from any notion of mutual contract between the parties, that in providing for the surety, the creditor shall be equally provided for, but from a principle of natural equity independent of contract; namely, that to prevent the surety from being first harassed for the debt or liability, and then turning him round to seek redress from the collateral security given by the principal, a court of equity will authorize, and even encourage, the creditor to claim



through the medium of the surety, all the rights he has thus acquired, to be exercised for his benefit, and in discharge of his obligations. The claim of the creditor,

222 therefore, is as much founded \*on the well known doctrine of substitution, as the claim of the surety to stand in the place of the creditor who has received collateral security from the debtor; and, in my opinion, it has no other foundation. For when the principal debtor conveys property to his surety, not specifically bound to the creditor, he has no intention of giving any lien to the creditor, or to pledge the property to him for the debt; and as he has a right to dispose of his property as he pleases, provided he commits no fraud, the court will not construe the instrument giving the lien beyond the intent; although it will, to effect the exoneration of innocent sureties, permit their substitution to the creditor's rights, or his substitution to theirs. By the civil law, this principle of natural justice was carried into effect by an actual cession of the action or debt; and this serves to mark the extent and nature of this doctrine, which we have evidently derived from that source. I cannot, therefore, agree that the deed of July 1820, to secure the M'Cartys and Armstrong against their indorsements, enured at once to The Cumberland Bank, as if it had been specially named as one of the *cestuis que trust* in the conveyance; and that the interest thus acquired existed even if the indorsers became discharged for want of notice of protest or otherwise. The obligation of Machir to the bank was not increased, or intended to be increased, by this transaction considered in itself; nor can it be construed into any new promise or acknowledgment of indebtedness on the part of the indorsers, superadded to the liability they had already incurred by their indorsement. The whole object of Machir was to secure his indorsers against their contingent liability, by giving them a specific lien on property, whilst they remained at full liberty to contest the right of the creditor to hold them responsible upon their indorsements. Considering the transaction in the light of a contract, it had this effect and no

223 more; and if the bank has any \*claim, it must be derived through the sureties. on the principle of substitution.

What then was the claim which the sureties had under the deed of July 1820? They had entered into a conditional engagement for Machir, which might bind them absolutely, in certain contingencies. If the paper they indorsed was common law paper, their undertaking was to pay after due diligence used by the creditor to obtain payment from the obligor, and a return of *nulla bona*, unless sufficient excuse was shewn for not pursuing the debtor: if the paper is treated as mercantile paper, (as I think it ought to be) their engagement was, that it should be duly honoured; and if not, that they, the indorsers, would on the default of the drawer or maker, and due notice given to them of such default, pay the amount. This was the extent and limit of their implied contract; and when the deed of July 1820 was made, it is not shewn that such contract had be-

come an absolute and unconditional one. That deed merely recites the fact that the M'Cartys and Armstrong had become indorsers for Machir on a note for 6000 dollars in The Cumberland Bank, upon which suit had been brought against Machir, and that he was willing to secure them against all loss or damage in consequence of thus becoming his indorsers. It contains no intimation, in any part of it, that the indorsers were fixed for the debt, or that the bank had taken the proper steps to make them liable. If the deed, however, had been made for their indemnification only, and there had been no other *cestuis que trust*, it is very possible, that opposition to the claim of the creditor might be ineffectual; for the M'Cartys and Armstrong would have no interest to make it, and the principal debtor could scarcely object, in a court of equity, to the application of any portion of his property in discharge of a just debt. On that point, it is not necessary to give an opinion; for here, the deed was made for the indemnification of

other sureties of Machir, who have been 224 made responsible \*for more than the whole trust subject has been sold for; and they, I think, have a right to raise the question of the title of other sureties to participate in the fund. The deed was unquestionably made for the benefit of all the sureties, and no one of them was to have priority over the other. It was made to protect them against loss or damage incurred or threatened, arising out of liability; and it was the evident intention of the grantor, that all should be completely secured; and, as a consequence, that if some were discharged from their obligations or were never bound, the benefit designed should enure to the rest, to the full extent of their engagements for him. This would be quite plain if the creditor had not interposed between them; and if he claims by substitution, and his right is subordinate to that of the sureties and derived through them (as I think it is) he can stand in no better situation than if a surety were applying to the court for protection against loss or danger. In such case, the other sureties, being directly interested in throwing the burden off the fund, for their own complete exoneration, would have a right to require the applicant to make out a case of liability for the principal debtor, bringing him within the terms and intention of the deed of trust. The bill in this case does not charge, that the M'Cartys and Armstrong were ever liable for the debt. It does not even charge, that a demand had ever been made upon them for it. It makes, indeed, the proceedings in Carthrae's suit a part of the record in this case; and in their answers to Carthrae's bill, the M'Cartys and Armstrong do state that a suit had been brought against them; but they also allege, that they are advised the bank cannot recover against them in any of the courts of this state, because it is a corporation created in another state, and in consequence of the great indulgence extended to Machir by the bank; yet they are unwilling to relinquish any right under the deed of trust until they are finally exonerated. Carthrae also alleges that



225 \*the M'Cartys and Armstrong are released; and shortly after their answers were filed, the bank suffered non-suits in the actions it had brought against them. Suppose, then, the M'Cartys and Armstrong were plaintiffs asking for participation in this fund, and stating all the facts which appear in the bill filed by the bank, and in their own answers to Carthrae's bill, together with the additional fact that in May 1823, three years before the commencement of their suit, the bank had abandoned its claim against them; and the other sureties had resisted that prayer of their bill: would the court have been justified in taking away from such other sureties, a portion of the fund already insufficient to indemnify them for actual losses sustained, and in decreeing its payment to the M'Cartys and Armstrong, or impounding it for their benefit? I think not; and, therefore, I think the decree is erroneous in directing the payment to a plaintiff standing in their place. It is the more objectionable, because, in my opinion, the proceeding in the cause, as well as the absence of any proof, or even of any allegation, that the steps necessary to charge the indorsers had been taken by the bank, authorize us to conclude, that they never were liable for this debt.

It is not necessary to notice, particularly, the numerous cases cited, illustrative of the doctrine of subrogation, since all of them are cases of rights and remedies actually existing; and the expressions sometimes used by the judges to explain the right of a creditor or surety to resort to a lien, as that "it is the property of the principal debtor pledged for the debt" (though not to the creditor or surety), must be taken in reference to the subject matter under discussion, and to the facts appearing in the case. Thus considered, there is nothing in the case of *M'Mahon v. Fawcett*, or in any other referred to, which is inconsistent with this opinion. No more is meant, than that if the prop-

226 erty is pledged to \*either the creditor or the surety, though not to the person seeking to charge it, it may be reached by substitution in a court of equity, without regard to the intention of the contracting parties. But still the party who seeks to be subrogated, must shew that the person, to whom the property is pledged or any other counter security is given, has or would have had a right, in the contemplation of a court of equity, to claim the benefit of the indemnification, by being one liable for the debt or obligation, or entitled to charge the fund pledged; and that the plaintiff has a subsisting equity to enforce the lien, or the counter security, in the same manner as if there were an actual cession of the action.

The result of this view of the case is, that the decree must be reversed, and the bill dismissed.

CABELL, J. Concurring in the general views expressed by judge Parker, I deem it necessary to say a word only. The Cumberland Bank is no party to the deed, the benefit of which it now seeks. The property is not conveyed to the bank, nor for its benefit. The declared object of the deed is to secure

the indorsers from all or any loss or damage which they or either of them may sustain in consequence of their indorsement. There is no provision for effecting this indemnification by any payment directly to the bank, which might render a resort to the indorsers unnecessary; for the deed does not purport to give the bank a right, under any circumstances whatever, to call for a sale of the property, or an application of the proceeds. The deed prescribes a different mode for effecting its object, the indemnification of the indorsers. The indorsers are to be "called upon," or the amount of the note "demanded from them, as indorsers, in consequence of the failure of Machir" to pay the same.

They are to request the sale of the property, and the proceeds of the sale are directed to be paid, directly, to them. If the 227 \*bank, then, is to be let in to any benefit from this deed, it cannot be on the ground of any contract between the grantor and the bank, or on the ground of any direction or intention, express or implied, on the part of the grantor, in its favour: it can only be on the well known principle of subrogation; the right of a creditor to stand in the place of the surety. But this right must be unavailing to the bank, in this case, if, in fact, the indorsers themselves have not now, and never had, any right to call for the application of these funds. It is true that the indorsers incurred a contingent liability, by the mere act of indorsement; a liability depending on the condition that the note should be duly proceeded with, that Machir should fail to pay it at maturity, that the note should be protested, and that due notice thereof should be given to the indorsers. But if this condition was not complied with, the indorsers were as much discharged from liability, as if they never had indorsed. How stands the fact in this case? The bill filed by the bank does not allege that any notice was given to the indorsers; and there is no proof of the fact. The other defendants in the cause were deeply interested in the question, and had a right to demand proof of notice to the indorsers (so as to fix their liability) before the indorsers, or those claiming under them, should be allowed to participate in the fund. Notice not being proved, we must regard it as not having been given. The indorsers, therefore, never were liable for the payment of this note; and, consequently, never had a right to call for the application of funds to its payment. And if they never had such right, I cannot perceive how the bank, claiming only through them, can have such right.

I am of opinion that the decree be reversed and the bill dismissed.

BROOKE, J., concurred.

Decree reversed, and bill dismissed.

228 \**Moore's Adm'r v. George's Adm'r.*

April, 1839. Richmond.

*Parties—Objection for First Time in Court of Appeals—Case at Bar.—Eight years after the death of an*

*\*Parties—Suit against Estate—Personal Representative.—In a suit to recover a claim against an estate.*

intestate who had no child his widow files a bill in equity to recover her moiety of his personal estate, without making any other distributee a party. The statement in the bill is, that to the other moiety the decedent's brother G. became entitled, he being his only relation by consanguinity in the United States, (for the decedent was a native of Ireland,) and the complainant has understood that the administrator fully satisfied and paid off the said G. his share of the estate, after which the said G. left this country, and either died, or, if living, it is not known in what part of the world he resides. The sureties of the administrator, in their answer to the bill, do not controvert this statement, nor is it objected that the necessary parties are not made, until after a decree in favour of the widow against the administrator his sureties, when the decree is appealed from, and the objection made for the first time in the court of appeals. **Held**, the statement in the bill respecting the next of kin must be taken as true, and the objection is therefore untenable.

**Decree—Delay for Stating Account—Case at Bar.**—The bill of a distributee, besides making the administrator and his sureties defendants, states, that the complainant has understood that the administrator, who has gone out of the commonwealth, appointed B. his agent to transact his business in this state, and that he put property or moneys into B.'s hands to satisfy his debts, but she is not sure that the fact is so, and therefore does not think it just to aver it positively. She makes him a defendant, and calls on him to state whether he has, or expects to have, any such funds, and, if any, what. B. dying, and the cause being revived against his executrix, she answers that her testator, so far from being indebted to the administrator, or having in his hands any estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of the administrator to a very considerable amount, and that the administrator is still considerably indebted to her as executrix; that she has a lien upon certain slaves, in which the wife of the administrator has an interest at the termination of a life estate; but even this property, if it could be sold now, would be insufficient to pay the debt due to her as executrix. An account having been taken ascer-

simply, no defendant is necessary or proper except the personal representative. *Jones v. Reid*, 12 W. Va. 399, citing the principal case.

**Same—Suit for Distribution—Cases Distinguished.**—All the residuary legatees or distributees, together with the executors or administrators of such as have died since the testator or intestate, ought to be parties to a suit for division of a *residuum*. *Richardson v. Hunt*, 2 Munf. 148; *Hooper v. Royster*, 1 Munf. 119; *Purcell v. Maddox*, 3 Munf. 79; *Sheppard v. Starke*, 3 Munf. 29. But these cases were distinguished from the principal case in a learned opinion by **JUDGE STANARD**, and one of the grounds taken by him was that in the above cases the suits were by residuary legatees, and in each case the bill or will under which the claim was made, showed that there were other legatees, and who they were, and no excuse was offered for failing to make them parties. Whereas, the principal case is that of a distributee entitled to a fixed portion of the estate without regard to the number of the other distributees, and those other distributees not known, or at least not ascertained by the court to be known, to the plaintiff.

taining the amount due to the plaintiff from the administrator. **Held**, there ought to be a decree for the same against the administrator and his sureties, without delaying the plaintiff for an account to be stated between B. and the administrator.

On the 30th of January 1819, Mary T. George, widow of Marcus George of Petersburg, exhibited her bill in the superior court of chancery holden at Richmond, setting forth, that her husband died in the winter of 1810, intestate and without issue, leaving no real estate, but considerable personal property in possession, and debts to a considerable amount due to him, besides money actually on hand; that Alexander Brown, then a merchant residing in the same town of Petersburg, undertook the administration of the estate, and gave William Moore and John Allison as sureties; that the decedent owed very little; and that after the payment of all his debts, his estate, in the complainant's estimation, was worth considerably more than ten thousand dollars. As the decedent had no issue, one half of his personal estate belonged to the complainant. To the other half, she states that his brother — George was entitled, "he being his only relation by consanguinity in the United States (for Marcus George was a native of Ireland)." She further states, that she has understood that the administrator fully satisfied and paid off the said — George his share of the estate, after which the said — George left this country and departed this life, "or, if he be living, it is not known in what part of the world he resides; but whether he received his half of the estate or not, the complainant knows not, nor does she conceive it to be material to her interest." She charges that considerably more than half her claim, with interest, remains still due to her from the said Alexander Brown, who has removed to and resides in Alabama. She has understood that Brown appointed William Bowden of Petersburg his agent to transact his business in this state, and that he put property or moneys into Bowden's hands to satisfy 230 debts; but she is not sure \*that the fact is so, and therefore does not think it just to aver it positively. She makes Bowden a defendant, however, and calls on him to state whether he has, or expects to have, any such funds, and, if any, what? Brown the administrator, and Allison and Moore his sureties, are made defendants also.

Allison and Moore answer, admitting their suretyship for Brown, but saying that they know nothing of his administration, and insisting that the complainant shall establish her claim by legal testimony.

Against Brown, the plaintiff proceeded in the mode prescribed by law in the case of absent defendants. As to Bowden, the bill was taken for confessed; and upon his death, the cause was revived against Elizabeth Bowden his executrix.

In this state of the case, an order being made for the settlement of Brown's administration account, the commissioner, in May 1823, made a report stating a balance due the plaintiff of 5377 dollars 23 cents, with interest

on 4272 dollars 21 cents, part thereof, from the 15th of July 1820. He also made another statement, in which, allowing credits mentioned in an account marked B. supposed to be in Brown's handwriting, the balance was reduced. Though he did not consider this latter statement as supported by sufficient evidence, yet he thought it extremely probable it would ultimately prove to be more correct than the other.

In January 1824, mrs. Bowden, the executrix of William Bowden, filed her answer, saying that her testator, so far from being indebted to Brown, or having in his hands any estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of Brown to a very considerable amount; that Brown is still considerably indebted to her as executrix; and that the few means which have been placed in her hands for the purpose of discharging that debt

are greatly insufficient for such purpose. She adds, that she has a \*lien upon certain slaves, in which mrs. Goode of Powhatan has a life estate, and in which the wife of Brown had an interest at the determination of that life estate; but even this property, if it could now be sold, would be wholly insufficient to pay the debt due to her.

On the 13th of March 1824, the cause coming on to be further heard, the court ordered that the defendant Elizabeth Bowden, executrix of William Bowden, render before a commissioner an account of all the property conveyed by Alexander Brown to William Bowden in his lifetime, as well as an account of the property conveyed by Brown for the benefit of Bowden's estate since his death, and of the moneys which came to the hands of Bowden in his lifetime, as the agent and attorney in fact of Brown, and to her hands since the death of Bowden.

Soon after this order was made, a copy of it was placed in the hands of a commissioner, and a notice was served on mrs. Bowden, requiring her to exhibit, on the 24th of June 1824, the accounts directed by the order. The commissioner reported, that no accounts were produced; that subsequent to that time, in the years 1824 and 1825, he made many applications to her agents for the accounts, but he had not been able to obtain them. He stated this fact, however, that an account current between Alexander Brown and William Bowden & Co. had been rendered, shewing a balance against Brown of somewhat over 23000 dollars on the first of September 1821. This account, he added, "affords but little if any part of the information required by the court. It may, however, serve to indicate the small probability existing, that any thing will ever be obtained from that source for the benefit of the plaintiff."

Upon this report being made, there was a rule against mrs. Bowden for an attachment.

The entry is "on motion of the plaintiff by counsel." Subsequently, \*on the 8th of March 1826, the plaintiff's counsel moved to discharge the rule. On that occasion the chancellor delivered an opinion, in which he declares, that while

neither the plaintiff nor the defendant mrs. Bowden wants the account called for, yet as the defendants Allison and Moore insist upon it, it should, on their account, (and, if it turns out against them, at their costs,) be rendered. Whereupon the court made the rule for the attachment absolute, but directed that if mrs. Bowden should appear before the commissioner at his office, with her accounts and vouchers, so as to enable the commissioners to execute the order of account, the attachment was thereupon to stand discharged.

In May 1826, the commissioner reported that mrs. Bowden had come forward by her agents, and enabled him to make the following statements, as the only response to the order that it was in her power to make. First, That she knows of no property conveyed to Bowden in his lifetime by Brown: that Brown's real property in Petersburg was conveyed in trust to secure a debt due by him to the office of the bank of Virginia in that town, and when the property was sold under the deed of trust, Bowden became the purchaser of the principal part thereof, and the amount of sales was duly accounted for at the bank. Secondly, That the only property conveyed by Brown for the benefit of Bowden's estate, since his death, consists of a half interest in the following slaves with their increase, held for life by mrs. Goode of Powhatan, the mother of mrs. Brown and of mrs. Bowden, to wit, Toby, &c. (naming them) in all thirty-two, as appears by the deed of trust which was exhibited to the commissioner. Thirdly, The account of moneys which came to the hands of Bowden in his lifetime, as the agent and attorney in fact of Brown, is returned as follows, viz:

233	*1818, April. Cash for two negro men, Tom and Billy,	1750 00
11.	Ditto received from L. E. Stainback,	1118 00
1819,	Jan'y 7. Ditto received from Thorp and Robertson,	721 78
March 12.	Ditto received from Daniel Sheffey,	1030 00
13.	Ditto received from William Gee,	175 00
Sept'r 1.	Ditto received from L. E. Stainback,	654 06
		<u>\$5448 84</u>

No other moneys have come into the hands of this defendant since the death of mr. Bowden, belonging to Brown. It is further represented that against the property conveyed and the money received, the estate of Bowden has a claim on Brown, amounting to upwards of 33000 dollars.

To this report the defendants Allison and Moore excepted, upon the ground that as the report was made and the account was taken for their benefit, it was incumbent on the commissioner to give them, or one of them, notice of the time he commenced taking the account.

On the 12th of January 1827, the cause came on to be further heard; whereupon,—the plaintiff by her counsel admitting the

correctness of the account marked B. referred to in the report of May 1823, and consequently of the statement in the said report founded on that account,—the court, approving that statement, and overruling the exceptions to the last report, decreed that the absent defendant Brown, and the defendants Allison and Moore his sureties, pay to the plaintiff the sum of 2663 dollars 5 cents, with interest on 2494 dollars 90 \*cents, part thereof, from the 15th of July 1820 till paid, and the cost of this suit; reserving liberty to the other distributees of the intestate Marcus George, to resort to this court to recover their share of the distributable surplus of the said intestate's estate. And the plaintiff was not to have the benefit of the decree until she gave a proper refunding bond.

From this decree, the defendants Moore and Allison appealed.

On the 26th of January 1836, this court, after hearing the arguments of counsel, and examining the transcript of the record, was of opinion that there was no error in the decree, and therefore decreed that the same be affirmed, and that the appellants pay unto the appellee her cost. And it was ordered that the cause be remanded to the circuit superior court of Henrico county, with leave to the appellants, at their costs, to pursue the garnishee by further proceedings in the cause.

During the same term, to wit, on the 20th of February 1836, it was shewn to the court that the appellant Moore was dead when the decree of the 26th of January was made; and it was therefore ordered that the same be set aside.

The cause being afterwards revived in the name of the administrator of Moore against the administrator of mrs. George, was rearranged February 1839, by Johnson and Macfarland for the appellants, and by Rhodes and Spooner for the appellee.

I. The counsel for the appellants insisted, that the proper parties were wanting; that the other distributee should have been before the court; and that, for this omission, the decree must be reversed with costs, under the decisions of this court. Hooper v. Royster, 1 Munf. 119; Richardson's ex'or v. Hunt, 2 Munf. 148; Sheppard's ex'or v. Starke and wife, 3 Munf. 29; Purcell v. Maddox, 3 Munf. 79; Myrick v. Adams, 4 Munf. 366. These cases

235 \*established that in a suit for distribution, all the distributees are necessary parties. The bill suggests that the brother of the intestate has left this country and died, or, if he be living, it is not known in what part of the world he resides. But there is no proof of any of these facts. And even in England, if any facts of this kind be stated in the bill as a reason for not bringing a party before the court, unless admitted by the defendants, it must be proved at the hearing. Mitf. Plead. 134. When the fact is thus proved, a sufficient excuse is furnished, because the plaintiff shews that he has done all that it is practicable to do. But in Virginia, such a fact, even if proved, can furnish no excuse. For here the statute authorizes an order of publication. 1 Rev. Code, ch. 123, § 1, 5, pp. 474, 476. And this

publication will answer against the brother if alive, or against his representatives if he be dead. Dunlop & Co. v. Keith and others, 1 Leigh 430.

The counsel for the appellee would not controvert the general rule that one distributee, suing for an account and distribution, should make his codistributees parties. But they said it was a rule of convenience, which would be perverted from its true object, if it were to lead to the reversal of such a decree as has been made in this case—a decree from which the absent distributee can never sustain injury, being upon an account stated on the shewing of the administrator himself, to which there is no exception, and only for the moiety to which the plaintiff is unquestionably entitled, no matter how many distributees there may be. Here, however, the plaintiff could not make the other distributee a party, not knowing whether he was alive, or, if alive, where he was. This allegation in the bill is not denied in the answers. And the sureties have never, in the court below, required other parties to be made, or indicated who should be parties. Calvert on

Parties 67, 114. The statute of Virginia does not affect \*the case. It was made for the benefit of plaintiffs.

They are not compelled to act under it, especially when the absent parties are not known, and the defendant makes no objection for want of parties, and never communicates who are the proper parties against whom the plaintiff can proceed by publication. But if the distributee were alive and his residence known, why make him a party, either in England or Virginia, if he has been paid his share? It is enough, in any case, to make those distributees parties, who are entitled to participate in the fund which is to be divided. Branch's adm'r & others v. Booker's adm'r, 3 Munf. 43.

II. The counsel for the appellants said, that the exception to the last report ought to have been sustained. As the sureties were the parties most materially interested in the enquiry, they were entitled to notice.

It was answered, that they required the account, and were bound to attend to it. They were therefore not entitled to notice.

III. The counsel for the appellants said, the principle was well established, that equity would decree in the first instance against a defendant who would be responsible to the other defendants. Garnett &c. v. Macon &c., 6 Call 349; Chamberlayne &c. v. Temple, 2 Rand. 384. Here, money to the amount of 5448 dollars 84 cents being admitted to have been received by Bowden as agent and attorney, and no set-off against it being shewn, a decree should have been rendered against the executrix for the amount due the plaintiff. Bowden, having received this money in a fiduciary character, was bound to exhibit an account of it, and his executrix could not discharge herself by alleging set-offs or disbursements, without proving them. Robertson v. Archer, 5 Rand. 119. The slaves conveyed ought to have been accounted for on the same principle. It is not competent to the creditor, without the assent of the sureties, to cease his pursuit of

237. a fund in the hands of \*an agent of the principal, and increase thereby the burthen upon the sureties. *Loop v. Summers*, 3 Rand. 511. On general principles, a plaintiff in equity is bound to proceed against any property of the principal debtor in this country. But whether bound or not, having proceeded against such property, he cannot abandon the pursuit.

It was answered, that here the bill does not charge Bowden. It merely calls for an answer, and by that professes a willingness to abide. The answer of Bowden's executrix does not admit or deny that Bowden was agent of Brown. It simply states that Bowden's estate, so far from being indebted to Brown, is largely a creditor, and that the means in the hands of the executrix to pay the debt due Bowden's estate are insufficient. So the answer does not charge Bowden's estate, but discharges it. And against the answer, there is no proof. On the contrary, an account is rendered, shewing a debt due Bowden from Brown of 23000 dollars. After this, the plaintiff ought not to have been compelled, against her will, to pursue these accounts for the benefit of the sureties. A creditor is not bound, for the exoneration of sureties, to pursue estate of the principal debtor, beyond a fund of the principal subject to the disposition of the court. Here, there was no such fund. And the sureties had as good a right to require of the plaintiff to pursue any and every person whom they might suggest to be Brown's debtors, as they had to require her to continue any further the pursuit of Bowden's executrix. But the chancellor being of a different opinion, the commissioner acted, and made a report which exonerates Bowden's estate. It is said, that according to the report, moneys came to the hands of Bowden as agent and attorney in fact of Brown. But what this agency was, does not appear; neither does the report, as to this matter, appear to be based on the admission of Mrs. Bowden. Admitting, 238 however, that he was agent, \*and received money in that character, does it appear that he was a debtor? So far from it, it is proved by Brown's deed of trust to the executrix, that Brown was largely indebted to Bowden at his death. As to the slaves conveyed by the deed of trust, to hold that the plaintiff must have them subjected to her claims before she can have a decree against the sureties, would be to compel her to wait till the death of the tenant for life. Moreover, Brown had no right to pledge his wife's reversionary estate in chattels, so as to bar her right of survivorship. *Honner v. Martin*, 4 Russ. 65; 3 Cond. Eng. Ch. Rep. 298.

STANARD, J. This suit was commenced in the court below twenty years ago, to recover a widow's share of the distributable surplus of her husband's estate, who died eight years before the suit was brought. The decree that has been rendered, and which is now in question, is for a sum that is incontestably due, and is against parties incontestably responsible. Notwithstanding this, it is exposed to objections which have been urged with unusual earnestness and

ability by the counsel of the appellants, and which claim the gravest consideration.

The first is, that proper parties were not made—that the other distributee or distributees of the intestate were proper parties, and no sufficient excuse is assigned for failing to make him or them parties, by name or description.

The bill treats the brother of the intestate as the only kindred of the intestate entitled to distribution; and in respect to him it suggests that he has been paid his full moiety of the estate, has left the United States, and his residence is unknown. This suggestion is not controverted by the answer.

By the well established practice of courts of equity, all known parties interested 239 in a common unliquidated \*fund must be made parties in a suit demanding an account and share of that fund. The object of this rule is to prevent multiplicity of suits, and save the parties accountable for the fund from the harassments of repeated settlements and litigation respecting it. This rule of practice is intended for the protection of the accounting party, and is enforced at his instance only. Hence, according to the course of the court of equity in England, the objection must be made by demurrer, either ore tenus or in writing, or by plea or answer. When the objection has not been made and brought under notice of the court before decree, it cannot be effectually urged as cause of reversing the decree in an appellate tribunal. To allow it to be so urged by a party who has failed to urge it in the preliminary stages of the litigation, after all the expense and trouble of that litigation shall have been incurred, would frustrate the very object sought by the rule. That object cannot be attained, unless the party for whose protection the rule was established were required to ask its application to prevent future, rather than frustrate passed litigation, and by its frustration render future necessary. But this court has in several cases departed from the english practice, and treated the objection for want of parties as available to warrant the reversal of the decree, though not made in the preliminary stages of the litigation. To the authority of these cases I am bound to yield; and if the case in judgment be not distinguishable from them, it must add one more to the numerous and regretted examples of protracted and expensive litigation for an undoubted right, rendered fruitless by unskillfulness or mistake in the mode of asserting it.

In the cases referred to, it has been decided that all residuary legatees should be parties in a suit by one or more to recover their shares of the residuum; and though the objection that all are not made parties be 240 \*not taken in the court below, it may be taken, and will justify the reversal of the decree, in the appellate court. The effect of these decisions is to save the defendant the benefit of the objection for the want of parties by reason of the omission of one or more residuary legatees, after decree, though not made by demurrer, plea or answer. In each of these cases, had there

been a demurrer for that cause, it would have been sustained. It so appeared to the appellate court; and submission to the authority of the decisions made in them does not necessarily result in reversal for such an objection, unless it appears that had the defendant taken it in the preliminary stages of the litigation, it must have been sustained. Does it so appear in the case in judgment? The bill substantially alleges, that the brother of the intestate was his next of kin, and entitled as such to a moiety of the distributable surplus, which had been paid to him, and that he had departed from the state, and his residence was unknown. Would a demurrer to the bill for failing to make this absent brother a party have been sustained? It would not, unless it be necessary to make parties those who were claimants on a common fund, but whose shares have been paid by the accountable defendant. Such necessity does not, in my opinion, exist. Such necessity does not result from the spirit and object of the rule of practice. I cannot doubt that the admitted allegation that one of the residuary legatees has been satisfied, obviates the necessity of making him a party, in a litigation to recover the shares of the others. If this be so, then had the defendant in this case demurred, he would have admitted the fact that justified the omission to make the distributee a party; and failing to demur, had he objected by plea or answer the failure to make the brother a party, the plea or answer must have denied the fact on which the plaintiff had justified the failure: and no such denial has been made.

241 \*Furthermore, the cases before mentioned, in which, in effect, the benefit of the demurrer has been allowed in the appellate court though not taken in the inferior court, were suits by residuary legatees; and in each case the bills or wills under which the claim was made, shewed that there were other legatees, and who they were, and no excuse was offered for failing, to make them parties. This case is that of a distributee entitled to a fixed portion of the estate without regard to the number of the other distributees, and those other distributees not known, or at least not ascertained by the court to be known, to the plaintiff. While the rule of practice invariably charges on the plaintiff claiming as residuary legatee, the duty of making all residuary legatees parties, if the objection for the omission be taken in due time, that is not the case with respect to a distributee plaintiff, unless it affirmatively appear that next of kin, other than the plaintiff, is known to the plaintiff; and unless it so appear, the suit proceeds, and (if asked for in its progress) an enquiry will be directed to be made by the master.

It is objected further, that there may be distributees other than the brother; and though not known, distributees, by the general description of distributees, ought to have been made parties by the bill. This objection is not well founded. 1st, Because the bill has treated the brother as the only distributee; and that not being controverted,

there was no occasion for the plaintiff to seek out or make other parties. 2ndly, If it had been admissible to act on the supposition that there were other but unknown distributees, the proper course would have been, not that suggested by the objection, but by a direction to the master to enquire and state to the court who were the next of kin; and this enquiry the defendants might have had, if the case had left room for it, and they had thought proper to ask it. Cooper's Eq. Pl. 39-40; Mitf. Pl. by 242 Jeremy. 167, et seq. My \*conclusion is, that the decree was not premature in favour of the plaintiff, by reason of want of proper parties.

The more serious question is, was it premature as to the appellants, because rendered before due pursuit of the effects of the principal, the absent defendant? The appellants, being sureties, have a just claim to have the demand satisfied, if it could be so, out of the effects of the principal, if they were accessible. This is an equity springing from the relations of the codefendants, and operating between them, not against the plaintiff. It is subordinate to, and should not be permitted to control or impair the rights of the plaintiff, to whom both principal and sureties are equally bound. It justly claims the fostering care of a court of equity, and should be enforced as far as it can be without materially impairing or delaying the rights to which it is subordinate. To permit it to impair or delay those rights, would be to do certain injustice to the party holding the paramount claim, in the pursuit, perhaps a vain one, of the means of doing justice to the subordinate one. If the pursuit prove abortive, then uncompensated wrong will have been done by the postponement of the just and ascertained demand of the plaintiff: and if otherwise, the injury of this delay will have been inflicted on the plaintiff, and all the benefit of the pursuit enure to others; and the chance of obtaining the means of doing justice between the defendants will have been purchased at the expense of certain injustice to the plaintiff. This would not, in my estimation, be reconcilable with the precepts of sound reason, the principles of equity, or doctrines inculcated directly or inferentially by the decisions of this court. When relief is sought against parties holding the relation of principal and surety, this court will so far defer to the equity arising from such relation, as to protect it from the caprice of the plaintiff, and give it effect if it can be done

243 \*without essentially derogating from the right of the plaintiff. In the case of Chamberlayne and others v. Temple, 2 Rand. 384, all the parties were, in the opinion of the court, liable to the plaintiff, but between themselves equity required a rateable contribution; and as the materials were all in the record, to make an apportionment of the burthen according to the requirements of this equity, without materially delaying the plaintiff, the court directed such apportionment: but it is expressly adjudged that it was not justifiable to subject the plaintiff to material delay

or detriment, to give effect to this equity between the defendant; and the plain inference from the case is, that the delay incident to the adjustment of the unliquidated accounts, to furnish the means of apportionment, would not be justifiable. In the case of Dabney's adm'r et al. v. Smith's legatees, 5 Leigh 13, the personal representative of the sheriff, the administrator of his deputy who conducted the administration, and the solvent sureties of the sheriff were defendants; and a decree having been rendered against the personal representatives of the sheriff and deputy, de bonis testatoris, and the execution on that decree being returned nulla bona, a decree was, on motion, rendered against the sureties of the sheriff; the court disregarding the objection of those sureties, that in equity, for their exoneration, the demand ought to be charged on the sureties of those representatives by an account to establish a devastavit, and on the real estate of the principal and the surety of the deputy sheriff, and the plaintiffs should be put in pursuit of satisfaction from these sources, before the sureties should be subjected to the decree. The doctrine of Chamberlayne v. Temple is there recognized, and it is adjudged that in the pursuit of satisfaction from the principal or those responsible for his estate, no measure subjecting the plaintiff to material injury or delay should be required as preliminary to the decree against the sureties. In that case the decree

244 was in the first \*instance rendered against the representative of the principal; and that course of practice is prescribed by the consideration, that if a joint decree were rendered against principal and sureties, the plaintiff or officer might capriciously or carelessly levy the amount from the effects of the sureties, and frustrate their equity to have the satisfaction sought from the principal, if attainable without material delay; and by the further consideration, that until a return of nulla bona on the execution upon that decree, it did not appear of record that a devastavit had been committed which rendered the sureties chargeable. In that case, when an account became necessary for the further pursuit of satisfaction from the effects of the principal, or from responsibilities for those effects, the plaintiff was liberated from that further pursuit, and the surety was told that "he must content himself with his right of subrogation, and take upon himself that pursuit, as the consequence of his having become sponsor for the principal."

Under the guidance of these doctrines, I proceed to the enquiry, Was the decree in the case in judgment prematurely rendered against the sureties?

It is not questioned that the plaintiff resorted properly to a court of equity for relief, making the absent administrator and his resident sureties parties. With these, William Bowden is also made a party, on the suggestion that effects of the absent administrator have been put in his hands to pay debts; and though the plaintiff declines to charge positively that such effects have been placed in Bowden's hands, Bowden is

called on to say whether the fact be so or not. The answer of mrs. Bowden the executrix states that her testator, so far from being indebted to Brown, or having in his hands any estate to satisfy the plaintiff's claim, was a creditor of Brown to a considerable amount; that Brown is still considerably indebted to her as executrix, and had given her security on a reversionary interest in certain \*slaves which he claimed in right of his wife, and which if sold would be inadequate to pay the debt. In March 1826, the case standing on the bill and answer in respect to this defendant, without any other evidence in regard to the effects of Brown in the hands of Bowden, and an account having been taken ascertaining the uncontested balance that was ultimately decreed to the plaintiff as her share of her husband's estate, there was, in my opinion, no just impediment to a decree at that time for that balance, and injustice was done the plaintiff by the failure to render the decree at that time. All the delay since has done wrong to the appellee; and I think that nothing in the record justifies a further delay, and that the decree ought to be affirmed.

PARKER, J., concurred in this opinion, and CABELL, J., in that of the president.

BROOKE, J. I think there is no doubt on the first point in this case, the want of parties. The general doctrine is, that if a person who ought to be a party departs from the jurisdiction of the court, the plaintiff cannot be required to make him a party. Mitf. Pl. book 2, ch. 3. If a sufficient reason for not bringing a party before the court is suggested by the bill, as if a party is resident out of the jurisdiction of the court, and that fact is charged, a demurrer will not hold. Nor does the act directing the method of proceeding in courts of equity against absent debtors affect that doctrine. That act was in ease of creditors whose debtors were absentees, to enable them to obtain their debts from resident debtors of the absentees. It does not apply to prevent a creditor or legatee from proceeding against the resident sureties of the absent debtor or personal representative. The facts alleged in the bill, that George the brother of the appellee's husband had been paid the amount due him, that he had left the country, and that, if alive, his

246 \*residence was not known, (none of which circumstances are denied by the defendants,) place the case on different ground from the case of Richardson's ex'or v. Hunt, 2 Munf. 148. The objection to the want of parties, I think, has nothing in it.

The second point is, that the plaintiff having made William Bowden a party, as being indebted to the absentee Brown the administrator, she ought to have pursued her claim against him or his representatives, until the assets in their hands, if any, were exhausted, before the defendants the sureties should be made responsible. I think it must be admitted that the plaintiff was under no obligation to make Bowden a party; but having made him a party in ease of the sureties, I do not think she was bound to proceed against his executrix, when it



was found that if there were any debt due by Bowden, the amount could not be ascertained but by a prolix proceeding to get at the reversionary interest of Brown's wife in some slaves. On the contrary, I think that upon the coming in of the answer of Bowden's executrix, the plaintiff should have had a decree for the amount of her claim against the absent administrator and his sureties, leaving it to them to seek indemnity from Bowden's estate, if they really thought he was indebted to Brown, the administrator and absentee. On these grounds, I am (as I was on the former argument of the case) for affirming the decree.

TUCKER, P. This case has again been fully argued, and although I am still of opinion that the decree should be reversed, yet upon the question of parties my views have been somewhat changed. Concurring heartily in the principle of former decisions as to the right of an executor or his surety, when sued by a residuary legatee or distributee, to require that all such legatees or distributees should be parties, I am of opinion that it is a right which is conceded 247 for his own benefit, and \*which he may therefore waive. I am moreover of opinion, upon the principle stated a few days past in *Manna v. Flinn's adm'r*\* that as that right was not insisted on or asserted, it must be taken to be waived, or at least it cannot for the first time be asserted here. I am therefore of opinion that there was no error in not making — George a party defendant, the defendants not having made the objection in the court below, and the extent of the complainant's rights being capable of ascertainment without him.

On the other point my opinion is unshaken, and is indeed confirmed and strengthened by the forcible views presented in the argument by the counsel of the appellants. Even if it be conceded that, upon the principles of *Dabney's adm'r* and others v. *Smith's legatees*, 5 Leigh 13, (which I fully approve) there was, in the commencement of the suit, no obligation on the complainant to pursue the funds in the hands of Bowden, yet after having instituted that proceeding, and by it attached those funds in the hands of the home defendant, she was bound in good faith to retain any lien she acquired. But for this course of proceeding, the defendants would, it may be presumed, have taken that pursuit upon themselves. The complainant having done so, they were lulled into security. For seven or eight years the case was depending, and Mrs. Bowden's answer having been entirely unsatisfactory, an order, and then an attachment, was moved for against her, to compel her to answer interrogatories. Thus far the sureties were led to believe that redress was in the first instance sought from her; when all at once the plaintiff abandons the pursuit, and moves to discharge the attachment, which the defendants thereupon instantly pray may be enforced. It is enforced. Mrs. Bowden confesses that 5000 dollars came to the hands of her

husband as the agent of the administrator, but she says, through her agent, that 248 the \*administrator was indebted to her husband to a much larger amount. Of this she furnishes no evidence; and herein the case is like that of *Beckwith v. Butler*, 1 Wash. 224. In this state of things a decree is rendered against the sureties, and being in its character final, (for the plaintiff has attained the object of her suit,) it operates a dismissal as to Mrs. Bowden, if it does not discharge her from all future claim. The effect therefore is to remove the lien, if there was any, of the attachment, and to let loose the funds which the suit in effect had impounded. A stronger case cannot, I think, be presented. The plaintiff, by her course of proceeding, has lulled the defendants into security; she has failed to pursue with diligence a fund that might have been available, and has in effect released it by taking a final decree against the sureties and waiving any decree against the garnishee.

It is said, indeed, that the creditor should not be compelled to go on with a pursuit that might delay him: and as a general principle this is undoubtedly true. *Dabney's adm'r* and others v. *Smith's legatees*, 5 Leigh 13. The prosecution of this suit manifests no unusual haste or diligence. In eight years the plaintiff might by reasonable diligence have brought about a full investigation of the accounts between Brown and Bowden, and have ascertained the truth of the allegation of Mrs. Bowden, (which, by the way, had not the sanction of her oath,) of the existence of a debt to her husband from Brown of 33000 dollars. That debt she was bound to prove. It would lead to most mischievous consequences to decide that a garnishee, who has funds in his hands by his own acknowledgment, should sweep them off by a round assertion that he has demands more than adequate to the amount of them, without a shadow of proof of the existence of those demands. Here, indeed, the allegation has not even the support of the party's own oath; for the anomalous case is presented 249

\*of a defendant purging herself from a contempt, not only without oath, but through an agent merely. The proceeding was altogether irregular, as was also the failure to give notice to the sureties of the proceeding of the commissioner. This was peculiarly necessary in this case. For although it is true that at this stage the attachment was prosecuted at the instance of the sureties, yet as it was impossible for them to know when Mrs. Bowden would attend to discharge the attachment by submitting to be examined, it was incumbent on the commissioner to give them notice, that they might attend for the purpose of putting the proper interrogatories.

I am, upon the whole, of opinion to reverse the decree, and send the cause back for further proceedings against the funds, of whatever kind, in the hands of the garnishee, which are chargeable with the plaintiff's demand.

The decree entered in the court of appeals was as follows:

"The court is of opinion that it would

\*Reported ante, p. 93.



have been improper to postpone a decree in favour of the appellee against the appellants, until a final settlement of the accounts between the estate of Bowden and the absent defendant, and the enforcement of any claim that on such account might be shewn to be due from the estate of Bowden to the absent defendant, or until the equity of redemption in the slaves conveyed by the absent defendant as a security for any balance he might owe Bowden's estate had been pursued, and, as far as it could be made available, charged with the appellee's claim; and that the decree in favor of the appellee against the appellants was not prematurely rendered. The court is further of opinion that as the decree appealed from made no final disposition of the matter in controversy in respect to

the executrix and estate of William 250 \*Bowden, that decree did not preclude the plaintiff, should the decree against the appellants prove unavailing, from farther proceedings against the executrix and estate of William Bowden, nor the appellants, after they satisfied or discharged the claim of the plaintiff, from enforcing their right of subrogation, by causing, on their application to the court by petition or cross bill, such farther proceedings to be had, either in the name of the appellee or their own, and in either mode at their costs, so as to obtain in this suit such relief as could have been obtained by the appellee, against the executrix and estate of Bowden, or from the said equity of redemption, had no decree been rendered against the appellants; and that this right to cause such farther proceedings to be had should still be preserved to the appellee and appellant; and that if such farther proceedings be not had within a reasonable time after this case shall return to the superior court, the suit, as to the representative and estate of William Bowden, ought, at the instance of such representative, to be dismissed for want of prosecution." Therefore, decree affirmed with costs, and cause remanded for farther proceedings to be had therein according to the principles of the foregoing opinion and decree.

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\*Moss v. Green.

April, 1839, Richmond.

[34 Am. Dec. 781.]

**Conditional Sale—When Not a Mortgage\*—Case at Bar.**

—A. being in want of money, B. his friend applies to C. to lend it, which the latter refuses, but says he will advance the money upon condition that A. will let him have a particular slave at a fair value. A conversation ensues as to the value of the slave, and \$600 is fixed on as a fair price. Whereupon C. agrees that if A. will convey the slave to him, he will advance the money that is wanted, and if it is returned at Christmas with interest, he will release the slave, and if it is not returned by that time, he will make it \$600, and keep the slave. A. being informed of this proposition, declares him-

self willing to comply with it, and observes that the slave is the one he preferred to sell, and that he thinks \$600 a fair price. Afterwards A. and C. go together to a scrivener, and request him to write a conditional bill of sale for the slave, which he writes accordingly, and it is thereupon executed by A. It expresses on its face that A. in consideration of \$393 89 cents, which is paid to him, has bargained and sold the slave to C. with the following conditions, to wit: if A. shall pay to C. the sum of \$393 89 cents on or before the 25th of December following, with lawful interest from the date, then the conveyance is to be void; but if A. shall fail to return the said sum and interest on or before the 25th of December, he obliges himself, upon C.'s paying him the sum of \$206 11 cents, (which makes up the \$600) to deliver to C. the slave, and make him a complete title. A. failing to make payment on or before the 25th of December, C. gets possession of the slave, and insists that the transaction is a conditional sale, which he can make absolute by paying the \$206 11 cents; whereas A. contends it is a mortgage, which he may redeem by paying the \$393 89 cents with interest. **Held**, the transaction is a conditional sale, and not a mortgage; *dissentientibus* TUCKER, P. and BROOKE, J.

**Same—Equity Jurisdiction—Multiplicity of Suits—Decree for Payment by Vendee.—**

A. falling in his bill to redeem, the question arises whether a court of equity has jurisdiction to make any decree as to the \$206 11 cents, which C. in his answer declared his willingness to pay. **Held**, under the circumstances, equity may put a stop to further litigation, and decree the payment of that sum with interest, but without costs.

The principal question in this cause, namely, whether the transaction be- 252 tween the parties was a mortgage or \*a conditional sale, depended chiefly upon the following writing, executed by Green and delivered to Moss, which the latter produced and filed with his answer:

"Know all men by these presents that I John Green, for and in consideration of the sum of three hundred and ninety-three dollars and eighty-nine cents to me in hand paid, as hereafter mentioned, by James Moss, have bargained and sold unto the said James Moss three negroes, to wit, Creasy and her two children, and her future increase; to have and to hold the said negro woman Creasy and her two children, to wit, Eliza and Lucy, and her increase, to him the said James Moss, his heirs and assigns forever, with the following conditions, to wit: if the said John Green, his heirs or assigns, shall well and truly pay to the said James Moss, his heirs or assigns, the said sum of three hundred and ninety-three dollars and eighty-nine cents, paid the said Green as above, on or before the twenty-fifth day of December next, with lawful interest from the date hereof, then the above conveyance to be void and of no effect; but if the said John Green shall fail or neglect to return the said sum of three hundred and ninety-three dollars and eighty-nine cents and the interest, on or before the said twenty-fifth day of December, the said John Green obliges himself, his heirs or assigns, upon the said James Moss paying him the sum of two hundred and six

\*Conditional Sales—Distinction between Mortgages and Conditional Sales.—The principal case is cited in *Earp v. Boothe*, 24 Gratt. 375. See generally, monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

dollars and eleven cents to make the sum of six hundred dollars, the consideration value of the said negroes, to deliver to the said James Moss, his heirs or assigns, the said negro woman Creasy and her two children, to wit, Eliza and Lucy, and her increase, and make him a complete title to the said negroes. In witness whereof the said John Green hath hereunto set his hand and seal this second day of November 1819.

John Green [Seal.]"

Witness,

Howell Myrick.

253 \*On the 13th of June 1821, Green filed a bill in the superior court of chancery holden at Richmond, wherein his case was stated rather imperfectly.

A supplemental bill, filed in January 1822, stated the case as follows: That in September 1819, the complainant, having occasion for money to aid him to pay off an execution issued against him by Lynch and Carter on a judgment rendered in Sussex superior court, and to redeem a negro girl of his named Rhoda, taken under the execution, applied (through Mr. William Parham) to James Moss for the loan of money for that purpose. That Moss agreed to lend the money on the following terms, viz. that for the loan of the money, the complainant should give him a conditional bill of sale for a negro woman named Creasy, and her two children named Eliza and Lucy, redeemable by the payment of the money, with interest, at Christmas following. That Rhoda was sold by the sheriff about ten days after Sussex court, in October 1819, and was cried out to Moss as the highest bidder, at about the price of 230 dollars, or perhaps 3 or 4 dollars more. That Moss agreed positively, before and at the sale, that the complainant should have the right of redemption on the terms aforesaid. That no money was then paid, but it was agreed to be paid by Moss at the next Sussex court, and the sheriff gave Moss a bill of sale for Rhoda, until the conditional bill of sale for Creasy &c. should be drawn. That the said execution being for a considerable sum, and the complainant not having a sufficient sum to pay it off, he borrowed of Moss the farther sum of 23 dollars 56 cents Virginia money, and about 140 dollars 39 cents North Carolina bank notes at 7 dollars discount, and at the same time executed to Moss a conditional bill of sale for the said negro woman Creasy and her two children, expressing on the face of it, as the complainant believes, that he should have the right of redeeming them on the twenty-

254 fifth day of December \*next. That the complainant was to retain possession of the slaves. That it was stipulated by Moss, that if the complainant did not pay the said borrowed money, with interest, on the 25th of December ensuing, then, if Moss should pay the complainant the sum of 206 dollars and 11 cents, the complainant should deliver up to him the said negro woman Creasy and her said two children. That on the 25th of December, the complainant had the money with interest ready to pay, but was very much indisposed, and did not carry and offer it to Moss, nor did Moss offer him, then or since, the said sum of 206 dollars and

11 cents, or any part of it (if that could have availed him). That on the said 25th of December, however, the said woman with her two children ran away from the complainant to Moss, and he has detained them ever since. That on the 27th of December, that is, two days after the time for redemption, Moss came to the complainant, near his dwelling-house, and complainant stated to him his indisposition on the 25th, but that he had then, and still, the borrowed money ready to pay to him, as he wished to redeem the woman and her two children. That Moss then told the complainant, explicitly, that he would not permit him to redeem them; that they had been, since the 25th of December, at his house, and he would keep them; that he had got the advantage of complainant, and would keep it. But Moss made no tender or offer to pay him the said sum of 206 dollars and 11 cents.

Moss is made defendant to both the original and the supplemental bill: and the prayer is, that complainant be permitted to redeem Creasy and her two children, on paying up the sum borrowed, with interest; that Moss may be compelled to pay a reasonable hire for Creasy from the 25th of December 1819, till he shall deliver her up to the complainant; that he be also decreed to deliver up the bill of sale for Rhoda; and for general relief.

255 \*Moss answered, saying, that the allegations in the bill as to Green's borrowing money from him are untrue: that Green applied to him for a loan of money, through one of his neighbours, but he declined the application: that afterwards a negro belonging to Green, to wit, Rhoda, being exposed to public sale, defendant purchased her at the sale, being the highest bidder, and took a bill of sale for her from the sheriff who sold her, which bill of sale defendant has in possession: that Green, through a certain William Parham, solicited defendant for a sum of money on loan, which the defendant refused, and told Parham, if Green would sell defendant a negro woman he had in possession, to wit, Creasy, and her two children, he would give up to Green all title he had to Rhoda, and pay Green the balance in cash, or on such terms as might be agreed on: and that Green acceded to the offer, and executed to defendant a bill of sale for the said negro woman and children; which bill of sale defendant files with his answer, and prays to be made a part thereof.\* As to any conversations of defendant with Green respecting a loan of money to him, or any promise to permit him to redeem the said negroes, he says he never negotiated with Green in any way, except in the way alleged in this answer. He relies on the sealed instrument filed by him, as disclosing the whole transaction respecting the said sale of negroes. He paid to Green the sum of 393 dollars 89 cents, as is expressed in the said bill of sale, in part for the said negroes, and Green never did offer to pay defendant the said sum, either before the 25th of December next ensuing

\*It is the instrument of the second of November 1819, inserted in the commencement of this report.

the execution of the said bill of sale, or on that day, or since that day, but defendant did tender to Green the sum of 206 dollars 11 cents, the balance he was to pay, making in all the sum of 600 dollars, which was adjudged by all who saw the 256 \*negroes to be their full value, and was in reality their adequate value. He is now ready, and ever has been ready since the execution of the bill of sale, to comply on his part with the condition. He did consider and now considers the instrument in his possession, conveying the said slaves to him, as a conditional sale, to be defeasanced by complying with its terms. Green failed on his part. And defendant came peaceably into the possession of the slaves, and insists that he ought not to be disturbed in that possession. All the allegations in the original and supplemental bills, contrary to this answer, are denied.

William Parham deposed, that in October 1819, Green came to him, and informed him that he had some property in the hands of the sheriff, which was to be sold in a few days, and he was very anxious to release it, and that he had a part of the money and wished to borrow the balance; and enquired of deponent if he knew of any person who had the money, that would lend it for a short time; and farther said he would pledge a negro for the payment by christmas following. Deponent informed Green, he had heard that Moss had some money by him; and Green requested him, if he should see Moss, to endeavour to get the money for him, and he would give a bill of sale for a negro woman, to secure the payment, with interest, by the christmas following, and if the money was not paid by that time, he should have the negro. Deponent saw Moss the next day, and mentioned the subject to him. He at first refused to have any thing to do with Green in any way whatever; but after some conversation with deponent on the subject he agreed to advance the money, upon condition that Green would let him have, at a fair value, a negro woman named Creasy and her two children (which woman a negro man of his had for a wife). Moss then described the negroes to deponent, and asked

him what he thought they were worth; 257 and deponent \*answered, that from the description given, he thought six hundred dollars would be a fair price for them. Moss then agreed that if Green would convey to him the said negro woman Creasy and her two children, with her future increase (she being pregnant at the time), he would advance the money wanted, and if the sum advanced was returned by the christmas following, with interest, he would release the said negroes, and if the money was not returned by that time, he would make the sum so advanced 600 dollars, and keep the negroes. A day or two afterwards, Green applied to deponent to know if he had made an arrangement for him to get the money. Deponent informed him of the proposition of Moss, and he said he was willing to comply with it, and observed that the negro woman was the one he preferred to sell, and that he thought 600 dollars a fair

price for her and her children. Deponent then advised him to go to Moss, and request him to meet at deponent's house the next morning, take a conveyance for the negroes, and pay the money. Green came to deponent's house the next morning, and waited some time, and Moss did not come; and at Green's request, deponent wrote a letter by him to Moss on the subject, in the following words: "Sir, I have seen mr. Green, and he is willing to convey to you his negro woman Creasy and her two children, for the loan of the money that he now wants, and if he fails to return it to you with interest by christmas, he will then deliver you the negroes upon your making the sum loaned him 600 dollars. If you will let him have the money, he has pledged his word to me that he will execute the conveyance at any time. 18th October 1819."

Howell Myrick deposed, that by virtue of an execution, he, as deputy sheriff, sold a negro girl taken from John Green, named Rhoda, and Moss became the purchaser: that some time afterwards, Green had to pay him as sheriff a farther sum of money, 258 and Green and \*Moss came together to deponent, with a request that he would write a conditional bill of sale for a negro woman Creasy and two children, which he did: that Moss admitted that the negro girl Rhoda, purchased at the sale, was included in the consideration money in the conditional bill of sale which deponent wrote, and so Green had purchased of Moss the said girl Rhoda. The balance of the consideration money in the conditional bill of sale, after deducting the price of Rhoda, was paid to deponent.

David Flowers deposed, that on the 27th of December 1819, Moss and Green met in the road, when Moss said to Green, "I have come for a settlement," and Green answered that he did not expect him so soon, for he had promised him twenty days notice; when Moss replied that he did not, but that he had given him ten days notice." Green's answer was, "I am ready to settle with you now, if you will pay me for your board with me." Moss replied that he had done enough for him; when Green rejoined, "I don't know what it was." Moss answered, "In getting work for you to do; but you done then as you do now, done nothing, and it's useless to talk any more about it. The negroes are at my house, and there I mean to keep them." Green enquired how they came there, for he knew nothing about their going. Moss replied, "Well, they are there, and I have come to pay the money for them." Green said, "I don't wish you to pay me any money, for I would rather pay you than that you should have the negroes. Suppose they were to die?" Moss answered, "I have the advantage of you, and I mean to keep it. I have the money in my pocket, and if you will go with me to mrs. Green's, I will pay you every cent. I have your bond, but I will not offer you that. I have got the Virginia money and specie."

There were two other depositions, one as to the fact of Moss's boarding with 259 Green some years before, and \*the

other mentioning a settlement between them subsequent to the boarding.

On the 9th of February 1826, the chancellor decreed that if the plaintiff should, within six months, pay to the defendant the sum of 393 dollars 89 cents, with interest thereon from the second of November 1819, the defendant should deliver to the plaintiff the slaves Creasy and Eliza and Lucy, and their increase, and should also deliver to the plaintiff, to be cancelled, the bill of sale of the second of November 1819. And the court further ordered that the defendant render an account of the hires of the said slaves during his possession of them, before one of its commissioners.

Commissioner Ritchie was of opinion that Moss was entitled to compensation for keeping the negroes from the year 1820 to the 9th of August 1826, the time of the plaintiff's default to satisfy the claim; after which period, the elder children becoming valuable, he thought the plaintiff should receive hire. The result according to his report was, that instead of any hires being due to the plaintiff, there was a balance due from him, for support of the negroes, of 95 dollars 9 cents, with interest on 75 dollars, part thereof, from the first of January 1830. To this report Green excepted.

In the mean time, Moss having refused to receive the money which the decree required Green to pay him, Green, on the 24th of August 1829, deposited in the office of the bank of Virginia at Petersburg a sufficient amount in specie, with his check on the office for the same, to be paid to any person legally authorized to receive it, after a final decree in the cause.

On the 24th of March 1830, the cause came on to be heard on the report of the commissioner. On consideration whereof, the court, disapproving so much of the report as relates to hires, and being of opinion that a reasonable hire should be allowed for the woman Creasy, and that 20 dollars per annum

260 would be this reasonable \*hire, amounting, for the time of the defendant's possession, to 208 dollars 33 cents, and that this hire should be deducted from the debt with the interest thereon to the date of the deposit, which would leave a balance due to the defendant of 417 dollars 42 cents, decreed, that after deducting the plaintiff's costs from the last mentioned sum, the defendant, on receiving a check for the balance out of the money deposited in the branch of the bank of Virginia at Petersburg, should deliver to the plaintiff the negro woman Creasy and her children, and also the bill of sale, to be cancelled.

From this decree Moss appealed.

Shands, for the appellant, observed, that the nature of the contract was fully disclosed by the sealed instrument. Green, in order to redeem the slaves, was bound to pay a certain sum on a certain day, and in case of default on his part, the right accrued to Moss, by advancing a sum of money, to be put in possession of the slaves and have his title perfected. The evidence of the witness who drew the contract shews most clearly that an absolute sale was intended and an adequate

price fixed. A sale being intended, a court of equity ought not, under the circumstances, to permit Green to redeem. The agreement in this case is substantially like that in Chapman's adm'r v. Turner, 1 Call 280.

Leigh, for the appellee, said, that the question whether a transaction was a conditional sale or a mortgage, was always one of no little nicety. It is to be determined upon a view of all the circumstances of the transaction, without being confined to the written evidence of it. The cases which have been decided on the subject are Thompson v. Davenport, 1 Wash. 125; Chapman's adm'r v. Turner, 1 Call 280; Robertson v. Campbell & Wheeler, 2 Call 421; King v. Newman, 2 Munf. 40; Roberts's adm'r v. Cocke ex'or &c., 1 Rand. 121; Leavell v. Robinson, 2 Leigh 161. In this case the 261 \*appellee relies on the facts, 1. that the money advanced by Moss was to be returned by Green with interest; 2. that the property was in the mean time to remain with the bargainor; and 3. that the delivery of the slaves at christmas by Green to Moss was made dependant on a double condition, viz. that Green should not then refund the 393 dollars 89 cents with interest, and that Moss should then pay him the 206 dollars 11 cents. Now, if Green did not pay the former sum, neither did Moss pay him the latter. To make the conditional sale complete, the two conditions were to be contemporarily complied with, namely, at christmas. If Green sold on condition of his not paying 393 dollars 89 cents at christmas, Moss purchased on condition that he should pay 206 dollars 11 cents at the same time. Moss did not pay the money. What passed on the 27th of December was not even a tender of it. This last circumstance distinguishes this case from all the others that have been before this court, and seems to indicate the necessity of holding that Green should be allowed to redeem. For the doctrines in England, see Willett v. Winnell, 1 Vern. 488, and 2 Cruise's Dig. 93, 4.

262 STANARD, J. A careful examination of the record has resulted in the conviction that the transaction between these parties, which the appellee insists was, and the court below has adjudged to be, a loan secured by mortgage, was a conditional sale and purchase. This to me is made manifest by the terms of the bill of sale, coupled with the evidence of Parham and Myrick. The real contract, as understood by both parties and the witnesses, was a sale of the slaves at a price fairly fixed to the satisfaction of both parties; the one intending to buy, and the other being willing to sell; the purchaser advancing a part of the purchase money; the seller reserving the right to abrogate the con- tract \*of sale by returning the money so advanced, with interest, at or before a particular time; and if not so abrogated, the contract to be completely executed, by the purchaser paying the residue of the purchase money, and the seller surrendering the possession of the slaves. To give the relief sought by the appellee, would be to give the active assistance of a court of equity to a party seeking to absolve himself from a

fair contract. This ought not to be done.

My opinion therefore is, that the decree of the court of chancery is erroneous and ought to be reversed: and as the appellant avows his willingness to pay the balance of the purchase money; and as, from delay by reason of the pursuit of a supposed right of redemption, and the sanction of that claim by the court below, and the possession by the appellant of the slaves, there may be some difficulty in the recovery of it by a suit at law, which in strictness was the proper remedy,—therefore, to prevent the occasion of future litigation between the parties, I think it fit that a decree should be rendered in favour of the appellee for the balance of the purchase money and interest, but without costs.

PARKER, J. The bill was filed in this case to redeem certain slaves alleged to have been conveyed to the defendant as a security for the repayment of a loan of 393 dollars 89 cents. The answer, which is responsive to the bill, denies that the deed for the slaves was intended merely as a security for money loaned. It avers that the respondent refused to advance his money on the terms proposed by Green of pledging a slave for the repayment; but that the proposition made and accepted was, that if Green would sell him a negro woman named Creasy (whose husband he owned) with her two children, for a price ascertained, he would advance the sum then required by Green, in part payment, and

Green should be at liberty to return it on or before the 25th of the ensuing December, and avoid the contract; but if not, that he would pay the balance, and take the slaves in possession.

The depositions of Parham and Myrick go far to verify this statement. Green had applied to Parham to get from Moss the money he wanted, and said he would give a bill of sale for a negro woman, to secure the repayment with interest at the following Christmas, and that if the money was not paid at that time, Moss should have the negro. When Parham made this proposition known to Moss, he at first refused to have anything to do with Green, but after some conversation said, if Green would let him have Creasy and her two children, he would advance the money he wanted, upon condition that he would let him have them at a fair value. That value was then agreed on between Parham the agent of Green, and Moss, at six hundred dollars, and it was arranged that Moss should, if Green approved it, advance the sum then required by Green, and take a conveyance of the slaves, with a stipulation that if the sum so advanced was returned by Christmas with interest, Moss would release the slaves, but if the money was not then returned, he would make up the sum of 600 dollars and keep them. Parham informed Green of this proposition and valuation, who said he was willing to comply with it; that Creasy was the negro woman he preferred to sell, and that he thought 600 dollars a fair price for her and her children. After this, Parham took no further part in the transaction, except, as he says, to write a letter to Moss, (which it does not appear

that he received,) informing him of Green's acceptance of his terms.

The bill of sale was written and attested by Howell Myrick. He proves, that he was requested by Moss and Green to write a conditional bill of sale for Creasy and her two children; that Moss had previously bought, at a sheriff's sale made by Myrick, a negro woman belonging 264 \*to Green, named Rhoda; and it was agreed, on the occasion referred to, that the price paid for Rhoda was to be a part of the consideration money for Creasy and her children, and that the balance of the consideration money in the conditional bill of sale mentioned should be paid, as it was in fact paid, to Myrick. The bill of sale expresses the consideration to be 393 dollars 89 cents, and is in the common form of such instruments, but reserving liberty to Green to repay the said sum of 393 dollars 89 cents, with interest, on the 25th of the ensuing December, in which event the sale was to be void. If, however, Green neglected or refused to do so, then he bound himself, upon Moss's paying him the additional sum of 206 dollars 11 cents (to make up the price agreed on of 600 dollars) to deliver Creasy and her children to Moss, and to make him a complete title therefor. No time is fixed for this additional payment, but it must necessarily have been after the 25th of December, because, until that day expired, it could not be known whether Green would pay the 393 dollars 89 cents or not.

Green failed to pay or tender the money at the time stipulated, but on the 27th of December, merely said to Moss he was ready to settle with him, if he would pay him for his board; which it seems had been due, if due at all, some eight or nine years before. Moss got possession of the slaves, and on the same 27th of December, offered to pay the additional 206 dollars 11 cents; which Green refused, and in 1821 brought this suit.

Upon this state of facts, the question propounded to the court is whether this transaction between Green and Moss was a mere mortgage, or a conditional sale? If it was in its inception a mortgage, I agree that the court will not permit it to be converted into an absolute purchase, for the default in the payment of the mortgage money at the appointed time. The rule is, once a mort- 265 \*gage always a mortgage, to which the right of redemption is inseparably incident, and cannot be restrained by any clause or agreement whatever made at the time of the loan. Willett v. Winnell, 1 Vern. 488, (which, by the very terms of the statement, was admitted to be a borrowing of money and a mortgage to secure it). But if the intention of the parties is to do something more than provide a security for money loaned or advanced, and to make a conditional sale if a further sum is advanced or the first sum is not repaid, there is certainly no rule of law which authorizes a court to control that intention. Thus in the case of Newcomb v. Bonham, 1 Vern. 8, 214, 232, where A. made an absolute conveyance for a sum of money paid, and by another deed

of equal date the lands were made redeemable at any time during the life of the grantor, the final decision of the court of chancery, affirmed in the house of lords, was that the estate was absolute in the grantee after the death of the grantor; there being proof that such was the intent of the parties, and their understanding at the time. So in the case of Chapman's adm'r v. Turner, 1 Call 280, an instrument in the following words was held to be a conditional sale, irredeemable after the day fixed for the payment of the money loaned: "I this day received of mr. Jno. Turner the sum of £30. and put a negro woman named Hannah in his hands as security, and if the said £30. is not paid at or before next July Hanover court, the said Turner is to have the said negro for the said £30." (Signed) "Richard Chapman." The words "and put a negro &c. in his hands as security" were considered to have effect by construing the sale as defeasible till July Hanover court, (during which time the negro would be only a security,) and afterwards absolute: whereas the other words of the agreement, "and if the said £30. is not paid at &c. Turner is to have the said negro for the said £30." would have no effect,

(judge Roane said,) without decreeing  
266 \*the sale absolute after default in nonpayment. It was also said in that case, that no loan was contemplated between the parties, as Turner had refused to lend, wishing to invest his money in property. That case is stronger against the construction placed on it by the court than the one at bar, because the £30. was not proved to have been the value of the negro, agreed on between Turner and Chapman, or to have been a fair value; although, as judge Roane said, it did not fall short of the general estimate of the witnesses "in any excessive degree." Here, it is proved that the 600 dollars was the full value of the slaves, and that Green was willing to sell them at that price, subject to his right to return the portion of the money paid, within a stipulated time. In the other circumstances, the cases are alike. The sale was defeasible until christmas, and until that period the slaves would be considered as a security; but if, after that, it is not deemed to be absolute, we shall have to reject the subsequent words of the agreement, and plainly violate the intention of the parties. In this case, too, Moss refused to lend money and take a bare security. His object was to buy the wife of a slave he owned, but to give time to Green to return the money advanced. That object was well known to Green, who consented to sell on the terms proposed. Thus the cases are similar in every circumstance relied on by the judges in Chapman's adm'r v. Turner, to sustain their opinions that the transaction in that case was a conditional sale; and there are, in the case at bar, facts proved which tend to strengthen such a conclusion. Besides the fact, already alluded to, of the value of the slaves being arranged and settled with an express reference to a sale, the parties applied to Myrick to write a conditional bill of sale, *eo nomine*; and it must be intended that they understood

the difference between such an instrument and a mere security for money lent.

267 \*Another case in this court, confirmatory of this view of the case before us, is that of Roberts's adm'r v. Cocke ex'or &c., 1 Rand. 121. It was a loan of money,—a pledge for its repayment by a given day, with interest,—and a stipulation that if not repaid at the day, Roberts should have the negro. It appearing that the £100. mentioned in the bill of sale was probably the agreed price of the negro, as evidenced by the subsequent acts of the parties, no redemption was permitted. To the same effect is the case of Leavell v. Robinson, 2 Leigh 161.

In the case of Robertson v. Campbell & Wheeler, 2 Call 421, judge Pendleton observed that it was often a nice and difficult question to draw the line between mortgages and conditional sales. "The great desideratum," says he, "which this court has made the ground of their decision, is whether the purpose of the parties was to treat of a purchase, the value of the commodity contemplated, and the price fixed; or whether the object was a loan of money, and a security or pledge for the repayment intended."

Tried by these criteria, or by the authorities I have cited, I think the transaction between Moss and Green amounted to a conditional sale. The object of the security was not merely to compel repayment, but a sale and purchase was evidently intended, subject to the right of the vendor to defeat it.

That the agreement was executory does not render it the less binding: nor does the fact that the possession was for a time retained by Green, (which, by the way, was the reason why interest was to be allowed if the money advanced was returned,) change the nature of the transaction; for when Moss asked or obtained possession of the slaves, he was bound to pay the additional sum; while Green was not bound to return any part of the 393 dollars 89 cents if he did not choose to do so, and although the 268 slaves had died subsequent to \*the 25th December, he would still have been entitled to the additional sum, and the loss would have fallen on Moss.

I am therefore of opinion to reverse the decree, and enter one for the balance only of the purchase money, with interest.

CABELL, J., concurred.

BROOKE, J. After what has already been said of the details of this case, I shall say very little. It has been often said, that it is frequently very difficult to distinguish a conditional sale from a mortgage; and I add, that conditional sales ought not to be countenanced by a court of equity, as I think they are too frequently the vehicle of extortion. In the case before us, when the treaty for the loan of money was begun through Parham, the property of Green the borrower was under execution, and he might in some sense be said to be the slave of the lender. It is true, that before the loan was consummated, his property had been sold and Moss had become the purchaser; but it does not appear that he was then less embarrassed,

and Moss was well apprized of his embarrassment, and appears to have had a great desire to possess the slaves in question, so much so that when he got possession of them against the consent of Green, he determined to keep them, instead of resorting to the proper tribunal for a decision on his contract. The first part of that contract was certainly nothing more than a mortgage; but to bar any right of redemption, the latter part of it, which by itself might be construed a conditional sale, was afterwards inserted—no doubt with the consent of Green; but that is of no consequence in a court of equity, which will not permit that which is a mortgage to be made irredeemable, even with the consent of parties; its maxim being once a mortgage always a mortgage. \*I shall not again cite all the cases that have been cited by the bar and bench. The first case in this court is Chapman's adm'x v. Turner, 1 Call 280; and I shall compare it with the case before us. In that case, the slave was delivered to Turner the lender of the money, at the same time that the money was received, and the money was to be repaid without interest; circumstances characteristic of a sale, and not of a mortgage. In the case before us, the slaves were retained by Green as his property, and the money was to be repaid with interest; both of which are circumstances characteristic of a mortgage. I think these cases are totally unlike. The first was decided by this court to be a case of conditional sale; and able judges have been heard to say, that even that case ought to have been differently decided; such is the unwillingness of courts of equity to sustain forfeitures or to limit the right of redemption, when it sees that the first object of the victim was to borrow money, and not to sell property. If the latter was the object in this case, what good reason can be given for Green's retaining the property, and agreeing to pay interest on the money? If the intention was to sell on condition, (a condition not likely to be performed, if we are to judge by the state of Green's affairs,) why was the slave not delivered, as is usual in the sale of a slave? why was interest to be paid on the money borrowed? On these grounds, I think the decree of the superior court was correct in deciding that the contract was a mortgage, and not a conditional sale.

TUCKER, P. I should be much concerned at a difference with part of my brethren on this occasion, if it were not that the line of discrimination between mortgages and conditional sales is confessedly indistinct, and that each case must in a great measure depend upon its own particular circumstances. In this case I \*am very clearly of opinion that the transaction between the parties was a mortgage, and not a conditional sale.

In considering this question, I am of opinion that it is unnecessary to recur to the parol testimony for an explanation of the intention. Not that I deny the admissibility of parol testimony to shew that, by the act of the scrivener, that which was intended as a mortgage has been turned into a condi-

tional sale, or that which was designed as a real though defeasible sale has been converted into a mortgage, against the true meaning of the contracting parties. But where there is no pretence that the agreement is not truly drawn, and where, on the contrary, the party insists on the agreement as drawn, and protests against any change of it by parol evidence, I do not admit that the party so insisting can be permitted to resort to such evidence, for the purpose of proving that the transaction was not what upon its face it purports to be. Such is the case here. The defendant in his answer says, that "he relies on the sealed instrument as disclosing the whole transaction respecting the said sale of the negroes, and is still willing to be bound by it on his part." Although, therefore, in many cases parol evidence has been freely admitted to prove an absolute sale in form to be a mortgage in fact, and in some has been admitted for the much more questionable purpose of explaining away a mortgage into a conditional sale (Chapman's adm'x v. Turner, 1 Call 280,) yet such evidence cannot be admissible here. The supposed purchaser does not pretend that the true character of the instrument had been perverted by the fraud, mistake or ignorance of the scrivener, but relies upon it as "disclosing the whole transaction," and strongly indicates his protest against an attempt to affect its character by an appeal to loose conversations.

How then is the case upon the face of the written document? It announces that Green, for the consideration of 393 dollars 89 cents to him in hand paid by \*Moss, bargained and sold the slaves to Moss, to hold to him and his heirs forever, upon the condition that if Green repaid the money with interest at Christmas, the conveyance should be void. If the deed had stopped there, it is not perceived that there could be any doubt that it was a mortgage; a construction confirmed by the fact that the slaves were retained in the possession of the mortgagor, and that the money was to be repaid with interest.

The deed, however, proceeds with a further provision, that if Green fails to pay the 393 dollars 89 cents at Christmas, he obliges himself, upon Moss's paying him the further sum of 206 dollars 11 cents, (to make the sum of 600 dollars, the consideration value of the said negroes,) to deliver the negroes to Moss, and make him a complete title for them. Does this clause convert what was before a mortgage into a conditional sale? I think not. It is well settled that no restraints will be permitted on the equity of redemption, since, if permitted, they would be perpetually extorted from the necessities of the borrower. And hence a court of equity allows validity to no agreement, made at the time of the mortgage, that in case the money be not repaid, and a further sum be advanced, the conveyance shall be absolute. Thus in the case of Willett v. Winnell, 1 Vern. 488, A. mortgaged lands for securing the payment of £200. to B. with the usual provisions to be void upon payment at the day; and it was agreed that if the £200. was not duly paid, then B. was to



pay A. a further sum of £78. in full for the purchase of the premises. The transaction was held to be a mortgage, and the heir of A. was permitted to redeem upon repayment of the two sums of £200. and £78. the last of which had been paid by the creditor to the administrator of A. This case seems to me to be full to the point, and it has never in any subsequent case been questioned, but on the contrary is referred to by the  
272 best \*elementary writers and abridgments, as establishing the principle that no agreement made at the date of the mortgage, for the purchase of the property on failure of payment, shall be held to operate an extinguishment of the equity of redemption. 5 Bac. Abr. 6; 1 Eq. Ca. Abr. 313, pl. 14.

It is objected indeed that here there is no covenant for repayment of the money, and lord Hardwicke and other judges, it is said, have always considered the want of it as a circumstance of some weight. But all admit that it is not conclusive. This is very strikingly evinced in *Lawley v. Hooper*, 3 Atk. 278, 280, where lord Hardwicke himself says: "It is objected that this is not to be considered as a mortgage, because there is no covenant in the deed to repay the money; but that objection is not well founded, for it is not necessary." See also *Conway's ex'ors v. Alexander*, 7 Cranch 218; *Mellor v. Lees*, 2 Atk. 494; *Goodman v. Grierson*, 2 Ball & Beatty 278. It seems indeed wonderful that a covenant should be considered so important; for without it the mortgagee has full remedy for his debt, even if the mortgaged subject were to be destroyed. For, as was justly said in *King v. King*, 3 P. Wms. 358, every mortgage, although there be no covenant nor bond to pay the money, implies a loan, and every loan a debt; as in the case of the mortgage of a ship at sea—though she was taken, and thus lost to the parties, the executor of the mortgagor was decreed to pay the debt secured by the mortgage. So as to Welsh mortgages, which never contain a covenant for repayment. *Howell v. Price*, 1 P. Wms. 291. So in *Ross v. Norvell*, 1 Wash. 14, there was no covenant for repayment. So in *Robertson v. Campbell & Wheeler*, 2 Call 421, there was no such covenant. So in *King v. Newman*, 2 Munf. 40. And so indeed must it be, of necessity, in every case of an absolute sale in form, though, as we well know, many of them have, upon evidence of the trust, been converted into mortgages.

273 \*In opposition to this very equivocal fact of the want of a covenant for repayment, we have in this case some of the strongest indications of a mortgage. The first of these is, that the debt and interest upon it are both to be repaid; and as a stipulation for repayment without interest has been considered as evidence that money advanced is purchase money, and not a loan, (1 Call 280,) so the converse seems equally true, that the insisting upon interest is evidence of a loan, and not a purchase. Secondly, the slaves were left in the possession of Green the original owner; which, as judge Pendleton remarks in *Ross v. Norvell*, is contrary to the ordinary effect of a sale.

On the other hand, it is with equal truth said by the chief justice, that such retention of possession is of the very nature of a mortgage. This fact, therefore, furnishes the most unequivocal negation of the transaction having been a sale. Considering as a sale, indeed, it would have been void, (for want of delivery of possession,) as to creditors and purchasers. It would be held, as to them, fraudulent per se; but if it be a mortgage, it is valid and unassailable. Now, where one construction of a transaction makes it fraudulent, and another makes it legal, the court should surely incline towards the latter.

It may be remarked, however, that in no view of this transaction is it a sale. At most it is but a contract to sell upon certain events and on certain terms, at a future day; both parties having, I think, the locus pœnitentiæ. It is to my mind very clear that Moss at least was not bound to take the slaves. The obligation is on the part of Green alone. He signs the instrument; Moss does not. The words are his, not Moss's. They oblige him, if he does not repay the sum advanced, to convey the slaves to Moss upon his paying him 206 dollars 11 cents more. This would not have amounted to an obligation on the part of Moss to take the slaves, even though he had been party to the deed, and had

274 \*sealed and executed it. For the words would leave an option with him to pay the additional sum or not, at his pleasure. 2 Bac. Abr. Cov't A. p. 64; *Drummond's adm'rs v. Richards*, 2 Munf. 337; *Suffield v. Baskervill*, 2 Mod. 36. And certain it is that if the negroes had died, he would not have completed the purchase unless he was obliged. It would be more reasonable to consider this a mortgage, in which the parties would stand on equal terms, than to hold it a conditional sale, in which Green would be absolutely bound if he could not raise the money, and Moss would be bound or not, at his pleasure; for the rule is that both parties should be bound, or neither. If the instrument were not under seal, this would be undoubted *Cooke v. Oxley*, 3 Term Rep. 653. Whether it is equally true in the case of a sealed instrument, may perhaps be questionable; but if not, yet there is a gross inequality in the contract, considered as a sale, which should lead us to reject that interpretation of it: for if the slaves had died, Moss would have insisted on the return of the money as a loan; as they lived, he insists upon the transaction as a purchaser. Green, though looked upon as a vendor, is compelled to take the hazards of a mortgagor, without his rights. He is the insurer of the lives of the slaves, though they are the property of Moss if he does not pay the money in the short period of six or eight weeks. In such a construction of the contract I cannot concur.

It is said, indeed, that Moss absolutely refused to lend his money, and would agree to nothing but a purchase. It is very clear that Green's object, at least, was to borrow. He did not wish to part with the slaves, as



appears from the provision for redemption. And as to Moss's refusing a loan, it is but a common contrivance for extortion and the extinction of the equity of redemption. But in these cases, as in cases of usury, these covers for fraudulent designs are little  
275 respected \*by courts of equity. In *Lawley v. Hooper*, 3 Atk. 278, the case was thus. Lawley, an indiscreet young man, having an annuity for life of £200. per annum, and having no means of delivering himself from jail except by disposing of the whole or some part of it, sold to one Davenant, by indenture, £150. per annum for £1050. In the deed there was a proviso, that if Lawley at any time should desire to purchase back the part of the annuity assigned, and would give Davenant six months notice, and at the expiration of the notice repay the £1050. then Davenant would reassign. This was decided to be a mortgage; lord Hardwicke saying, "I think there is strong foundation to consider this a loan of money, and I really believe in my conscience that ninety-nine in a hundred of these bargains are nothing but loans, turned into this shape to avoid the statutes of usury"—or, I will add, to extinguish a power of redemption. So in this case, though Moss disavowed a willingness to lend, what was the transaction in effect but a loan, if Green had repaid the money, with interest (for which the deed provided)? or if, the slaves having died, Moss had refused to pay the 206 dollars 11 cents, and sued for the money which he had advanced?

With these views, and without adverting to the parol evidence, (as the appellant has avowed that the deed discloses the real character of the transaction, and does not seek to impeach it on the ground of fraud, ignorance or mistake,) I am very clearly of opinion that the decree is right upon the merits, and that the appellee was entitled to redeem. I have, however, examined the evidence very carefully, and am satisfied that it ought to make no difference in the result. The distinctions between conditional sales and mortgages are so nice, that I am but little inclined to look to the opinions or to the loose language of witnesses to decide the question. In the case before cited, lord  
276 Hardwicke observes, "The \*proviso uses the word repurchase; but there is very little difference in reality between the meaning of the words repurchase and redemption. One of the witnesses uses the word redemption; and I take the word purchase, used in all the other depositions, to be only a cant word, meaning a sale or a mortgage; and the indorsement shews they were used promiscuously." Where to common understandings the shades of difference between terms are so slight, it is hazarding too much to trust to the testimony of individuals not versed in such nice discriminations, instead of resting upon the written and unquestioned evidence of the contract of the parties.

There are some other questions of detail, and perhaps some irregularities and errors in the manner in which the court has carried out its principles, which I shall not examine,

as the direction to be given to the case by the opinions of my brethren will render it unnecessary.

Decree reversed with costs. And this court proceeding &c. it is further decreed and ordered that the appellant do pay unto the appellee the sum of 206 dollars 11 cents, with interest at the rate of six per centum per annum from the 25th of December 1819 till payment.

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**\*Crawford v. Moses.**

May, 1839, Richmond.

(Absent BROOKE, J.)

**Slaves—Emancipation—Right of Issue\*—Case Approved.**—The principle decided in *Maria &c. v. Sturbaugh*, 2 Rand. 238, that where the mother is a slave until she attains a particular age, her children, born in the mean time, are born slaves, and continue to be so even after the mother's right to freedom accrues, again recognized and acted upon.

**Same—Same—Same—Case at Bar.**—A will contains the following clause: "It is my will and desire that after the death or marriage of my wife, all my negroes shall have their right to freedom when they arrive to lawful age or 21 years old: and if any should be born hereafter, it is my will that they shall have a right to freedom when they shall arrive to the aforesaid term of years." The testator, at his death, has a slave named Winney, who afterwards, while the widow is alive and unmarried, has a daughter named Jane. After the death of the widow, and before Jane attains the age of 21 years, she has a son named Moses. Moses, upon arriving at the age of 21, brings a suit for his freedom. **HELD**, he is a slave.

James Johnson of Louisa made his will, bearing date the 21st of the 2d month 1785, whereby, after certain bequests, he devised and bequeathed as follows:

"Item, I lend to my beloved wife Lucy Johnson, during her widowhood or life, the land whereon I now live, with all my negroes, stock and every other part of my estate not already given, during the above mentioned time." Then came a devise of

**\*Slaves—Emancipation—Right of Issue.**—See foot-  
notes to *Osborne v. Taylor*, 12 Gratt. 117; *Ellis v. Jenny*, 2 Rob. 597.

The principal case is cited in *Wood v. Humphreys*, 12 Gratt. 334, 346, 352; *Taylor v. Cullins*, 12 Gratt. 398.

**Same—Same—Gift of Freedom in Futuro—Construction of Statute.**—In *Wood v. Humphreys*, 12 Gratt. 339, the court said: "Some judges have doubted whether the statute, 1 Rev. Code of 1819, ch. 111, § 53, p. 433, giving owners of slaves a right to emancipate them, authorized the gift of freedom *in futuro*. But these judges have admitted that the statute has been long and uniformly construed to give such authority, and that the construction could only be changed by legislative power. *TUCKER, P.*, in *Crawford v. Moses*, 10 Leigh 279, *BROOKE, J.*, in *Anderson v. Anderson*, 11 Leigh 624." The principal case is cited in *Wood v. Humphreys*, 12 Gratt. 341. But see principal case cited in opinion of *DANIEL, J.*, in *Wood v. Humphreys*, 12 Gratt. 357.

**Same—Same—Definition of Manumission.**—The principal case is cited in *Williamson v. Coalter*, 14 Gratt. 398.

the reversion in the land, and after that devise, the following clause:

"Item, It is my will and desire that after the death or marriage of my wife, all my negroes shall have their right to freedom when they arrive to lawful age or twenty-one years old; and if any should be born hereafter, it is my will that they shall have a right to freedom when they shall arrive to the aforesaid term of years."

In a suit in the circuit court of Powhatan against James Crawford, by Moses a  
278 man of colour to recover his freedom, \*a special verdict was returned, whereby the jury found, that after the death of James Johnson, to wit, on the 8th of December 1788, the said will was duly proved and recorded; that among the slaves belonging to the testator at the time of his will and at his death, was a woman named Winney, who survived the testator, and after his death, and during the life and widowhood of his wife, had issue a daughter named Jane Robinson, who afterwards, and before she the said Jane attained the age of twenty-one years, had issue the plaintiff; that the widow of the testator was dead, and the plaintiff had attained the age of twenty-one years, before the institution of this suit; that Jane Robinson the mother of the plaintiff, after the birth of the plaintiff, to wit, on the 11th of July 1816, was registered in the county court of Powhatan, and obtained her free papers, being then twenty-one years old, and has ever since been and still is free within this commonwealth; and that the plaintiff is detained in slavery by the defendant, and has been so detained from his birth.

The circuit court, being of opinion that the law was for the plaintiff, entered judgment that he recover his freedom.

Whereupon Crawford presented a petition to this court for a supersedeas, stating, that he was advised that this judgment was not to be sustained by any authority, unless it could rest upon the opinions of two judges (Carrington and Pendleton) in the case of *Pleasants v. Pleasants*, 2 Call 319. Whatever respect might be due to the authority of those opinions, this case, he insisted, was not brought within their protection; for they have not carried the right of freedom farther than to maintain it against the family of the testator, or volunteers claiming under them, to the exclusion of creditors and purchasers; and the jury have not, in this case, found that the petitioner was a member of the family, or a volunteer claiming under them.

279 \*But the opinions of those two judges, the petitioner was advised, were not authority. He insisted that the doctrine maintained by them had never since been sanctioned by any judicial opinion; that it violated some of the best settled rules of law; and that, if followed, it would introduce an anomaly in the laws of civilized society—a state of hereditary slavery for years. If such be the law, he was advised that it ought to be pronounced by at least a majority of the court of appeals.

By the decision in *Maria and others v.*

*Surbaugh*, 2 Rand. 228, recognized in *Fulton v. Shaw*, 4 Rand. 597, and again in *Isaac v. West's ex'or*, 6 Rand. 652, it was obvious, he said, that Jane Robinson, the mother of Moses, was born a slave, and continued to be a slave till the age of twenty-one; that Moses, her son, was also born a slave; and that, if he was entitled to his freedom at the age of 21 years, he derived that title from the will of a testator who died as early, at least, as the year 1788, giving law to the third generation after his deceased: and it was equally obvious that if this will could give freedom to Moses, in the third generation, it might equally give freedom to those born in any generation, however remote.

He urged, that before such a doctrine as this should be established as the law of the land, it ought to receive the gravest consideration.

The supersedeas was allowed.

The case was elaborately argued in this court, by Johnson, for the plaintiff in error, and Rhodes and Scott, for the defendant in error. But no note of the argument has been preserved.

TUCKER, P. This is a case of prospective emancipation by will, and presents some of the difficulties which have resulted from construing the statute to authorize \*the gift of freedom in futuro.

Such, I am persuaded, never was its design, and such an effect is at variance with every principle. For, in the nature of the act, emancipation is immediate, not prospective. If the act be not executed, but executory, it is but a contract for freedom between the master and slave, which is void. If, on the other hand, the act be considered as executed, it must take effect immediately, and intermediate servitude is incompatible with it. The act of assembly seems distinctly to recognize the principle; for in giving the power to emancipate by deed or will, it declares that the slave "shall thereupon" (that is, upon the probat of a deed or will of emancipation) "be entirely and fully discharged from the performance of any contract entered into during servitude, and enjoy as full freedom as if he had been particularly named and freed by this act." 1 Rev. Code, ch. 111, § 53, p. 433. It is not easy to perceive how, under this clause, emancipations in futuro could have been countenanced; yet they have been so long recognized, that it is only left for us to follow the steps of those who have gone before us, until a change is effected by legislative power; and the subject is only mentioned here, as affording a motive for limiting ourselves at least to the strictest rule which former decisions will permit.

According to my construction of the will in the case before us, all the testator's slaves in existence at his death, and all the issue of his female slaves, born during the life of the widow, were emancipated by the operation of the clause declaring that all the testator's slaves should have their freedom after the death or marriage of his wife. For the afterborn slaves, if born in the widow's lifetime, were, according to the decisions of this court, as much the testator's

property, and as much subject to his disposition, as those in existence at his death. Accordingly they passed, as fast as they came into being, to the widow during  
 281 her life, under \*the bequest to her of all his slaves. It cannot be denied that she had a life estate in the posthumous children, who, but for this clause in the will, would have fallen into the residuum for division among the distributees. If the posthumous children are embraced by the words "all my negroes" in the bequest to his wife, they are equally embraced by the same words in the clause of emancipation, and hence all born during the widow's life and after the death of the testator, were free after the death of the widow and their arrival at age. If Moses was in this predicament, he was therefore free.

It seems to have been supposed that the particular provision for those born "hereafter," excluded them from the operation of the general clause above mentioned. If so, the case would not be materially varied. The children born during the wife's life were, as has been already said, subject to the testator's disposition, and were given to the wife during her life or widowhood. Their freedom, then, was subordinate to this gift; for we cannot suppose for a moment that he intended freedom, before her death, to the posthumous, more than to those in existence at the date of the will. The will, as to them, must therefore be read thus: "And if any should be born hereafter, they shall have a right to freedom, after the death or marriage of my wife, upon their attaining the age of 21 years." Now this language can only apply to those born during the widow's life; it is inappropriate to those born after her death or marriage; for as their right to freedom is postponed until the death or marriage, their pre-existence during her life is inevitably implied. If this be so, we must still further mould the expression, so as to read it thus: "And if any should be born hereafter during the life and widowhood of my wife, they shall have a right &c." Thus construed, it is clear that Moses is free if he was born  
 282 during the life or widowhood of the wife; \*and if not born until after her death, he is a slave, as he is in that event within neither clause of the will. There must then be a venire de novo to ascertain this fact, unless the parties will agree it in this court.

After this opinion was prepared, an order was made, by the consent in writing of the parties by their counsel, that the record be amended so as to supply the defect in the special verdict, by admitting the fact that Moses was born after the death of Mrs. Lucy Johnson, the widow of James Johnson.

STANARD, J. The special verdict, on which the questions involved in this case arise, was defective in not ascertaining whether or no the birth of Moses (the plaintiff in the court below) was before or after the death or marriage of Mrs. Johnson the relict of the testator. That defect has been cured by the admission on behalf of the pauper, that he was born after the death of Mrs. Johnson. If, then,

on the just construction of the will, none can claim title to freedom, as derived immediately from the dispositions therein, but those born before the death of Mrs. Johnson, the right of Moses is that only which he could derive from his mother; she being one of those who the will directs shall have their freedom at the age of 21, and he being born before she attained that age.

My opinion is that a just construction of the will gives it the same meaning that would be distinctly expressed had the clause been framed thus—"After the death or marriage of my wife, all my negroes then living, as well those that shall be born hereafter as those now in being, shall have a right to their freedom; those aged 21 years and upwards, immediately; and those under that age, when they attain it." The slaves living at the death or marriage of the widow were within the immediate scope of the will,  
 283 and entitled to claim \*their freedom under it. The testator obviously apprehended that the first member of the clause of the will giving freedom to all his slaves after the death or marriage of his wife, might be interpreted as applicable and restricted to the slaves he possessed at the date of his will, or at his death. This apprehension caused him to add the second member; and its function being to supply the supposed defect of the first, it should have a corresponding interpretation. According to the decision of this court in the case of *Erskine v. Henry & ux.*, 9 Leigh 188, the first member of the clause would have comprehended afterborn slaves; and for that purpose the second was superfluous. But this in no wise weakens the suggestion that this testator apprehended it was not sufficiently explicit, and added the second member to remove all doubt as to his purpose to comprehend all that might be living, either at his death, or the death or marriage of his widow. The result is, that on the just construction of the will, those slaves that were living at the death or marriage of the wife derived their title to freedom directly from the will, and those born afterwards must derive their title from their mothers. This is the construction contended for by the counsel of the pauper; and as Moses was born after the death of the widow, and before his mother attained the age of 21, the counsel has attempted to distinguish this from the case of *Maria &c. v. Surbaugh*, by treating the postponement of the emancipation of the mother to the age of 21, as a retention of service in the nature of an apprenticeship—as temporary service which would not affect the offspring born during that time. The distinction cannot, in my opinion, be sustained. Though my judgment has never been convinced of the correctness of the decision in the case of *Maria &c. v. Surbaugh*, I feel judicially bound by its authority; and under that obligation I must decide that Moses, being born before his mother's right to freedom  
 284 \*was consummated by the attainment of the age of 21, is a slave.

I forbear to express an opinion, or even to enter into the investigation of the question

so much and so ably discussed by the counsel of the appellant, as to the validity of the will, had its construction been such as to provide for the emancipation of slaves at a period more remote than the law allows for an executory devise or bequest of property. The inclination of my mind is against the application of that rule respecting the limitation of property, to cases in which property is not fettered, but renounced; in which property is not granted, but extinguished. The case of *Maria &c. v. Surbaugh* rests mainly on the proposition, that by emancipation, property is not granted, and the right of one to prospective emancipation is not a right to property, or analogous to, or having the incidents of such a right. But I have formed no definitive opinion on the question, and therefore give none.

Judgment reversed. And this court, proceeding &c. is of opinion that the matters of law arising upon the special verdict found by the jury are for the said James Crawford, the plaintiff in this court: therefore it is considered that the said Moses, the defendant here, take nothing by his bill, &c.

### Baker v. Morris's Adm'r.

May, 1839, Richmond.

(Absent BROOKE and PARKER,\* J.)

**Discovery—To Rebut Presumption of Payment—Answer.**—In a suit in equity to enforce payment of a bond debt twenty-eight years after the right to demand it accrued, there being no remedy  
285 \*under the circumstances of the case but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, calls on the defendant to answer, whether the debt has been paid or not: **Held**, the defendant was properly compelled to answer to that point.

**Same—Assumpsit—Plea of Statute of Limitations—New Promise.**—Where assumpsit is brought at law, and the statute of limitations pleaded, the plaintiff may file a bill of discovery in equity, calling on the defendant to answer whether he has not made a new promise within the term of limitation, in order to use this matter, on the trial of the action at law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath.

**Laches;—Bond Creditor—Case at Bar.**—Testator bequeaths his daughter "all debts due him at his death from his several sons, by bonds, notes or other writings," among which is a bond from his son J. B. whom he appoints one of his executors; this bond is delivered in 1807 by the executors to the legatee, then sole; in 1808, she marries S. who dies in 1819; and in 1820 she marries M. and dies in 1833; the son and executor J. B. early and constantly denies his liability to pay the debt, and this is known to the legatee, and to both her husbands

\*He decided the cause in the circuit superior court.

**†Discovery—To Rebut Presumption of Payment—Answer.**—The principal case is cited in *Kyle v. Kyle*, 1 Gratt. 582. See monographic note on "Bills of Discovery" appended to *Lyons v. Miller*, 6 Gratt. 427.

**‡Laches.**—See monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

during her coverture; but no suit is ever brought or demand made on the bond till 1835, when a suit in equity is brought by M. as administrator of his deceased wife, against the obligor, to compel payment of the bond; in which the obligor is unable to shew any exemption from his liability to pay the debt: **Held**, upon the circumstances of the case, accounting for the long delay to prosecute the claim, the plaintiff is entitled to relief notwithstanding the delay.

**Same—Same—Excuse for Delay—Coverture.**—In such case, the fact of the legatee having been under the disability of coverture during so great a portion of the time, is a circumstance to account for and excuse the delay.

**Chancery Practice—Interest beyond Penalty of Bond.**—Full interest is given on the bond, though it exceed the penalty.

**Debt on Bond—Interest beyond Penalty of Bond—Damages.**—It seems, that in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages.

In September 1802, Henry Baker, late of Winchester, sold and conveyed to his son John Baker part of lot No. 5, in that town, for £400, the consideration expressed in the deed; of which the son paid £100, and for the balance executed three bonds to his father, each in the penalty of 666 dollars 66 cents, with condition to pay 333 dollars 33 cents; they were all payable on demand.

286 Upon each of these bonds, there was found indorsed a \*credit for interest paid till the 17th March 1807, which was the day of the father's death; but these indorsements were made after the father's death.

The father, by his will, devised to his son Henry part of the same lot, measuring thirty-eight feet front and extending back to an alley, and to his son Isaac another part of the same lot measuring the width of the testator's then dwellinghouse in front, leaving a space between the parts devised to Henry and Isaac, which he desired should be reserved as a way common to them both; and then he devised the residue of the same lot, being thirty-two feet front, to his son John, mentioning that it was the same he had before sold and conveyed to him. He then divided another lot, called the Brickhouse lot, between his sons Abraham, John, Joseph, and Jacob; giving to Abraham fifty-six feet front, charged with £200, to be paid to the testator's daughter Betsey; to John forty feet front, to Joseph fifty feet front, and the residue to Jacob. And then, after devising and bequeathing to his daughter Betsey other lots in Winchester, some bank stock, and the £200. charged on Abraham's share of the Brickhouse lot, he

**§Chancery Practice—Interest beyond Penalty of Bond.**—The principal case is cited in *Tazewell v. Saunders*, 18 Gratt. 367. The cases upon this subject are collected in monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.

**¶Debt on Bond—Interest beyond Penalty of Bond—Damages.**—The principal case is cited in *Perry v. Horn*, 22 W. Va. 385.

**Tennant v. Gray**, 5 Munf. 404, is an express authority in favor of the right at law to recover interest beyond the penalty in the shape of damages.

added—"I likewise bequeath to my said daughter Betsey all the debts due at my death from my several sons, as evidenced by bonds, notes or other writings, signed by them." He appointed his sons Henry and John his executors, who proved the will, and qualified as executors.

The three bonds of John Baker to his father and testator, were found among the testator's papers at his death; and they were inventoried as part of his estate, in the inventory signed by both executors, and returned to court, in the following words, viz. "Three bonds executed by John Baker for £100. each to the testator Henry Baker, and bequeathed by him to Elizabeth Baker, which bonds are delivered up to her."

In 1808, about a year after her father's death, Elizabeth Baker married Joseph Stover, into whose hands these 287 \*bonds of John Baker fell, but he never made any attempt to enforce payment thereof. Stover died in 1820, and his executor delivered the bonds to his widow, or to her second husband, as her property. She remained a widow about a twelvemonth, and then married William Morris. She lived his wife till 1833, and then died. During all this time, no demand of the debt due by the bonds was ever made. But Morris having taken administration of his deceased wife's estate, and being unable to maintain an action at law on the bonds by reason of the obligor being one of the executors of the obligee, exhibited a bill in chancery, in the circuit superior court of Frederick, against John Baker, the obligor, to enforce payment of the debt due on the bonds.

The bill was exhibited in 1835. After setting forth the facts above stated, and alleging that the debt due upon the bonds had never been paid, and that the defendant, during the year of his sister's widowhood, had requested her to get them from the executor of her first husband Stover, saying that he might be pressed for the money, and could pay it more conveniently to her,—the bill stated various reasons to account for the long delay to demand payment of the debt, and to repel the presumption of payment arising from lapse of time; namely, that Mrs. Morris, before her first marriage, was unwilling to enforce payment of the debt from her brother by harsh measures; that after her marriage with Stover, he forbore to demand the debt, because he was wealthy and did not want the money, and because the defendant Baker, soon after his father's death, brought a suit in chancery against his coexecutor and all his colegatees, Stover and wife among the rest, to recover a large sum of money which he claimed as due to him from his father's estate, for services rendered by him to his father in his lifetime, which suit was pending till November 1818, when the bill was dismissed, shortly before Stover's death; that Stover left his 288 widow so well \*provided for, that she did not want the money during her widowhood; and that the plaintiff, after he married her, was unwilling to go to law with his brother in law, especially as it would

have been very unpleasant to his wife, whose mind was somewhat affected, even before she became insane, and for the last five years before her death, she was actually of unsound mind. And the bill called upon the defendant to answer and say, whether or no he had paid the debt? and if he had, when, how and to whom?

The defendant, in his answer, repelled the circumstances alleged in the bill, to account for the delay in making and prosecuting the demand of the debt due on the bonds, and to rebut the presumption of satisfaction arising from the lapse of time; he insisted, that near thirty years having elapsed since the bonds came into the hands of his sister, then a feme sole, and no demand having ever been made upon them; they ought to be presumed in law to be paid; and he relied on this legal presumption as a full and sufficient defence to the plaintiff's claim; but he made no answer to the interrogatory, whether he had in fact paid the debt or not.

Exception being taken by the plaintiff to the sufficiency of the answer in that particular, the court sustained the exception, and ordered the defendant to put in a full answer to the bill.

Whereupon, he filed an amended answer, in which he admitted, that he had never paid the money for which the bonds were given by him to his father. But he said, that he had been in possession of the property for the purchase money of which they were given, paying his father rent for the same, some two or three years before his purchase, and his father, having occasion for money, proposed to convey the property to him, upon the following terms—that, fixing the price of it at £400. he 289 should pay his father £100. in cash, \*and should pay him interest on the balance of £300. during his life; a proposal which the defendant, and all the family who were privy to the transaction, understood as nothing more than an anticipation of what his father intended at his death, namely, to give him, as well as his two other sons, the parts of the lot No. 5, of which they were respectively in possession, he paying interest on £300. instead of rent which his brothers paid for the parts of the lot held by them; and when the arrangement was carried into execution by the conveyance of the property to him, his bonds for the £300. were taken and given, only to secure payment of the interest thereof to his father during his lifetime; he declaring, in the presence of the subscribing witnesses to the bonds and the conveyance, and of his son Joseph who drew the instruments, that he was only to draw interest upon the bonds during his life, and at his death they were to be returned to the defendant; which facts could have been proved by those persons while they were living, but they were all dead long before this suit was brought. That, accordingly, his father, by his will, devised to his sons Henry and Isaac the parts of the lot No. 5, of which they had been in possession paying him rent during his life; and devised to him the part that had been con-

vayed to him; a devise of property already conveyed, for which the testator could have had no inducement, but to fulfil the contract on his part, on which the purchase had been made by the defendant. That when the father's will came to be examined, all the family, including the daughter (the plaintiff's intestate), being well acquainted with the father's intention in the transaction upon which the bonds were executed, understood the devise to the defendant of the same property for the price of which the bonds were given, and which had been before conveyed to him, as intended by the testator to operate as a surrender of the bonds; and the

290 acquiescence \*of the daughter and of both her husbands in this construction of the will, appeared by the fact, that neither she nor they, during twenty-six years from the testator's death in 1807 till her death in 1833, ever demanded the debt or the interest upon it; in which, the defendant had no doubt, both the husbands were controlled by their wife's knowledge that the bonds were not in truth her property. That the bonds were not specially mentioned and bequeathed by the testator's will to his daughter: she claimed them under the general bequest of "debts due to the testator from his sons, by bonds, notes, or other writings, signed by them;" and besides these bonds, there were bonds of the testator's sons Isaac and Joseph, on which the bequest could operate, which bonds were delivered to the daughter and were collected by her. That the defendant's bonds were not delivered by the executors to her: she had access to the testator's papers, and took possession of the bonds in question, without their knowledge at the time; but she afterwards, at different times, admitted to some of her brothers, that these bonds were not hers, and said they should be restored to the defendant; and though three of the brothers were dead, he expected to prove by one who yet survived, that she made a declaration to that effect during her widowhood. And advertising to the inventory of the testator's estate returned to court, and signed by both executors, wherein these bonds are mentioned, as bequeathed and delivered up to her,—the defendant said, that the inventory was prepared by his coexecutor Henry Baker under advice of counsel, by whom that part of the inventory was written; and, without pretending to remember the incident, he had no doubt, that his brother having shewn him the inventory as a paper prepared according to advice of counsel, and told him his signature was necessary, he signed it without any examination of it; for

291 from the death of his \*father, he had uniformly contended, that the bonds ought, rightfully, to be given up to him. And upon the whole he insisted, that under the circumstances,—after such long delay, acquiescence and abandonment,—equity ought not to enforce the claim.

The parol evidence on the part of the plaintiff consisted in the depositions—

1 Of G. Happ; who deposed, that the three bonds of John Baker were put into his hands for collection by Joseph Stover (the

first husband of Mrs. Morris) about a year before his death, but the witness made no effort to collect them; Stover would not have suit brought on them, "for fear of producing a split in the family;" his wife said, she was anxious to have the money collected, and was displeased that she had not got an equal share of her father's estate. The witness also said, that she was for many years affected, periodically, by pain in the head, which for a time disordered her mind; the affliction grew more and more severe as she grew older; and about two years after her marriage to her second husband Morris, she became insane, so that it was necessary to confine her.

2. D. Stickley; who deposed, that he had had frequent conversations with Mrs. Morris, on the subject of the bonds of Isaac Baker and John Baker (which he understood had been bequeathed to her by her father's will), during the life of her first husband Stover, during her widowhood, and after her marriage with Morris; in which she said, that some of her friends wished her to forgive the bonds, but she had refused to do so; she intended to make her brothers pay the amount due on them; perhaps the money might be of use to her on a rainy day; her first husband had told her, she might do as she pleased with the bonds.

3. Rachel Stickley; who deposed, that she lived with Mrs. Morris, for many years during her first husband's life, during her widowhood, at the time she married 292 \*Morris, and for some months after. The witness heard her say frequently, that she had held the bonds in question from the time of her father's death; that he had bequeathed them to her; that her brother ought to pay her the bonds, but that he said he would not pay her, because he did not consider them just; that she did not stand in need of the money, but she thought her brother ought to pay it, as it was given her by her father. The witness also heard her say, both before and after her marriage with Morris, that she would as lief it should fall into the hands of the Baker family as into the hands of strangers, as she had no children.

4. J. Spengler, the administrator of Stover the first husband of Mrs. Morris; who deposed, that Stover died in November 1819; that he found the bonds in question among Stover's papers; he was advised by counsel that they survived to his widow; and, as well as he could remember, he delivered them to Morris shortly after he married her.

The evidence for the defendant consisted in the depositions—

1. Of G. Reed; who deposed, that in a casual conversation between him and Henry Baker the elder, in 1806, John Baker happening to pass through the room where they were sitting, Henry Baker told the witness, that that son had done him more service than any other child he had, and that he held his paper or bonds for a sum of money, but never intended to make him pay the money, as he had relieved him out of his difficulties; that a few days after this conversation, the witness told John Baker what

his father had said, and John requested him to make a memorandum of it, which the witness did at the time. He produced the memorandum, which was in these words: "1806, Feb. 26. Memorandum made at the request of Mr. John Baker. In conversation with his father (as we often had on elections and other matters) sitting in his house, 293 Mr. John \*Baker passed through the room where we were sitting, and Mr. Baker remarked, that that boy had done him more service than any other child he had, and that he held his paper for a sum of money, but that he never intended to make him pay the money, as he had relieved him out of his difficulties." The witness said, he had forgotten that he had the memorandum till very recently, when, being reminded of it by John Baker, he had looked for and found it.

2. William Baker, a nephew of Mrs. Morris and of John Baker; who deposed, that in 1809, he went to his aunt to get her to lend or give him some money to go into business; she gave him a trivial sum; at the same time, taking some papers out of a drawer, she said they were notes of his uncle John, which she would not give him, saying that they belonged to him and that she intended to give them to him.

3. Henry Baker the younger, son and one of the executors of Henry the elder; who deposed, that on the day when the conveyance made by his father to John Baker, and the bonds of John Baker to his father, were executed, while the parties were engaged in the business, the witness went into the room on some business with Lewis Hoff or Isaac Baker (who were subscribing witnesses both to the deed and the bonds): he found his brother Joseph Baker (who drew the deed and one of the bonds) also present: and on the same day, in conversation with Joseph Baker, Joseph said, that the bonds were only sham bonds, that it was only intended that he (John Baker) should pay the interest of the bonds as rent, that his father might as well give them up now as at a future day, which he would do without doubt. Lewis Hoff and Isaac Baker, the subscribing witnesses to the deed and the bonds, and Joseph Baker, were all dead before this suit was brought: Isaac Baker died in 1830, Hoff in 1832, and Joseph Baker in 1833. The

294 \*witness further deposed, that his sister, Mrs. Morris, after the death of her first husband Stover, and during her widowhood, made a visit to Winchester; and during her stay there, she told him, that she had three bonds of John Baker in her possession, which she wished to deliver up to him, if he would go up and get them, meaning if he would go up home with her. That the part of the lot No. 5, conveyed by his father to John Baker, for the balance of the purchase money of which the bonds were given, had been held by his father at £800, but he sold it to John for £400. That the credits on the bonds for interest to the 17th March 1807, were indorsed by Isaac Baker, after his father's death: there was an account between his father and John Baker kept by his father, upon the settle-

ment of which account, John was credited upon his bonds for the interest; the witness was told by his father that that was the way he received the interest on the bonds.

4. J. Hieronimus; who deposed, that in a conversation between him and Henry Baker the elder, some three years before his death, Henry Baker declared his intention to forgive a large balance due him from his son Jacob Baker; and added, that as there had been some jealousy between his sons Jacob and John, he intended to treat John in the same manner, by giving him up, at some future day, claims he had on him for the purchase of the house and lot which he had sold him.

5. Eliza Price; who deposed, that during Mrs. Morris's widowhood, on her first visit to Winchester after her first husband Stover's death, the witness heard her speak of the bonds in question; and she repeatedly said, that the bonds she had in her possession, mentioned in her father's will, were John Baker's, and she wished her brother John to have them, as they were not hers; that it was her wish he should receive them at that time, but there was a little difference between her and a member \*of her brother John's family, which was the only reason that she had not gone there and given the bonds up, as the member of John's family alluded to might think she wished to cringe to them. Some three or four years after her marriage with Morris, she mentioned the subject again, and seemed to regret that she had not given the bonds to her brother John at the time first mentioned; she said, they had been now taken out of her possession, but if ever she could lay her hands on them again, he should have them. At the time of this last conversation, her mind was sound.

6. John Hoff; who deposed, that the defendant John Baker, talking of the bonds in question shortly after his father's death, and frequently afterwards, always said he would never pay them.

It appeared, that the defendant John Baker brought a suit in chancery against his coexecutor Henry Baker and his colleagues, to recover a debt which he claimed of his father's estate for services rendered his father in his lifetime; which suit was brought in 1808, and the bill was dismissed in November 1818. And the plaintiff exhibited the answers of Joseph, Jacob and Henry Baker, and of Stover and wife, in that suit; shewing that all those defendants mentioned the bonds in question in their answers, and represented them as evidences of debt actually due from their brother John to their father, and that Stover and wife then held and claimed the bonds as their property. He exhibited also a deposition, taken in that cause, of the same deponent G. Reed above mentioned, for the purpose of discrediting his evidence in this cause.

The circuit superior court, upon the hearing, decreed, that the defendant should pay the plaintiff 999 dollars 99 cents (the amount of debt due upon the three bonds) with interest from the 17th March 1807 till paid, and

costs. From which decree, this court, on the petition of the defendant, allowed him an appeal.

296 \*Leigh, for the appellant, contended,

1. That the defendant was well entitled to rely on the presumption of satisfaction of the debt arising from the length of time during which no demand of it had been made, without answering the interrogatory in the bill whether the debt had been paid or not, and he ought not to have been required to help the plaintiff's case by making a discovery on that point. The bill sought to recover a debt due on old bonds, demanded now for the first time; and the only ground of equitable jurisdiction was, that the obligor being one of the executors of the obligee, actions could not be brought on the bonds at law. Equity, doubtless, might for that reason entertain the bill; yet the claim was in its nature purely legal, and ought to be prosecuted in equity in exact analogy to an action at law: the case should be viewed in equity in the same light as if actions had been brought on the bonds at law, and this were a bill brought in equity for a discovery of matter to rebut the legal presumption of satisfaction. If the practice adopted by the court of chancery in this case should be approved, every action on a stale bond hereafter brought, would be accompanied by a bill in equity for a discovery to rebut the presumption of satisfaction, or by interrogatories addressed to the defendant's conscience under the provision of the circuit superior court law, Supp. to Rev. Code, ch. 109, § 68, p. 161. Nay more, the statute of limitations, which was intended to put an end to litigation, would, in effect, give rise to yet more troublesome litigation in equity, for the discovery of matters which might avoid the statute. He said, the general inconvenience to which the practice would lead, should make the court cautious against the toleration of it in order to give relief in the particular case. And he contended for this proposition—that where laches appeared on the face of the plaintiff's bill, the defendant should not be held to

answer to matters which might entitle the plaintiff to \*relief notwithstanding the laches, when without such discovery relief would be denied. He cited *Phillips v. Prevost*, 4 Johns. Ch. Rep. 205; *Lansing v. Starr*, 2 Johns. Ch. Rep. 150; *Jermey v. Best*, 1 Sim. 373; *MacGregor v. East India Co.*, 2 Sim. 452; 2 Cond. Eng. Ch. Rep. 187, 496.

2. He insisted, that this was a stale demand, which equity should not be active to enforce. The bonds came to the hands of Mrs. Morris, then a feme sole, in 1807: there was nothing to prevent her from bringing suit on the claim immediately; but, whether from doubts in her own mind as to the real justice of it, or from whatever cause, she did not prosecute it. Her first husband never prosecuted it; she did not prosecute it during her widowhood. When she was again sui juris; and her second husband never asserted it during her life. There was at all times a person having full capacity to assert, and an interest to assert, the claim. It was never even demanded.

It must be admitted, that the precise ground of defence stated in the defendant's answer was not made out by the evidence; namely, that the bonds were given by him and taken by his father, only to secure payment of the interest during the father's life, with an understanding that they were to be given up at his death. But enough appears to shew, that it might probably have been proved, if this suit had been brought while the two subscribing witnesses to the transaction, and while Joseph Baker who drew the instruments, were living, and while Mrs. Morris was living, from whom a discovery might have been had by a cross bill; and if such a state of the case had been proved, it would have been hard to resist the equity of the defendant to be relieved from the bonds. The delay to assert the claim deprived the defendant of his defence, even if it were founded in truth, because the death of the persons most likely to be

298 consensual of the truth, deprived him of the evidence. And during \*the whole time, the parties entitled to assert the claim, knew that the defendant denied the justice of it, while they never gave him any reason to believe that they insisted on it. The first husband Stover would not have suits brought on the bonds, for fear of producing "a split in the family;" his wife told Mrs. Stickley, that her brother ought to pay her the bonds, but "that he said he would not pay her, because he did not consider them just;" and Morris after his marriage with her, as he says in his bill, was unwilling to go to law with his brother in law, especially as it would have been very unpleasant to his wife. All the parties, then, knew, from the first, that the claim would be contested; and, with this knowledge, abstained from bringing suit, and never made even a demand of the debt, for twenty-eight years. In other words, they acquiesced, during that whole time, in the defendant's claim to exemption from the obligation of these bonds. But not only was there a wilful delay to assert the claim, and an acquiescence in the defendant's pretensions that it was not just, but Mrs. Morris was conscious, that those pretensions were not unfounded. For, though she sometimes asserted her right to the money, and complained that it was withheld from her, yet at other times, and especially during her widowhood, when she was sui juris, she declared, that the bonds belonged to her brother, and that she would surrender them to him: she told her nephew William Baker, as early as 1809, that the bonds belonged to her brother John, and that she intended to give them to him: and during her widowhood, she told Mrs. Price that the bonds were not hers and she wished her brother John to have them, and her brother Henry that she had the three bonds of her brother John in her possession, which she wished to deliver up to him, if he would go home with her and get them. Here, then, he said, was a stale demand founded on a right that accrued twenty-eight years before it

299 \*was asserted; all the parties, succes-



sively entitled, had, during all that time, slept upon their rights; knowing that the claim was contested, they had acquiesced, during all that time, in the defendant's refusal to pay the debt, and in his denial of its justice; and the party whose title the plaintiff was now asserting, had abandoned it some sixteen years before the plaintiff's suit was brought. Though the defendant admitted that the debt claimed on the bonds had not been paid, so that the lapse of time could not raise a presumption of payment, it might yet afford a presumption against justice of the debt. *Christophers v. Sparke*, 2 Jac. & Walk. 222. At any rate, he said, this was a case in which a court of equity should not be active to give relief. *Smith v. Clay*, 3 Bro. C. C. 639, in note; *Deloraine v. Browne*, Id. 633, 646; *Jones v. Turberville*, 2 Ves. jun. 11; *Hercy v. Dinwoody*, Id. 87; *Parks v. Rucker*, 5 Leigh 144; *Carr v. Chapman*, Id. 164; *Hayes v. Goode*, 7 Leigh 452.

3. He submitted, that if it was right under the circumstances of the case to give any relief at all, the court should have decreed only the principal of the debt, and should, on account of the laches, have refused to allow any interest; on the principle on which the account of profits was denied in *Acherley v. Roe*, 5 Ves. 565. Or, on the principle of *Pickering v. Ld. Stamford*, 2 Ves. jun. 272, 581, interest should have been allowed only from the filing of the bill.

But 4. he insisted, that if interest ought to have been allowed, yet the decree was erroneous in giving interest beyond the penalty of the bonds: that in the naked case of a claim on a bond in a penalty conditioned for the payment of money, interest could not be recovered beyond the penalty, either at law, *Ld. Lonsdale v. Church*, 2 T. R. 388, overruled in *Wilde v. Clarkson*, 6 T. R. 303; 1 Wms. Saund. 58, n. 1; *Downman v. Downman's ex'ors*, 1 Wash. 26; *Ragsdale ex'or v. Balte ex'or*, 2 Wash. 201; *Atwell's adm'r v. Towles*, 1 Munf. 175, or in equity,

300 *Bromley v. Goodere*, 1 Atk. 75; *Tew v. Earl Winton*, 3 Bro. C. C. 489; *Knight v. Maclean*, Id. 496. The cases in which interest had been allowed upon judgments on bonds, beyond the penalties of the bonds on which they were recovered, stood on a different reason; *McClure v. Dunkin*, 1 East 437; *Roane's adm'r v. Drummond*, 6 Rand. 182; *Clark's adm'r v. Day*, 2 Leigh 172; *Godfrey v. Watson*, 3 Atk. 81. There was an instance of a bond in the penalty of £120. with condition to pay £120. where interest was allowed beyond the nominal penalty, which was in truth not a penalty; *Francis v. Wilson, Ry. & Mood*, 105; 21 Eng. C. L. R. 391. In the cases where interest beyond the penalty of a bond had been allowed in equity, it would be found, that the creditor's claim was not founded on the bond alone, but on some other contract besides, as a mortgage or special agreement, *Clark v. Ld. Abingdon*, 17 Ves. 106; *Jeudwine v. Agate*, 3 Sim. 129; 5 Condens. Eng. Ch. Rep. 45, or that the debtor, by injunction or other proceeding, had delayed the creditor's recovery of the debt, and there was no fault on his part, *Grant v. Grant*, 3

Russ. 598; 3 Sim. 340; 3 Condens. Eng. Ch. Rep. 533; 5 Id. 340. The case of *Tennant's ex'or v. Gray*, 5 Munf. 494, stood alone: there, while the court held that the plaintiff could not recover interest beyond the penalty, as part of the debt due on the bond, it seemed to sanction the recovery of the surplus interest in the form of damages.

Patton, for the appellee, maintained, on the 1st point, that the defendant was bound to answer the interrogatory in the bill, whether he had paid the debt or not. He said, a plaintiff in chancery had a right to obtain from the defendant's own acknowledgment, evidence of facts material to his case; and whether the bill were a bill for discovery merely, or a bill for discovery and relief, the plaintiff was equally entitled to the discovery he asked. This was

the general rule: there were exceptions\* to it, but the present case was not within the reason of any of them. Here, the bill was for discovery and relief: the defendant was bound to answer all the allegations of the bill shewing the plaintiff's right to relief; as much bound to answer the allegation that he had not paid the debt, as any other. Lapse of time was only presumptive evidence of payment; and if in a suit to recover a bond debt, either at law or in equity, the defendant would rely on that presumptive evidence of payment, he must plead payment; else, there could be no issue between the parties to which the evidence could apply. The defendant's difficulty in this case was, that if he alleged payment, either by plea or in his answer, he would have been bound to swear to it; which he could not do without forswearing himself; and therefore, he wished to rely on the lapse of time as evidence of payment, without pleading payment. But a party admitting the original obligation to pay (as the defendant did in his first answer), could never rely on lapse of time as presumptive evidence of payment. *Livingston v. Livingston*, 4 Johns. C. R. 287. He said, the defence founded on lapse of time as proof of payment, ought not to be confounded with the bar of the statute of limitations: where the statute applied, it was immaterial whether in fact the debt had been paid or not: in the other case, the time being merely presumptive evidence of the fact of payment, the presumption might be rebutted by a variety of circumstances, much more by an admission of the debtor that the debt was still due. *Oswald v. Leigh*, 1 T. R. 271; *Stark. Ev.* part 4, p. 1090; *Christophers v. Sparke*, 2 Jac. & Walk. 223-234. But even in the case of a bill filed for discovery to support a suit or defence at law, it was settled, that a party should be compelled to answer and admit facts which might defeat his claim or repel his defence at law; and in the strong case of the defence of the statute of limitations, the defendant might be compelled, 302 \*in equity, to admit a new promise which would avoid the bar of the statute. The principle was stated in *Kane v. Bloodgood*, 7 Johns. C. R. 134; *Anon.* 3 Atk. 70; *Jones v. Pengree*, 6 Ves. 580; *Baillie v.*

Sibbald, 15 Ves. 185; Cork v. Wilcock, 5 Madd. Rep. 328; Goodrich v. Pendleton, 3 Johns. C. R. 384. In the case of Lansing v. Starr, cited for the appellant, it was impossible that chancellor Kent, who decided *Kane v. Bloodgood* and *Goodrich v. Pendleton* could have intended to go the length the appellant's counsel supposed: and, indeed, in that case, the new promises and payments alleged by the bill to have been made within six years, were expressly denied by plea and answer; and the only point of discovery called for by the bill to which no answer was given, was the origin and consideration of the note on which the action at law was founded, which could constitute no support for the plaintiff's action, or answer to the statute of limitations. If, then, a party might be compelled to discover a fact, which would avoid the bar of the statute of limitations, otherwise a complete defence at law, much more should he be compelled to discover that he had not paid a debt which he sought to defeat by the mere presumption of payment arising from lapse of time. And upon the general principles of equity pleadings, he said it was plain, that the defendant was bound to answer all the allegations of the bill, and among the rest, the allegation that the debt had not been paid. In *Cookson v. Eliason*, 2 Bro. C. C. 252, lord Thurlow laid down the rule, that a party submitting to answer, must answer fully. The rule had been modified by subsequent cases, so as to admit of some exceptions, while it was still recognized as the general rule; and in the more recent cases, it seemed to be the opinion of the court of chancery of England, that it ought never to have been relaxed. *Newman v. Godfrey*, 2 Bro. C. C. 332; *Shepherd v. Roberts*, 3 Bro. C. C. 239; *Jacobs v. Goodman*, Id. 487, in 303 \*note; *Jerrard v. Saunders*, 2 Ves. jun. 454; *Marquis Donnegal v. Stewart*, 3 Ves. 446; *Fenton v. Hughes*, 7 Ves. 287; *Taylor v. Milner*, 11 Ves. 41; *Dolder v. Ld. Huntingfield*, Id. 283; *Faulder v. Stewart*, Id. 296; *Shaw v. Ching*, Id. 303; *Rowe v. Teed*, 15 Ves. 372. In the case of *The Methodist Church v. Jaques*, 1 Johns. C. R. 74, chancellor Kent, after reviewing the cases, stated, as the result of them all, that the rule of lord Thurlow in *Cookson v. Eliason* was still the recognized rule in England, subject to particular exceptions; as, for instance, where the bill prayed an account of partnership, and the defendant denied the partnership; or where the defendant was a fair purchaser without notice for a valuable consideration; or where the defendant denied some allegation of the bill, which not being true, the plaintiff was left without any title to relief, even though the matters of discovery were fully answered. And to this last class of exceptions belonged the case of *Phillips v. Prevost*, cited by the appellant's counsel.

As to the 2nd objection to the decree, that the laches of the plaintiff, and of all the parties who had had a right successively to assert the demand, their acquiescence in the defendant's refusal to pay the money, and the abandonment of the claim by mrs. Morris

during her widowhood, ought to close the door of equity against the relief now sought; he said, that, considering this as a suit in equity to enforce a legal demand, the obligation of which still continued, though the legal remedy could not be resorted to by reason of the relation of the parties, the case was to be determined upon the principles of a court of law; and, surely, not one of these points of defence would have been available at law, when it was once proved that the debt had never been paid. The general principles stated in *Smith v. Clay*, *Hercy v. Dinwoody* and *Carr v. Chapman*, were incontrovertible; but it was admitted, in those cases, and in all cases of the same class, that every case of the kind 304 \*must depend upon its own peculiar circumstances; and without desiring to mitigate the strong language of lord Camden in *Smith v. Clay*, except as he had himself explained it, and applying the reasoning of that case to the case before the court, considered as a suit to enforce a legal right on a legal obligation, he was willing that every presumption, in favour of every fact which would have been a valid defence at law, should be regarded as true, if it was not rebutted by facts and circumstances proved in the cause. There was no arbitrary discretion in a court of equity to refuse relief on the mere ground of delay: a delay of twenty or of a hundred years would not close the door of a court of equity against the claim, if the delay had been occasioned by the defendant's own act, or if it could be accounted for by the plaintiff's disability, or if it had in no degree impaired any defence which the defendant originally had. In *Burwell's ex'ors v. Anderson*, 3 Leigh 348; *Pickering v. Ld. Stamford*, 2 Ves. jun. 272, 581; *Arden's ex'ors v. Arden's ex'ors*, 1 Johns. C. R. 312, and many other cases, relief had been given even against decedents' estates, and for the settlement of executors' accounts, after as great and greater lapse of time than had occurred in this case. He then entered into an examination of the evidence, for the purpose of shewing, that the defendant had no ground for his pretensions that these bonds were given by him, and taken by his father, only to secure payment of the interest on the money during the father's life, and that the father, by his will, intended to bequeath the bonds to him, and not to his daughter; that he never set up such pretensions till he filed his amended answer; that the parties had never acquiesced in those pretensions, and, for aught that appeared, never heard of them; that mrs. Morris never abandoned her claim to the money; and that the defendant had not been deprived, by the delay in asserting the claim, of any testimony which could have been

305 \*of any avail to his defence. He remarked, that the defendant in his first answer relied on grounds of defence inconsistent with those detailed in his amended answer; which alone should suffice to condemn his new pretensions. And as to the delay of the parties to assert the claim, that was accounted for, by the fact that the defendant had, in 1808, brought a suit against his co-

executor and his colegatees to recover a debt claimed by him of his father's estate for services rendered to his father in his lifetime, and if he had succeeded in that suit, the debt due on these bonds might have been extinguished; and this suit was depending till 1818. Add to which, Mrs. Morris was under the disability of coverture, from 1808 till 1819; and again from 1820 till her death in 1833; and during this disability, her rights could not be affected by delay, nor was she capable of destroying them by any acts of acquiescence or abandonment, even if such acts had been proved. *Bailey v. Jackson*, 16 Johns. R. 210; *Dunlop & Co. v. Ball*, 2 Cranch 180; *Waller v. Armistead's adm'rs*, 2 Leigh 11; *Hatch v. Hatch*, 9 Ves. 292; *Christophers v. Sparke*, 2 Jac. & Walk. 223.

3. If the court was right in decreeing the principal, it was right in decreeing interest too. In *Jones ex'or v. Williams*, 2 Call 103, 106, *Pendleton, P.*, said, "it was natural justice that he who has the use of another's money should pay interest." In *Jones v. Turberville*, 2 Ves. jun. 14, lord commissioner Ashhurst said, that one of the objections to entertaining stale demands, was, that "if a man was liable after such a length of time, he was liable for interest also." In *Burwell's ex'ors v. Anderson*, 3 Leigh 348, this court, while it had some difficulty in entertaining the bill at all, and refused to interfere with the general frame of the executor's account, because of the staleness of the demand, yet charged the executor with interest which had been omitted in the audited account. And in *Arden's ex'ors v. Arden's ex'ors*, before \*cited, chancellor Kent decreeing a legacy after a great lapse of time, because of the disability of the legatee, decreed interest also, and recognized the right to interest wherever the principal was due.

4. He admitted, that according to the course of decisions in England, in equity as well as at law, interest could not, in general, be carried beyond the penalty of the bond; but the courts, in modern cases, had been astute to lay hold of any circumstance which would enable them to do full justice, without regard to the technical rule that limited the recovery to the penalty. In 1 Wms. Saund. 58, n. 1, serjeant Williams, speaking of this rule, said—"If by any contrivance of the debtor, he does in fact withhold payment, upon what principle of law or honesty are a jury not to give the obligee interest by way of damages for the detention of the debt, in this case as well as in the case of bills of exchange or promissory notes, or the like, where interest has always been given when payment has been refused? In all actions of debt, the judgment is to recover the debt and nominal damages for the detention of the debt; but if the circumstances of the case be such as to prove to the satisfaction of the jury that the plaintiff has sustained a real damage by the detention of the debt, there seems to be no reason or authority against the jury giving such damage in addition to the penalty of the bond." In *Tennant's ex'or v. Gray*, 5 Munf. 494, this court (as the appellant's counsel admitted) sanctioned the

giving of the surplus interest beyond the penalty, in the form of damages. That case, he believed, had been followed in practice ever since. And he said, the supreme court of New York had held, in general terms, that interest beyond the penalty was recoverable, in *Smedes v. Hooghtaling*, 3 Caines's Rep. 48.

The case has been argued, as if the legal obligation of the bonds in question was in full force, and the object of the suit was to enforce that obligation. But the obligee appointed the obligor his executor, and thereby extinguished the legal remedy on the bonds, though, by the statute 1 Rev. Code, ch. 104, § 57, p. 389, the debt was not extinguished. It was a debt of the defendant to his testator's estate; it was assets in his hand, which he ought to have applied according to the directions of the will; and the will bequeathed the debt specifically to the testator's daughter. The delivery of the bonds to her, was an assent to the legacy; and the executor who himself owed the debt, could not allege want of assets to pay it, unless the money was wanted to pay debts of his testator, which is not pretended. As soon as the defendant qualified as executor of his father, he became bound, not only as obligor in the bonds, but in his executorial character, to pay money he owed his father's estate to his sister. This suit, therefore, was not merely a suit in equity upon the bonds, but it was a bill in equity for a specific legacy, against the executor who was chargeable for it. This view of the case, he said, while it nowise weakened the argument for the appellee on the other points, removed all difficulty in regard to the question whether interest should be given beyond the penalty of the bonds.

TUCKER, P. The first objection made to the proceedings in this case, is, that the defendant was erroneously compelled to answer whether he had paid off the bonds or not. I am of opinion that this objection cannot be sustained. There seems to have been at one time a doubt, whether a mere bill of discovery would lie, for the purpose of compelling the defendant in an action at law, who had pleaded the statute of limitations, to answer whether he had not made a new promise within five years, in order to avoid the bar. In my early practice, judge Carr dismissed a bill which I filed for that purpose. It seems, however, that the practice has been recognized, and sustained by various cases. *Cork v. Wilcock*, 5 Madd. R. 328; *Baillie v. Sibbald*, 15 Ves. 185; *Hindman v. Taylor*, 2 Bro. C. C. 7. And it is in perfect conformity with the general principle, that where the party cannot establish his case at law by other means than an appeal to the conscience of the defendant, he is entitled to make that appeal. *Mitt. Plead.* 130, 148; *Madd. Ch. Prac.* 161, 167. Although, therefore, the defendant pleads at law the bar of the statute, yet if the plaintiff avoids the bar by replying a new promise within five years, he may by bill of discovery compel the defendant to answer whether he has made such a promise or not. The case of *MacGregor v. The*

East India Company, 2 Sim. 452, so far from impugning this doctrine, seems to me to confirm it; for it admits, by strong implication, that if the bill had alleged a new promise, and that the defendants had documents in their possession, which would prove it, the defendants must have answered. But if the discovery is compelled in aid of a trial at law in such case, much more should it be enforced, where the bill is filed for relief, and the plaintiff, apprehending the bar of the statute, charges a particular special promise to avoid its operation. The defendant must in such case deny the promise charged, not only by averment in the plea, but by answer also in support of the plea. Mitf. Plead. 212, 213; 3 Atk. 70; 2 Atk. 51; Bailey v. Adams, 6 Ves. 586, 596; Beames's Pleas in Eq. 169; Kane v. Bloodgood, 7 Johns. Ch. Rep. 90, 134. If this, then, was a bill upon an open account instead of a bond, and the plaintiff had charged a new promise to avoid the bar of the statute, the defendant must have answered to it. It is not perceived, that in the weaker case of presumption, which is but matter of evidence, and, offers no peremptory bar, he should be absolved from answering whether, in truth and in fact, he had paid the debt, in order to avoid the effect of lapse of time in barring the plaintiff's demand.

The presumption may be repelled by  
309 \*any thing which goes to shew non-payment. By what can it be more effectually repelled, than by the defendant's own confession? Of what can he complain, when the fact of his having made payment is to be determined by his own oath? Whatever the length of time, there is no bar, if he acknowledges that the debt has never been discharged. Such an acknowledgment to a third person, would be good evidence, and would repel the presumption: then, why shall he not be compelled to answer to the fact upon the requisition of the plaintiff? Under which of the exceptions to the duty to answer can he bring himself? It subjects him neither to a penalty nor forfeiture, but merely to the payment of a just debt. It compels him not to disclose his own turpitude nor does it expose him to the danger of a criminal prosecution. It disburthens his conscience by compelling him to do justice. It absolves him from the demand if he swears that it has been paid, and only charges him upon his own confession that it is unpaid. I am therefore clearly of opinion, that the answer was properly enforced.

On the merits of the case, an examination of the record has left no doubts on my mind. The presumption of payment from length of time, on which the defendant first rested his case, has been repelled by the extorted confession in the answer. The defence, that by the original transaction it was designed to bind him only to pay the interest during his father's life, is not only in conflict with the principle which forbids the contradiction of written contracts by extrinsic evidence, unless there has been fraud, accident or surprise, but it is at variance with the facts and with the defendant's own conduct. Before it be admitted, he should explain why his deed recites a purchase for the full sum of £400?

—why bonds are taken, instead of a simple written engagement to pay his father sixty dollars per annum during his life?—  
310 why three bonds were taken instead \*of one?—why, in the eagerness of the defendant to clutch at any testimony in support of his pretensions (evinced by requesting Reed to reduce to writing his gossip with the old man) he did not at that time, or before, procure from his father himself, the evidence of his rights, if rights he had? and, lastly, why he never thought of this defence until he was compelled to own that the debt was yet unpaid? Moreover, having but an equity, why has it remained so long unassembled? The presumption from length of time, bears with at least as much force against his pretensions, as against the clear documentary evidences of debt on the part of the plaintiff. I am of opinion, therefore, that, in this case, we ought not to presume that the defendant ever had a good equitable defence against these bonds; a conclusion fortified by his having signed an inventory, in which they were inserted as part of the estate to which his sister was entitled, and by the other evidences in the cause, going to shew very clearly, that his father was not bound to give them up, but that at most he had made him some promise to do so at his death, which promise, being altogether voluntary and unexecuted, cannot be insisted on or enforced.

As to the supposed abandonment of her rights by Mrs. Morris, I must content myself with saying, that the facts do not sustain it, nor can it be inferred from the delay. Stickley's testimony proves beyond question, that she still held the bonds after her marriage with Morris, which must, of course, have been within twenty years before suit brought. She said, "some of her friends wished her to forgive them, but that she refused to do so, and intended making her brother pay the bonds, as the money might be of use to her on a rainy day." Mrs. Stickley's testimony is to the same effect. Independently, therefore, of the principle that legal rights are never lost by abandonment, though equitable rights may be, here is neither proof of abandonment, nor sufficient length of time from which to infer it.

311 \*These pretensions on the part of the defendant are the more extraordinary, considering the position he occupied in relation to the debts and the legatee. Constituted by his father one of his executors, the instant he qualified, the amount of those bonds was assets in his hands, subject to debts in default of other personal estate, but otherwise payable to his sister the legatee. It was his duty to pay over the money to her, as soon as the estate was wound up, and it was ascertained that the legacy bequeathed to her would not be impaired by any demands against the estate. Indeed, as he gave up the bonds, or as they were given up to her without opposition on his part, we must take the assent of the executors to have been given to her legacy, and it was the duty of this executor, who owed the debt which had thus become assets in his hands, to pay it to his sister. It is with an

ill grace, that he complains of her forbearing to press her claims for her small patrimony. Placed in affluent circumstances, and in no need of the money, she did forbear, leaving to the defendant to make the payment when it suited his pleasure or his convenience. These considerations, together with her coverture for twenty odd years, and her unsettled state of mind, abundantly account for that delay to sue the defendant, on which he now rests his defence against the payment of his sister's portion of her father's estate.

Upon weighing the whole matter, I am well content to affirm the decree in all things: being satisfied to follow the decision of *Tenant's ex'or v. Gray*, and well convinced, that if interest ought, in any case, to be given beyond the penalty, it was most proper in this case.

CABELL, J., concurred.

STANARD, J. I think the court below was right in enforcing an answer from the defendant, to the interrogatory of the bill respecting the nonpayment of the

312 \*debt in question; a proceeding, which has been treated, in the argument, as the compelling of a discovery in respect to that matter. But it was no more a discovery coerced, than the requiring of an answer to any other allegation of the bill would have been. The bill was no more a bill of discovery than any other bill in equity. It was brought for a claim that was recoverable only in equity. To all the allegations of such a bill material to the plaintiff's case, the defendant ought, and may be compelled, to answer. Every bill in equity is, in that sense, a bill of discovery. To every material allegation, the defendant must answer on oath, unless he be protected from the obligation to do so, by the consideration, that his answer would violate professional confidence, or that it would subject him to a penalty &c. The answer of the defendant in equity makes up the issue between the parties: and according to the course of the court of equity, the issue is, in all cases, made on the oath of the defendant; it is not so at law, except in particular cases, under statutory provisions. "Every plaintiff (in equity) is entitled to have a discovery from the defendant, as to two heads; to enable him to obtain a decree, and to ascertain facts material to the merits of his case, that either he cannot prove, or in aid of proof;" *Finch v. Finch*, 2 Ves. sen. 592. Lord Eldon, in *Cooth v. Jackson*, 6 Ves. 37, 8, states the rule thus: "If the party has a right to relief in this court, he has a right to an answer from the defendant to every allegation of his bill, the admission of the truth of which, or the proof of the truth of which, is necessary to entitle him to that relief." If a suit at law had been brought on the bonds of the defendant, he could no otherwise have relied on the presumption of payment from the lapse of time, but by putting the fact of payment in issue by plea, and then using the lapse of time as evidence to sustain the plea; and so in equity, unless the pleadings had made that issue,

313 \*this evidence could not have been resorted to as proof. The argument on the point turned mainly on the power of the court to enforce discovery on a bill, technically called a bill of discovery, by which the aid of the court is asked to discover matter to be used as evidence before another forum, or where the necessity of seeking a discovery is the ground of the plaintiff's claim to ask relief from the court of equity, and sustain its jurisdiction in cases in which it would otherwise want jurisdiction. But the case before us belongs to neither of those classes; and, therefore, though the court might refuse to compel the discovery, if its aid were asked as merely ancillary to a court of law, for the purpose of avoiding the bar of the statute of limitations or of repelling the presumption of payment from lapse of time, it would not follow that the court would, in a regular suit for relief which could be had in equity only, dispense with an answer to any of the material allegations of the bill. Even where the discovery is sought, only for the purpose of repelling the defence of the statute of limitations at law, the discovery will be enforced. It is so distinctly decided in the case of *Cork v. Wilcock*, cited at the bar: and the case of *MacGregor v. The East India Company* is to the same effect; for it was there decided, that the plea to such a bill must distinctly deny, that any assumpsit was made within the term of limitation; and according to the practice of the court of chancery, such a plea must be sustained by the oath of the party; *Wyat's Reg.* 325.

As to the effect of the lapse of time on the title of the appellee to relief in this court, I have the misfortune to differ from my brethren. The statute of Virginia prevented the extinguishment of the debt (if one was due) from John Baker to his father, in consequence of his appointment and qualification as executor of his father; but after his appointment and qualification, the legatee of that debt had no remedy but in equity 314 only. \*The delivery of the bonds by the executor to the legatee, was an assent to the legacy, and vested in her a right to the debt, if one was due from the defendant to the testator, and was equivalent to the delivery of a specific chattel to the legatee thereof; and it withdrew these bonds from the assets of the testator's estate, in like manner as they would have been withdrawn from them if the obligor had not been the executor. After this assent to the legacy, and delivery of the bonds to the legatee, the executors, and John Baker as one of them, ceased to be responsible to the legatee as executors: the relation of creditor and debtor, to the extent that John Baker was indebted, was established between the legatee and him, with this peculiarity, that the creditor had remedy in equity only for her claim. Such being the relation of the parties in 1807, the suit to charge the defendant with this debt was not brought till 1835, and was then brought by the surviving husband of the creditor as her administrator, she having lived in the vicinity of the party now charged as her debtor, till 1833. In this interval, it

does not appear that the defendant ever acknowledged the debt, or that it was ever demanded of him. It appears that he contested his liability for it at an early period; and that his sister and her first husband during her first coverture, she during her widowhood, and she and her second husband, were all fully aware that it was so contested: that of the facts on which he relied to resist the payment of the bonds, he had one witness, at least, who was no longer living when this suit was brought; that his sister and her husbands, apprized of his denial of the justice of the claim, forbore to bring suit for twenty-eight years; and that she, at some times, asserted her right to the bonds, and the defendant's obligation to pay them, and, on other occasions, expressed her acquiescence in his objections to the payment of the bonds, and her willingness

315 to forego any claim on \*them; but none of these assertions of right, or declarations of acquiescence, were made in any communication between the parties. While the conflict between the purposes and views of the alleged creditor at different times, leaves the matter in some doubt as to what she might finally have done, the fact of actual forbearance is incontestable; nor is there any evidence even of a demand. The parties were in antagonist positions for more than twenty years before this suit was brought, while one denied his obligation to pay, and the other forbore to assert her right to receive. There has been (if I may use the expression) an adversary possession of the money in controversy for more than twenty years; and there has been a forbearance to bring suit for a right, recoverable in equity only, for that length of time, with full knowledge to the parties entitled and able to sue, that the right was denied: and the only question is, whether a court of equity will, after such delay, entertain the suit? My impression is, that in such a case, according to the principles of numerous decisions, the activity of a court of equity ought not to be called forth. The inference which length of time per se might warrant, that the party intended to relinquish the claim, is in some degree strengthened by the evidence of avowals of that purpose at different times; and time has deprived the defendant of the protection of such a purpose to relinquish the claim, by the death of the party to whom it is presumptively or by direct proof imputed. But I rest mainly on the proposition, that, after the lapse of more than twenty years, during which liability for the claim (for which there was no remedy but in equity) was, to the knowledge of the claimant, denied, and during which there was no impediment to a suit by the party entitled to sue for and recover the claim if it was just, and yet no suit was brought, the lapse of time, relied on

as a defence, is effectual to repel the 316 claim, \*and to protect the defendant from the active agency of a court of equity to subject him to it. Among many cases that might be cited, I refer to *Marquis Cholmondeley v. Ld. Clinton*, 2 Jac. & Walk. 1, 184-192; *Hoveden v. Ld. Annesley*, 2

*Scho. & Lef.* 607, 630; *Elmendorf v. Taylor*, 10 Wheat. 152; *Miller v. M'Intyre*, 6 Peters 61.

Decree affirmed.

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\**Taylor v. Cooper.*

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Judicial Sales—Confirmation\*—Change in Value of Property.**—Where a sale is made under a decree, if, before it is confirmed, the value of the property be materially increased or diminished, the purchaser, under the English practice, has neither the benefit in the one case, nor the burthen in the other: per TUCKER, P.

**Same—Same—Retraction.**†—After the sale is confirmed, the confirmation relates back to the sale, and the purchaser is entitled to every thing he would have been entitled to, had the confirmation and conveyance been contemporaneous with the sale.

**Same—Same—Same—Case at Bar.**—On the 30th of October 1834, a decree was made for the sale of a tract of land, on a credit of six, twelve and eighteen months. Before the decree, there had been a contract to rent the land, and pursuant to that contract, a lease was made for a year, commencing the 25th of December 1834 and ending the 25th

\***Judicial Sales—Confirmation—Discretion of Court.**—Whether a sale will be confirmed is a question not of arbitrary, but of sound legal discretion in view of all the circumstances to be exercised in the interests of fairness, prudence, and with a just regard to the rights of all concerned. For this proposition the principal case is cited in *Brock v. Rice*, 27 Gratt. 816; *Carr v. Carr*, 88 Va. 739, 14 S. E. Rep. 368; *Todd v. Gallego Mills Mfg. Co.*, 84 Va. 590, 5 S. E. Rep. 676; *Berlin v. Melhorn*, 75 Va. 642; *Terry v. Coles*, 80 Va. 703.

See, in accord, *Roudabush v. Miller*, 33 Gratt. 454; *Daniel v. Leitch*, 13 Gratt. 195; *Hansucker v. Walker*, 76 Va. 753; *Coles v. Coles*, 83 Va. 525, 5 S. E. Rep. 673; *Moore v. Triplett*, 96 Va. 603, 32 S. E. Rep. 50; *Kable v. Mitchell*, 9 W. Va. 492; *Marling v. Robrecht*, 13 W. Va. 440; *Hilleary v. Thompson*, 11 W. Va. 113; *Hartley v. Roffe*, 12 W. Va. 401.

†**Same—Same—Retraction.**—When a judicial sale is confirmed by the court such confirmation relates to and vests the title in the purchaser from the date of sale, thus entitling him to the intermediate rents and profits. In support of this proposition the principal case is cited in *Donahue v. Fackler*, 21 W. Va. 129; *Lathrop v. Nelson*, Fed. Cas. No. 8,111, 14 Fed. Cas. p. 1184; *Childs v. Hurd*, 25 W. Va. 535; *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 350, 23 S. E. Rep. 575; *Hyman v. Smith*, 13 W. Va. 768; *Kable v. Mitchell*, 9 W. Va. 514; *Cale v. Shaw*, 33 W. Va. 305, 10 S. E. Rep. 639. See *Evans v. Spurgin*, 6 Gratt. 107, and *note*.

**Same—Same—Change in Value of Property before Confirmation.**—The highest bidder at a judicial sale is not considered as the purchaser, until the report of sale is confirmed. Until then, according to the English practice, he has no right to sell at a profit, except for the benefit of the owner of the estate. He is not liable to any loss by fire or otherwise, which may happen to the estate. Nor is he entitled to the benefit of any material appreciation of the estate by the accidental falling-in of lives or by other means. *Daniel v. Leitch*, 13 Gratt. 211, citing

of December 1835. During this year, to wit, on the 10th of January 1836, sale was made under the decree. That sale being confirmed and a conveyance executed to the purchaser, HELD, the purchaser must be considered complete owner from the date of the sale, and entitled to the rent which became due afterwards.

**Same—Same—Same—Assumpsit.**—In such case, if the rent has been paid to the representative of the former owner, the purchaser may recover it from him by an action of assumpsit for money had and received.

**Assumpsit** in the circuit court of Montgomery county, by Jacob Cooper against John M'C. Taylor administrator of the estate of Peter Dyerle deceased. The plaintiff declared for money had and received by the defendant to the use of the plaintiff. The defendant pleaded the general issue.

At the trial, the jury returned a special verdict, which found the following facts: 1. A decree made the 30th of October 1834, for the sale, on a credit of six, twelve and eighteen months, of a tract of land whereon

Peter Dyerle resided at the time of his death. \*2. That on the 10th of January 1835, sale was made under the decree, and Cooper, the plaintiff, purchased the land for 3270 dollars, and gave bonds with sureties for the purchase money, the whole of which purchase money has since been paid. 3. That at the time of the sale, the land was in the possession of one John G. Burgess, to whom it had been rented by the defendant Taylor (to whom, as sheriff of Montgomery, the estate of Dyerle had been committed) for a year commencing the 25th of December 1834 and ending the 25th of December 1835. 4. That although the lease commenced after the decree for the sale, yet the contract was

made with Burgess before the decree. 5. That the rent of Burgess was 210 dollars, and it has been paid by him to Taylor as administrator of Dyerle, although Cooper claimed it and gave notice to Burgess not to pay it. 6. That the sale was confirmed by a subsequent decree, and an order made directing a conveyance to Cooper, which was executed accordingly, and Cooper took possession of the land at the end of the year for which Burgess rented.

The circuit court being of opinion, upon the facts found, that the law was for the plaintiff, and the jury having, in that event, assessed the damages at 210 dollars with interest from the 25th of December 1835, judgment was entered accordingly.

To this judgment a supersedeas was allowed.

The attorney general and Preston, for plaintiff in error.

Edward Johnson, for defendant in error.

TUCKER, P. I have had not the slightest doubt of the right of Cooper the purchaser to the rent in question. The principles of the court, according to the english practice, I take to be clearly these:

1. Where there is a sale by the master, and the property appreciates by the accidental falling in of lives \*or by other means, the court will only confirm the sale upon the terms of the purchaser's making compensation. *Davy v. Barber*, 2 Atk. 490; *Blount v. Blount*, 3 Atk. 638. And in doing this, it but acts within the scope of its rights and powers; for the sale is not conclusive until confirmed, and justice to the owner of the estate demands that where there has been a material appreciation before confirmation, a resale should be directed unless the purchaser will make compensation.

2. Where, after the sale and before confirmation, (as in the cases of *Ex parte Minor*, 11 Ves. 559, and *Heywood v. Covington's heirs*, 4 Leigh 373,) the property is destroyed or materially injured by flood or fire, the loss must fall on the vendor; for as, in the case of appreciation, the vendee will be charged with compensation, so, in the case of depreciation by destruction of part of the estate, he has a fair claim to a deduction. Until the sale is confirmed, he is considered in England as having no fixed interest in the subject of purchase. 11 Ves. 559. Before it is confirmed, he is always liable there to have the biddings opened, and therefore non constat that he is a purchaser. *Anonymous*, 2 Ves. jun. 336. In case of loss he is therefore allowed a deduction. The practice with us has gradually departed from that of the english courts in some respects which it is not necessary here to set forth.

3. But, thirdly, where the sale is confirmed, that is, where both contracting parties (the purchaser and the court) concur in ratifying the inchoate purchase, the confirmation relates back to the sale, and the purchaser is entitled to every thing he would have been entitled to if the confirmation and conveyance of the title had been contemporaneous with the sale. *Anson v. Towgood*, 1 Jac. & Walk. 617. In this manner I think the several authorities are easily reconciled; and if

the principal case; *Heywood v. Covington*, 4 Leigh 373.

The principal case and *Hyman v. Smith*, 18 W. Va. 744, are cited in *Stout v. Philippi Mfg., etc., Co.*, 41 W. Va. 350, 23 S. E. Rep. 575, for the proposition that, if, after sale, and before confirmation, the property is destroyed or injured, the purchaser will not be compelled to comply with his purchase, if without fault, as confirmation relates back to the moment of purchase, and the purchaser is entitled to it in its then condition.

**Same—When Absolute—Confirmation.**—The principal case is cited in *Childs v. Hurd*, 25 W. Va. 538, for the proposition that a sale made by a commissioner under a decree in a court of equity is not an absolute sale, and does not become such, until it is confirmed by the court, and until this has been done, the purchaser has no fixed interest in the subject of the sale. The principal case is further cited in support of this proposition in *Cocke v. Gilpin*, 1 Rob. 39; *Kable v. Mitchell*, 9 W. Va. 515. See *foot-note* to *Cocke v. Gilpin*, 1 Rob. 39; *Hudgins v. Marchant*, 28 Gratt. 177.

The three principles stated by TUCKER, P. in the principal case are quoted in *Kable v. Mitchell*, 9 W. Va. 513; *Hyman v. Smith*, 18 W. Va. 767.

For a full discussion on the subject of "Judicial Sales," see monographic note on that subject appended to *Walker v. Page*, 21 Gratt. 636.

\***Assumpsit**—See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.



this be so in England, I think it may be safely affirmed to be yet more unquestionable under our practice.

320 \*Taking these principles as fixed, the present case will be found to come within the last. In this case Cooper purchased under a decree giving a credit of six, twelve and eighteen months. His bonds are given payable in six, twelve and eighteen months from the day of sale. If he does not receive this rent, he will have no enjoyment of the estate until nearly twelve months after the sale, so that he will have to pay his first bond several months in advance of his perception of the profits, and his twelve months bond will be a cash payment. This is neither just nor equal. The report having been confirmed, he must be considered complete owner from the date of the sale, and of course entitled to the rent becoming due after it.

I have had much doubt, however, whether the remedy of Cooper was in the court of chancery, or at law. But upon much reflection, I think the action at law is maintainable. Before confirmation of the report, indeed, and while the cause is yet pending in the court of chancery, I am of opinion that to that tribunal alone can the purchaser resort for the adjustment of his rights and the enforcement of his claim. Such was the case of *Crews v. Pendleton &c.*, 1 Leigh 297, and *Heywood v. Covington's heirs*, 4 Leigh 373. But where the chancery cause is ended, or where at least, by the confirmation of the report and the execution of the deed to him, the transactions with the purchaser in that court are closed and at an end, I apprehend it is competent to him to assert in this equitable action his title to the rent paid over wrongfully to the defendant. I am therefore of opinion to affirm the judgment.

The other judges concurring, judgment affirmed.

### 321 \*Terrell v. Imboden and Others.

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Fraudulent Assignment—Good between Parties.**—The obligee in a bond secured by a deed of trust, makes a deed transferring the bond and deed of trust for the benefit of his creditors. Afterwards, at the request of the obligor, the obligee signs a receipt, stating, that on the day of the date thereof, he received the amount of the bond. The bond was in fact executed without consideration, and the receipt was in fact given without any payment. The creditors for whose benefit the bond was assigned had no notice of its being without consideration until after the assignment: but the obligor knew of the assignment when he took

the receipt. In a suit between the obligor and those claiming under the assignment, an injunction awarded to restrain the sale of the property conveyed to secure the bond, was dissolved; and the court of appeals affirmed the order of dissolution.

On the 8th of November 1836, Robert Terrell made a deed of trust to Jefferson Kinney, to secure the payment of 650 dollars stated to be due from Terrell to Henry Imboden by single bill dated the first of January 1835. The deed conveyed real and personal property, and authorized a sale if Terrell should not pay off the single bill on or before the 8th of November 1837.

Before that time arrived, to wit, on the 20th of October 1837, Terrell filed a bill in the circuit court of Augusta, setting forth, that the debt evidenced by the deed was unjust in its origin, and the complainant never in fact received one cent in consideration therefor; that he was induced to execute the bond and deed of trust by delusive promises held out to him by Imboden, in whom he had great confidence, and who was a near connexion, the complainant having married his niece; that these promises had never been performed; nevertheless the debt had been fully adjusted and discharged, 322 \*as would appear by Imboden's receipt exhibited with the bill. The bill then stated that Thomas J. Michie, as trustee, and Joseph Points junior, Francis T. Stribling, Walter H. Tapp, George Imboden and Lewis Harman, as

Thornburg v. Bowen, 37 W. Va. 544, 16 S. E. Rep. 837; Horn v. Star Foundry Co., 23 W. Va. 539; and distinguished in Kyger v. Depue, 6 W. Va. 299.

The principal case is also cited in *Montgomery v. Rose*, 1 Pat. & H. 9.

**Case Contra Disapproved.**—The case of *Austin v. Winston*, 1 H. & M. 33, seems to lay down a contrary doctrine. It holds that where a transaction between a debtor and his creditor, is intended by them both to defraud the other creditors of the debtor, but the latter, under all the circumstances of the case, is not so culpable as the former, it would seem, that the court of equity ought not altogether to refuse relief to the debtor, but to apportion the relief granted to the degree of criminality in both parties, so as on the one hand to avoid the encouragement of fraud, and on the other, to prevent extortion and oppression. But this decision was rendered by a divided court, and the conclusion reached by the majority of the court was one, which evidently did not meet with the cordial approbation of even the majority, for JUDGE CARBINGTON, one of the majority, concludes his opinion thus: "So far as respects myself, it is not to be considered that any principle is here fixed so as to operate as a precedent in other cases. This decree is adopted to fit the present case only: and it is hoped that so gross a fraud may not again be brought before this court." And JUDGE GREEN, in *Horn v. Star Foundry Co.*, 23 W. Va. 534, in reference to this case, says: "In subsequent Virginia cases this case was accordingly not regarded as settling the law, and when spoken of afterwards it was either impliedly disapproved or apologized for, because of the particular circumstances surrounding this particular case. I do not regard it as authority to be followed." Digitized by Google

\***Fraudulent Conveyance—Good between Parties.**—A fraudulent conveyance, though void as to creditors, is good between the parties, and, therefore, the fraudulent grantor cannot be permitted to allege his fraud to avoid his deed. *Starke v. Littlepage*, 4 Rand. 306; *James v. Bird*, 8 Leigh 510, 31 Am. Dec. 606; *Terrell v. Imboden*, 10 Leigh 321; *Owen v. Sharp*, 12 Leigh 427. For this proposition the principal case is cited approvingly in *Owen v. Sharp*, 12 Leigh 430; *Harris v. Harris*, 23 Gratt. 756, 759, 763, 770;



cestuis que trust, claiming under some assignment or conveyance in trust from Imboden, sought to subject the complainant to the payment of the claim evidenced by the deed, and the complainant was apprehensive that the trustee would sell the property conveyed, so soon as it could be done under the provisions of the deed. The bill farther stated, that at the time of the adjustment and discharge of the debt, the complainant had no notice or information of any claim on the part of Michie and the other persons above named, if any then existed, but believed that it was still within the power and control of Imboden. Imboden, Kinney, Michie, and the cestuis que trust of Michie, before named were made defendants. And the bill prayed that Imboden might be required to state whether the said obligation and trust deed were not executed without any consideration whatever, and whether the debt thereby evidenced had not been fully adjusted and discharged; that the defendants might be enjoined from all proceedings under said trust deed; and for general relief.

The receipt filed with the bill was in these words: "Staunton, 17th March 1837. I this day received the amount of bond executed to me for \$650, due 27th November 1837, and secured by trust on land, Terrell's property; and I further certify that the said Terrell is not due me any other thing at this time. Henry Imboden."

The answer of Imboden stated, that on the day of the date of the deed, Terrell came to his house, and represented to him that he was about to be pressed for a debt that he owed (as surety, respondent thought), and proposed, by way of relieving himself from the payment of said debt, to give respondent a bond and deed of

323 \*trust to the amount of his (Terrell's) property. In accordance with this design, and without any delusive promises held out to him by the respondent, but solely with the view of defeating his other creditors, Terrell executed to respondent a bond, dated back to the 11th of January 1836, for 650 dollars payable on demand, and executed to Jefferson Kinney the deed of trust to secure the payment of the bond. Neither the scrivener who drew the deed, nor the trustee, had any notice, either then or afterwards, what was its real consideration. The answer then stated, that in February 1837, the respondent executed to Thomas J. Michie the deed of trust a copy whereof was exhibited with the answer, and in accordance with the provisions of that deed, placed the bond for 650 dollars, with some others, in the hands of Michie, to be by him collected and appropriated to the objects of the trust. During all this time, and for some time after, neither Michie nor any of those for whose benefit the deed of trust to him was executed, had any notice of the character of the claim against Terrell, so far as respondent knows or believes. On the 17th of March 1837, Terrell called on respondent, and stated that George Imboden, one of the cestuis que trust, had shortly before informed him that his bond was in Michie's hands for collection; he

represented that the debt was not just, and he wished respondent to give him a receipt against it, to prevent its recovery by said trustee. Respondent then gave the receipt exhibited with the bill. He did not, at the date of the receipt or at any other time, receive any money or other thing on account of the bond. The receipt was given to prevent Michie as trustee, and the cestuis que trust, from collecting the money from Terrell, and with a full knowledge on the part of Terrell that respondent, at the time of giving it, had assigned away the debt for the benefit of his sureties, and had no right to collect or adjust it.

324 \*The deed from Imboden to Michie bore date the — day of February 1837, and was recorded the fourth of that month. It was made to secure Joseph Points junior, Francis T. Stribling, Walter H. Tapp, George Imboden and Lewis Harman, as the sureties of Henry Imboden, and besides conveying real and personal property, transferred all the bonds, notes and book accounts, and debts due to said H. Imboden in any manner whatsoever, together with the benefit of all deeds of trust and other securities by which any of said debts are intended to be secured.

Pending the cause, Kinney, the trustee in the deed from Terrell, advertised the property thereby conveyed, for sale on the 3d of March 1838; and on Terrell's petition, the judge of the circuit court awarded an injunction to restrain the sale.

Soon after the injunction was awarded, the sureties of Imboden filed their answer; wherein, after mentioning the deed from Terrell to Kinney, the deed from Imboden to Michie, and Imboden's surrendering to Michie the bond of Terrell for 650 dollars, they stated that during all this time they had no notice whatever that the said obligation was without consideration, but on the contrary believed that it was based on a good and sufficient consideration. They claim to be innocent transferees for a valuable consideration without notice. Long since that transfer, they have heard of Terrell's alleging that the obligation and deed were executed by him to defraud his creditors. But they insist that if this were so, it would not be available against Imboden himself, much less against his innocent transferees. They do not admit that the debt has been adjusted or discharged by Terrell, either in whole or in part. They charge that Terrell did not apply to Imboden for said receipt till after he was informed of the transfer to Michie, and that the sole object he had in obtaining it was to aid him in a defence against Imboden's assignees.

325 \*Kinney answered, saying, that he knows nothing of the consideration of the bond to Imboden and the deed of trust to himself, nor of the subsequent discharge or release thereof. He had always considered the deed fair and bona fide, and would not have executed it with any other impression. Several months before the trust could, by its terms, be executed, Imboden came to respondent, and urged him to advertise and sell for the debt. Respondent, intending to comply

with the request, turned to the deed, and found he could not then act.

The defendants took the deposition of Erasmus Stribling, the scrivener who drew the deed. The deponent happened, on the day of its date, to be in Imboden's store, and was invited by him into his countingroom and asked to draw such a deed. Deponent assented, and Terrell, coming in shortly afterwards, furnished the list of property included in the deed. Deponent then, by direction of the parties, filled up the deed as it now stands. He was himself requested to act as trustee, but declined so to do, informing the parties that he was often from home and they had better substitute some other name. The name of Jefferson Kinney was then inserted. Something was said about the time which was to run before the trust was to be acted on. Terrell wished a longer time than twelve months, but it was agreed that that should be the time; Imboden observing that Terrell need not be afraid to trust to him for indulgence, if it should be necessary,—or words to that amount. Deponent did not see or hear any thing from the parties, or either of them, calculated to raise a suspicion in his mind that the transaction was not fair and bona fide between them. He never heard there was any debt due from Terrell to Imboden until the time he drew the deed, nor did he ever hear its integrity impeached until some time during the past fall or this winter. The date of this deposition was the 17th of February 1838.

326 \*Two days after this deposition was taken, the plaintiff took that of Catharine Imboden, the mother of Henry Imboden, and grandmother of Terrell's wife. She deposed, that her son Henry came into her presence, in the fall or winter of 1836, and told her that Robert Terrell had given him a deed of trust upon every thing he had, for 600 dollars. She asked him if Terrell owed him? and he replied, "Oh no—I took the deed of trust for the benefit of Terrell's wife and children. He is going to run off, in consequence of having had a fight with Nat. Grove, and being bound for security money for Peck." The witness, being asked if she knew whether Terrell was indebted to her son, answered, that he never told her that Robert Terrell was in debt to him, but he said that his brother Dick was.

The defendants then took the deposition of Joseph R. Beatty. He deposed, that about the year 1835, he heard Henry Imboden say that he was astonished at Robert Terrell's not having complied with a promise he had made to pay him money about that time. Deponent asked Imboden if Terrell owed him much? Imboden answered "Yes," and named the amount; which being large, deponent asked Imboden if Terrell was able to pay a debt of that amount? Imboden said "Yes, I think he is." Deponent thought he had heard Imboden say that the debt was in part for cash loaned. He heard him complain more than once of Terrell's failure to pay him money.

On the 21st of June 1839, the court, on the motion of the defendants, ordered that the injunction be dissolved.

From this order, an appeal was allowed.

Baldwin, for the appellant. The plaintiff has come into court upon equitable grounds, to wit, the want of consideration for the debt, and its having been discharged. He

327 does not seek relief on the ground that \*the contract was in fraud of his creditors. That is a defence made by Imboden and those claiming under him. They seek to shew that the consideration of the bond was unlawful. Such a ground is inadmissible. One is not to be heard to allege his own turpitude, when he is more deeply dyed in guilt than his adversary—when that adversary is not in *pari delicto*. Besides, the answers are not evidence of the truth of the allegation, and the proof does not sustain it. There is no proof that Terrell, at the time of the transaction, was indebted to third persons. But whether the transaction was fraudulent or not in regard to third persons, the debt was discharged by Imboden's acquittance, not only as against him but as against his assignees. The assignees can stand upon no better footing than the obligee, unless they prove that at the time of the discharge, the obligor had notice of the assignment. But of this there is no evidence. Imboden and his assignees seek to set aside the acquittance, and to enforce what they allege was a fraudulent plan concocted by Imboden. The court should not aid these efforts. It should stay the trust deed, on the concession of want of consideration, and the evidence of satisfaction, and not hear the defence set up, or at least require full proof. Imboden is doubly stained with guilt. His declarations, whether in or out of court, are no evidence. *Jones's adm'r v. Comer's ex'or*, 5 Leigh 350; *Austin's adm'x v. Winston's ex'x*, 1 Hen. & Munf. 33.

Michie, for the appellees. The allegations of the bill are vague and unsatisfactory. What were the promises made by Imboden and not performed, is not stated. What injustice there was in the bond and trust, we are not told. And while the plaintiff alleges that he received no consideration, he does not say whether any, or, if any, what consideration was stipulated. Nor is it alleged that the debt was paid. The statement is

328 merely that the debt was adjusted and discharged. \*The adjustment and discharge may have been just such as is stated in the answers. And such an adjustment and discharge could not avail against innocent assignees. For, though bound by all payments and setoffs after the assignment and before notice, they would hardly be bound by a contract between the obligor and obligee that the debt should be cancelled or surrendered. The complainant not having alleged such fraud in the consideration, or such failure of consideration, as would vitiate the debt, and not having alleged payment, the injunction was improvidently awarded. But whether it was rightly awarded or not, most clearly the order dissolving it is correct. The deposition of Catharine Imboden, taken by the plaintiff, explains the nature of the delusive promises mentioned in the bill, and shews that the bond and deed of trust were voluntarily given

by Terrell (without fraud on the part of Imboden) to delay and defraud his creditors. Suppose this so, will the court set aside the contract even as between Terrell and Imboden? A man has a right to make a voluntary conveyance of his property, where there is no fraud on either side, and deprive himself of the power to recover it back from the voluntary donee. Shall a fraudulent intent on the part of the donor place him in a better situation than he would have occupied had his intent been good? If the courts of the country sanction this principle, then all a fraudulent debtor has to do, is to cover up his property while the storm rages; and when his creditors are dead, or their debts out of date, he may come out with his pockets full. But this is a case of assignees for valuable consideration without notice, who stand upon a higher footing than the original grantee or obligee. It has been so adjudged in relation to the assignee of a fraudulent grantee, under the proviso in the statute of frauds.

329 \*TUCKER, P. In whatever light we view this case, I am satisfied that the decree of the court of chancery is right. If we consider it in the way in which the facts present it, there can be no doubt that the original transaction was fraudulent as to the creditors of Terrell, who gave the bond and executed the deed of trust to a near connexion for the purpose of protecting his property from their demands. The legal consequence is, that though the transaction was void as to Terrell's creditors, it was binding between the parties. See the statute of frauds, 1 Rev. Code, ch. 101, § 2, p. 372, and the case of *Starke's ex'ors v. Littlepage*, 4 Rand. 368. And thus it follows that the transfer to Imboden's creditors gives them complete title as against Terrell himself, though that title would be defeasible by his creditors, if he has any at this time. Had Imboden's creditors pursued him to insolvency, instead of taking the assignment of this bond and the deed of trust, Imboden would have been bound to surrender the bond as part of his available estate, and Terrell could not have gainsaid the payment.

Such is the case presented, divested of all technicality. Let us look at it, however, according to strict legal rules. The plaintiff files his bill, setting forth that the debt was unjust in its origin, as he never received a cent of consideration, and was induced to execute the bond and deed by delusive promises never performed. What they were he does not state, but contents himself with these vague generalities. If, as I think is apparent from the whole case, this form of the bill was adopted as a veil to the real transaction, and because the plaintiff knew that a disclosure of the truth would be fatal to him, then the case is very much like that of *James v. Bird's adm'r*, 8 Leigh 510, in which the plaintiff equally evaded a disclosure of the fraudulent transaction, but the court nevertheless, upon the proofs of its character, dismissed his bill. In this case, indeed, \*the plaintiff had a difficult game to play. If he attempted to

shew by the proofs, or by Imboden's answer, that there was no consideration, out would come the fraud. If he failed to shew the want of consideration, then the bond and deed of trust were unassailed, and there was no equity for him to rest upon. Driven to this strait, he calls on Imboden to answer, who discloses the original fraudulent object of the transaction, and then proceeds unscrupulously to set forth his own multiplied iniquities in relation to his debts. He transfers it for the payment of his own debts, in violation of the trust reposed in him, and then endeavours to defeat this transfer by signing a receipt acknowledging payment, when no such payment had been made. His fraud is gross and palpable: so gross, that if others were not interested, I should not only deny him the right to make such a defence, but should feel anxious to relieve his less guilty confederate, if the rules of the court would permit it.

But others are parties in interest, and parties to the cause. The creditors have answered, declaring their belief, when they took the assignment, that the bond was on good consideration and the debt a just debt; but that in any aspect they were entitled to it. Now if Imboden's answer and his declarations proved by his mother are put out of the case, it is the naked case of a bond and deed of trust assailed on the ground of want of consideration, where the equity of the bill is denied, and there is no proof whatever in support of it. On the other hand, if Imboden's answer and declarations are evidence, then they prove the fraud beyond question, and the case is precisely that of *James v. Bird's adm'r*, in which, though the bill did not distinctly disclose the fraud, it was dismissed upon proof of it. But in truth the answer of Imboden is evidence against the plaintiff who has called for it, whether it was evidence against the creditors or not. *Field v. Holland*, 6 Cranch 331 \*9. And even though he could not avail himself of such a defence, yet his assignees have a right to use his answer and his declarations against the plaintiff, as the plaintiff himself has brought them into the cause.

As to the receipt, it is of no account. It was given after the assignment, and with full notice of it. This is indeed denied by the bill, but proved by the answer, without the evidence of which, there is no proof of the receipt whatever. Reject the proof, and the receipt is out of the case: admit it, and it is fraudulent. It is then no evidence against the creditors. *Starkie on Evid.* part 4, p. 32; *Pocock v. Billing*, 2 Bing. 269; 9 Eng. C. L. Rep. 409; *Frear v. Everton*, 20 Johns. Rep. 142; *Dade's adm'r v. Madison*, 5 Leigh 401, and the cases there cited.

In every view of the case, I am of opinion that the decree should be affirmed.

CABELL, J., concurred in the opinion of the president, and STANARD and PARKER, J., concurred in the decision that the decree should be affirmed.

Decree affirmed.

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**\*Humes v. Shugart.**

July, 1830. Lewisburg.

(Absent BROOKE, J.)

**Mills—Application—Interference with Subsisting Privilege.**—After a county court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down upon the same stream, and the party who first obtained leave shew that the dam for the second mill would be several feet higher than the fall between the two millseats, and would, if built, destroy the privilege previously granted to him, the court, in the exercise of a sound discretion, ought to refuse the second application.

**Same—Same—Same.**—Though the leave first given to build a mill be granted while a prior application to build lower down upon the same stream is pending, yet if the order granting this privilege remain in full force, unreversed and not appealed from, and it be shewn that the privilege so granted would be destroyed by allowing the other, that other ought not to be granted.

Zachariah Shugart, the owner of land on one side of the middle fork of Holston river in the county of Smyth, desiring to erect a dam across the stream for the purpose of working a saw and grist mill and other machinery, gave notice to William Byars guardian of John Irons junior, the owner of the land against which the dam would have to be abutted, that he would apply to the court of Smyth county for a writ of ad quod damnum. Application being made pursuant to the notice, the court, on the 19th of July 1832, awarded the writ, to be executed on the 30th of that month. The jury impanelled under this writ laid off an acre of land for the purpose of the abutment, which they appraised to 7 dollars 50 cents. They were farther of opinion, that if a dam of nine feet high were built, it would overflow a part of the lands of John Irons junior, an infant, and William Humes, and they assessed the damage to 46 cents. Upon the return  
333 of the writ and inquisition, \*an order was made directing Byars, as guardian of John Irons junior, and William Humes to be summoned. On the 24th of November 1832, Shugart, Byars and Humes being fully heard, the petition of Shugart was dismissed: whereupon he appealed to the circuit court.

The circuit court reversed the order of the county court dismissing the petition, and, proceeding to give such judgment as the county court ought to have given, ordered that the inquisition and all the proceedings thereon be set aside and annulled; that a guardian ad litem be appointed for the infant John Irons junior, and that, after making such appointment, a new writ of ad quod damnum should be awarded.

A copy of the decision of the circuit court being produced to the county court on the 24th of October 1833, it was accordingly ordered that William Byars be appointed guardian ad litem of the said John Irons junior. And thereupon a writ of ad quod damnum was awarded, to be executed on the

18th of November 1833. The inquisition was taken on the 18th and 19th of that month. The jury laid off an acre of land for the abutment, and appraised that acre, "and what is overflowed of John Irons junior," to 13 dollars 8 cents. They were of opinion that if a dam of 8 feet 9 inches high were built, it would overflow a part of the land of said John Irons junior and William Humes, and they assessed the damage to Humes to 8 dollars. Upon the return of this inquisition, Byars, as guardian ad litem of John Irons junior, and William Humes were ordered to be summoned. On the 22d of March 1834, divers witnesses being sworn and examined, the petitioner, Byars and Humes fully heard, and all the circumstances weighed, the county court ordered that Shugart have leave to build the mill and dam, and that he become seized in fee simple of the acre of land located,

upon his paying, to the respective per-  
334 sons entitled thereto, \*the valuation of the said acre, and the damages which the jury assessed for overflowing the lands of the said John Irons junior and William Humes. Whereupon Byars, as guardian ad litem, and Humes appealed to the circuit court.

In the circuit court, the appellants gave in evidence a transcript of the record of an order of the county court, made the 25th of October 1833, granting leave to John and William Humes to build a dam. Their application had only been made the 24th of that month. But they were stated to be the owners of the land on both sides, as well as the bed of the stream. And the writ awarded on the 24th was directed to be executed on the 25th. The inquisition was taken accordingly. The jury found that the land on both sides of the river belonged to the said John and William Humes, and were of opinion that if a dam ten feet high were built, it would not overflow the lands of any other person.

The river was surveyed by Charles F. Taylor, who made a map which was exhibited in court, and the correctness of it being deposed to by him, it was part of the record. The point designated on the map as No. 1, was admitted to be the place to which the proceedings of the county court on Shugart's petition applied. The point to which the order in favour of Humes applied was No. 2. From No. 1 to No. 2, the distance was only 68 poles, and the fall 3 feet 9 inches. Humes had, however, an equally good or better seat at No. 6, which would be unaffected by Shugart's dam; the fall from No. 1 to No. 6, being 13 feet 1 inch.

The evidence of the witnesses examined in the circuit court was spread upon the record. One of them, William H. Holt, a builder of mills, well acquainted with the various millseats on the river belonging to the parties, deposed that Shugart's dam of 8½ feet would wholly destroy the millseat at No. 2, worth, in his opinion, 1000 dollars. Thomas  
335 Ochiltree, another millwright, \*deposed that six or eight months previously, he had offered Humes, for the seat at No. 2, 100 dollars per foot for an eight feet dam at that place, with sufficient land adjacent for a mill-house, and timber sufficient to construct a

\*See monographic note on "Mills and Milldams" appended to Calhoun v. Palmer, 8 Gratt. 88.

mill; which offer was refused. Holt, being reexamined, deposed that the two seats at No. 2, and No. 6, would each be unaffected by a dam at the other—that valuable mills or other machinery might be erected at both, and operate without injury to each other.

It is not deemed material to state the evidence of the other witnesses. The statement concluded as follows:

"All errors existing in the record subsequent to the judgment of the circuit superior court of law and chancery of Smyth county, reversing the judgment of the county court of Smyth, and sending the cause back to that court for further proceedings, are waived in open court by the appellant and his counsel.

"It was stated by the witnesses Holt and Ochiltree, that if the appellee Shugart should be confined to a dam of a height that would only throw back the water as far as his land extended up the river, his seat, in that event, would in their opinion be worth nothing.

"It is agreed by the parties that Taylor's map referred to by the witnesses, with the indorsements thereon, is evidence in this cause."

The circuit court was of opinion that there was no error in the judgment of the county court, and affirmed the same.

On the petition of Humes, a supersedeas was allowed.

M'Comas and Sheffey for plaintiff in error.  
Johnson for defendant in error.

PARKER, J. The appellant Humes having first obtained leave to build a mill at the point No. 2, in the map annexed to the record, (the parties admitting that

336 \*to be the place to which the proceedings of the county court on the appellant's petition apply) and it being manifest, upon the proof, that a mill erected at No. 1, with a dam 8 feet 9 inches high, would destroy the privilege to build at No. 2. I think that the court ought, after granting leave to Humes, to have refused leave to Shugart, in the exercise of a sound discretion. The first order in favour of Shugart had been reversed and annulled by the superior court, and the case remanded to the county court for further proceedings. It was therefore as if it never existed, except that it might have been a reason with the county court for delaying a decision upon Humes's application, until a final decision upon Shugart's. But the court made the order giving leave to Humes on the 25th of October 1833, and that order was in full force, unreversed and not appealed from, when the order in favour of Shugart was made on the 22d of May 1834, from which the appeal was taken to the superior court, where the order was affirmed. In my opinion, the court ought to have reversed that order, not only on account of its interference with the privilege previously granted to Humes, the owner of the land on both sides the stream, but because the destruction of a valuable millsite owned by Humes at No. 2, proved to be worth from 800 to 1000 dollars, ought to have been taken into the estimate of the jury in awarding damages to Humes, notwithstanding he was the proprietor of another seat for water machinery higher up the

stream at No. 6, as good or better than the one at No. 2.

The only difficulty in the case is, that the appellant is stated to have waived "all errors existing in the record, subsequent to the judgment of the circuit court reversing the first judgment of the county court and sending the cause back for further proceedings." The object could not have been to waive the error of the superior court in affirming against the evidence which

337 \*it was then hearing. The waiver was probably made before the witnesses were examined, and was intended to apply to the proceedings as they appeared on the record of the county court. After this entry, some evidence appears to have been taken, and some admissions were made for the purpose of bringing the case fully and fairly before this court; and it would be absurd to suppose that the appellant or his counsel intended to waive all errors in a proceeding he was about to appeal from. This entry, therefore, ought not to stand in the way of deciding the cause upon its merits; and upon those merits, I am of opinion that the order of the county court in favour of Shugart ought to have been reversed, and his petition dismissed with costs, and consequently that the judgment of the superior court affirming that order ought to be reversed.

But this judgment is not intended to prevent any new proceeding on the part of Shugart, to erect a dam which will only throw back the water in such manner as to leave the privilege granted to Humes unimpaired and unaffected.

STANARD and CABELL, J., concurred.

TUCKER, P. I concur entirely in that part of the opinion of my brother Parker which respects the merits of the controversy. I have some doubts yet remaining as to the effect of the waiver of error, since it would seem to waive all errors in the county court, and of course the error of that court in giving leave to Shugart to build his mill. I have no doubt it was an inadvertence, and therefore the more readily surrender the objection.

Judgments of both courts reversed, and petition of appellee dismissed.

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\*Lincoln v. Chrisman.

July, 1839, Lewisburg.

(Absent BROOKE, J.)

Slander\*—Proof of Malice—Words Formerly Spoken Barred by Limitation.—In an action for slander, in which the pleas were not guilty and not guilty within one year, the plaintiff, after proving that the words in the declaration mentioned were spoken by the defendant within a year prior to the institution of the suit, offered evidence to prove the speaking by the defendant of the same and like words more than a year before the suit was instituted, and, on some occasions, several years prior thereto: HELD, the evidence so offered was

\*Slander—Mitigation of Damages—Evidence—General Character of Plaintiff.—The principal case is cited in Adams v. Lawson, 17 Gratt. 260, 261.

See monographic note on "Libel and Slander" appended to Bourland v. Eidson, 8 Gratt. 37.

admissible for the purpose of shewing the defendant's malice towards the plaintiff.

**Same Evidence—General Character of Plaintiff—Damages.**—In an action for slander in imputing perjury to the plaintiff, after the plaintiff had proved that the defendant had spoken the words mentioned in the declaration, he asked a witness introduced by him for the purpose, what was his the plaintiff's general character, when on oath and when not on oath, as a man of truth? and the witness answered the question favourably to the plaintiff. The defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character? and the plaintiff objected to the question. **Held**, the question ought to be answered, because it was asked on a cross-examination, and also because the answer might furnish evidence in mitigation of damages.

Case for slander, brought by John Chrisman against Abraham Lincoln in the circuit court of Rockingham. The words alleged to have been spoken imported that the plaintiff had perjured himself. Issues were joined on the following pleas, to wit: 1. Not guilty; 2. Not guilty within one year; 3. That the matter to which the plaintiff deposed was untrue.

At the trial, the plaintiff, after proving that the words in the declaration mentioned were spoken by the defendant within twelve months prior to the institution of this suit, introduced a witness to prove the speaking by the defendant of the same and like words more than twelve months before the institution of this suit, and, on some occasions, several years prior thereto. This evidence, though offered merely for the purpose of shewing the defendant's malice towards the plaintiff, was objected to by the defendant's counsel; but the court overruled the objection, and permitted the evidence to go to the jury.

Afterwards the plaintiff's counsel introduced a witness to prove the general character of the plaintiff. He asked the witness what was the plaintiff's general character, when on oath and when not on oath, as a man of truth? and the witness answered the question favourably to the plaintiff. The defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character? To this question the plaintiff's counsel objected, and the court sustaining the objection, the witness did not answer the question.

To these two opinions of the court, the defendant's counsel excepted.

The verdict returned by the jury was recorded, in the first instance, in the following terms: "that the said defendant is guilty in manner and form as the plaintiff in his declaration against him hath complained, and they do assess the plaintiff's damage, by occasion thereof, to 700 dollars besides the costs." On a subsequent day of the term, the court, perceiving that there was a mistake in the entry, corrected the same, and recorded the verdict as follows: "that the defendant is guilty in manner and form as the plaintiff in his declaration against him hath complained, and that the words in the declaration alleged to have been spoken by

the defendant of the plaintiff, were spoken by the defendant within one year before the commencement of this suit, and that the said words, so alleged to have been spoken by the defendant of the plaintiff, were not true, but false and slanderous words, as spoken of him \*the plaintiff by him the said defendant, as the plaintiff by replying hath alleged, and they do assess the plaintiff's damage, by occasion thereof, to 700 dollars besides the costs." Judgment was thereupon entered for the plaintiff, for the damages so assessed, and his costs.

To this judgment a supersedeas was allowed, upon a petition assigning the following errors:

1. That the opinion first mentioned was wrong. The effect of it was to deprive the defendant of the benefit of his plea of the statute of limitations. Besides, the evidence objected to was of words actionable in themselves, and such words cannot be proved in order to aggravate the damages by showing malice; they constituting a distinct injury, for which the plaintiff had his remedy by action. The circumstance that he chose to waive that remedy until it was barred by the statute, furnishes no reason for reviving it indirectly in a collateral action, especially as the words already proved were in no wise equivocal or ambiguous. In no point of view can words spoken previously to the grievance complained of and proved, be permitted to aid the plaintiff or prejudice the defendant.

2. That the other opinion given at the trial was wrong. In the relation to the veracity of a plaintiff, no distinct opinion may have been formed by the public, and a defendant may fail in proving a plaintiff's character bad in that particular, while he may, by the most satisfactory evidence, prove that the plaintiff's general character is infamous. Such a plaintiff cannot be entitled to the same measure of damages as one whose character is unblemished. A notorious rogue, perhaps just from the penitentiary, ought not to recover as heavy damages for defamatory words in relation to his veracity, as a man free from all exception. Besides, in this case, the subject of the plaintiff's general character was introduced by the plaintiff himself, and he had no right to exclude part of it, though he was at liberty to enquire \*into the grounds upon which the public belief was founded.

3. It appears that the verdict, as found by the jury, responded only to the issue upon the plea of not guilty, and the court has undertaken, on a subsequent day, to correct the verdict and make it respond to other issues. In so doing, the court has exceeded its authority.

Upon these points, the cause was argued in this court by Baldwin for the plaintiff in error, and Michie for the defendant in error.

The counsel for the defendant in error insisted, 1. That the court below properly decided to admit evidence of the speaking of the same words in the declaration mentioned, and like words, more than twelve

months before the bringing of the suit, in order to shew malice. Starkie on Slander 398, 9, and note on p. 591; 2 Starkie on Evid. 870. On principle, he said, there could be no objection to such evidence. The court would instruct the jury not to give damages for the words so proven out of the declaration, but to receive them merely in proof of the *quo animo*. Exclude such evidence, and it would, in most cases, be out of the plaintiff's power to shew the extent of the defendant's malice.

2. He insisted that the court did right in excluding all evidence offered by the defendant to prove the plaintiff's general moral character, except as touching the charge stated in the declaration. A contrary practice, he said, would be attended with much mischief. "General moral character" is a very vague and indefinite phrase, differently understood by every witness, according to his own peculiar moral principles. An abolitionist, for instance, would say that a man's general moral character was bad, if he held slaves; a religionist, if he lacked chastity; his neighbours generally, if he were quarrelsome or litigious. The case of *M'Nutt v. Young*, \*8 Leigh 542, does not justify the reception, in mitigation of damages, of evidence of moral character, except on the subject of the particular slander charged. The inconvenience suggested in the petition can never result from thus restricting the defendant, since a notorious rogue, or one just from the penitentiary, could hardly sustain a good general character for truth.

3. He referred to 1 Rob. Prac. 355, 6, to shew the manner in which verdicts are usually found, and afterwards extended by the clerk; and he said, that was to be presumed to have been the manner here, particularly as there was no exception to the subsequent entry made by the court. It was not to be supposed that the court had made an entry unauthorized by the actual verdict.

PARKER, J. I refer to the president's opinion, for the reasons which induce me to think that the court below committed no error in receiving evidence of slanderous words of the same and like character, spoken by the defendant of the plaintiff before the institution of the suit, for the purpose of proving malice; and none in modifying the entry which had been previously made of the verdict and judgment. The refusal of the court to permit the witness to prove the general character of the plaintiff, stands, as I think, on a different footing. It may be, that in actions for slanders charging professional negligence or incompetence, or for words imputing no moral delinquency, and in other similar cases, the evidence of the plaintiff's general bad character might be properly rejected, as irrelevant to the issue, and as having no bearing upon the question of the amount of damages. About this, I wish to be understood as expressing no opinion. The defamatory words for which this action is brought, import a direct attack upon

moral character; and in such case, surely the man of unblemished reputation  
343 \*is entitled to greater damages than one whose character is already so bad as to receive little or no detriment from the imputed slander. This question was much considered in the case of *M'Nutt v. Young*, 8 Leigh 542. The point there decided was, that evidence of the general character of the plaintiff in relation to the charge stated in the declaration, ought to have been admitted in mitigation of the damages. That was the precise point presented by the bill of exceptions, and the court of course confined itself to that; but the reasoning of the judges for coming to that conclusion, fully justifies the reception of evidence of the plaintiff's bad character at large. Indeed it has been seriously doubted, by those who agreed that general character may form the subject of examination, whether to confine the enquiry to the particular character of the party in the capacity in which he has been libelled, would not be infringing the rule that the truth of the words cannot be given in evidence under the general issue. See justice Thompson's opinion in the case of *Foot v. Tracy*, 1 Johns. Rep. 46. In the opinion of such persons, the enquiry ought to be confined to general character; but as this court, by a decision of all the judges, has settled that question, we cannot, I think, hesitate in our judgment upon the case at bar.

It cannot be denied that in an action for an injury to reputation, the character of the prosecutor is of some importance in estimating damages. The defendant cannot plead the blemished character of the plaintiff, and for that very reason he ought to be allowed to give it in evidence in mitigation of damages; for it is a settled rule, as was shewn in the case of *M'Nutt v. Young*, that where a party cannot take advantage of special matter bearing upon the measure of damages, by pleading, he may give it in evidence under the general issue. Otherwise there is no mode by which he can avail himself of a fact which, it must  
344 be conceded, ought to have a material influence upon the quantum of damages. That some inconveniences may result from this practice, and even danger occur of occasional injustice, may readily be admitted; but upon the whole, it is required by the general principle which admits in evidence matters relevant to the cause, and is necessary in a great majority of cases to guide the discretion of the jury, who, without such evidence, will take general character into their estimate, grounded upon their own knowledge, or upon vague and delusive rumours.

There is no great hardship in holding that a plaintiff suing for his character should come prepared to defend it from general attacks. If a witness impugns it, he has a right to call on him to specify the grounds of his opinion; and if, on that cross-examination, it should appear that the opinion was founded on his anti-abolitionism, or his want of chastity, or his intem-



perate use of spirits, or his fondness for cards, or his addiction to any other vice which a jury might consider venial, they would know how to estimate it.

All the authorities on this subject were cited and commented on in the case of *M'Nutt v. Young*, and it is unnecessary to examine them farther. That case, in my opinion, substantially decides this, and convicts the court below of error in rejecting the testimony of general character offered by the defendant. A fortiori, I think the court erred in refusing it upon the cross-examination. The plaintiff himself had introduced the witness to prove his own general character, and had asked him what was his the plaintiff's character, when on oath and when not on oath, as a man of truth? The witness answered favorably to him, and then the defendant desired to cross-examine him on the subject of general character. This cross-examination ought, in my opinion, to have been allowed, for the purpose (if for no other) of enabling the jury to estimate what credit

was due to the witness's opinion of  
345 good character \*in one particular, by comparing it with his character in general. Had the witness answered that his general character was infamous, surely the jury would not have attached much weight to the favourable report he made of his character as a man of truth. But it is unnecessary to enlarge on this ground.

STANARD and CABELL, J., concurred in the opinion that the judgment should be reversed for the error commented on by Parker, J.

TUCKER, P. Upon the question presented first in the bill of exceptions, I was inclined to differ with the court below, believing that the effect of the decision was to give the plaintiff damages indirectly for a slander which was barred by the statute of limitations. I am persuaded upon reflection, that my first impression was incorrect.

However questionable the practice may seem, to permit the introduction of evidence of words spoken at a different time, in order to prove malice in speaking those charged in the declaration, it seems now too firmly established to be shaken. Though there is some contrariety of opinion as to the admissibility of distinct slanderous matter subsequent to that charged in the declaration, yet I think the weight of authority, as well as the universal practice of the courts, recognizes the right of the plaintiff, after proving the words laid, to go on to prove the speaking of the same or the like words at any time antecedent. I have met with no case in which that right is denied. The admissibility of the proof of the repetition of the same slander at various times, seems to be conceded in all the cases, as the stress of the argument in them has always turned upon the fact that the words were subsequently spoken. *Rustell v. Macquister*, 1 Camp. 49, note; *Macleod v. Wakley*, 3 Carr. & Payne 311; 14 Eng. C. L. Rep. 322; *Tate v.*  
346 \**Humphrey*, 2 Camp. 73, note, and

*Bodwell v. Swan et ux.*, 3 Pick. 376, are cases in which subsequent slanders were admitted for the purpose of shewing malice. The case of *Mead v. Daubigny*, *Peake's Cas.* 125, decided by lord Kenyon, is contra: but lord Kenyon himself decided differently in *Lee v. Huson*, *Peake's Cas.* 166. In *Finerty v. Tipper*, 2 Camp. 72, chief justice Mansfield seemed inclined to modify the rule, though it would appear that he approved the decisions. But his opinion also refers to subsequent words, and therefore does not touch the question of the antecedent speaking of the same words. I take it, then, that such proof is clearly admissible.

But it is said, that where the speaking of the words attempted to be given in evidence was more than a year anterior to the trial, an action for them is barred by the statute, and that as the proof of them would tend to inflame the minds of the jury and to increase the damages, the plaintiff will indirectly recover damages for a wrong, for which the action is gone forever. This argument is very plausible, but I think it unsound. The evidence is introduced solely to prove the deep-seated malice with which the last words were spoken, and is permitted to go to the jury with that qualification; *Rustell v. Macquister*, 1 Camp. 49, note. With that qualification, there can be no objection to admitting proof of the antecedent speaking of the same words, although the action for them is barred. For I apprehend, even if the plaintiff had sued for them and recovered damages for them, the proof of that fact would be good evidence in an action for repetition of the same slander. Is it not obviously a gross aggravation of a subsequent slander—is it not strong evidence of the most deeprooted malignity, that even the conviction and the punishment of the slanderer has worked no reformation in his conduct, and has been unavailing to arrest the foul current of his abuse? Is it not a reason for increasing the penalty of this new transgression,

347 \*repeated after he has had an opportunity of justifying his accusations, and has shrunk from or has failed in the attempt? I cannot doubt it. Yet who ever thought of rejecting the proof of the fact, because the plaintiff had already recovered damages for the first slander, and cannot refer to it to increase the damages for the second? So in this case, though no action has been brought for the first slander, is it not an aggravation of the last, that it is repeated? When the plaintiff, in a spirit of forbearance, has waived his right of action for the first slander, either perhaps because it was uttered in a moment of heat, or that he felt an innate consciousness that he would live down the calumny by the correctness of his life, is it no aggravation of a repetition of the slander, that the defendant, regardless of his forbearance, will not let him live in peace? Admit that no damages whatever are allowed for the first slander, is not here ample ground for increasing the damages for the second? I think there is, and am therefore of opinion that the testimony was properly admitted.



On the second question, I was inclined to think that the enquiry as to general character should be confined to the particular matter which is the subject of the charge. But my brethren think differently, and I willingly defer to their opinion.

As to the third point, there being no exception, I must presume every thing right. I have no doubt, enough matter appeared to the judge of the court below to authorize his newmodelling the entry, and I must take it for granted that it did so appear, as the contrary is not shewn by an exception.

There being, however, in the opinion of a majority of the court, error in the refusal to permit an enquiry as to the plaintiff's general character, the judgment must for that cause be reversed.

Judgment reversed.

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**\*Hoppess v. Straw.**

July, 1830. Lewisburg.

(Absent BROOKE, J.)

**Assumpsit\*—Count in Tort—Demurrer—Case at Bar.—**

A declaration, having two counts which are clearly in assumpsit, has a third to the following effect: that the defendant employed the plaintiff as his agent to receive from D. G. 901 pounds of bar iron at 4 cents per pound, and the plaintiff accordingly received from D. G. for the defendant, the said quantity of bar iron, and delivered the same to the defendant, but the defendant afterwards denied that he had authorized the plaintiff to receive the same, and also denied that the plaintiff had delivered to him the said bar iron, and altogether refused to pay the said D. G. for the same; whereupon D. G. brought suit against the plaintiff, and recovered against him \$36.04 cents damages, the price of the bar iron, with interest from the 9th of March 1830, and \$56.36 cents costs, which damages, interest and costs the plaintiff paid; by reason whereof the defendant became liable to pay the plaintiff the same, and in consideration thereof undertook and promised to pay the said plaintiff the same, but has failed so to do. Upon a demurrer to this court, HELD, it is in assumpsit, as well as the others, and sufficient matter is contained in it to maintain the action.

Assumpsit in the county court of Wythe, by David Straw against Henry Hoppess. The declaration contained three counts. The first count was as follows: "that on the—day of—1830, at the county aforesaid, the defendant employed the said plaintiff as his agent to receive from a certain David Graham 901 pounds of bar iron at the price of 4 cents per pound, and afterwards, to wit, on the—day of—in the year 1830, at the county aforesaid, the said plaintiff, in pursuance of the said authority, and at the special instance and request of the said defendant, did receive from the said David Graham, for the said defendant, the said quantity of 901 pounds of iron, which said quantity of bar iron of 901 pounds the said plaintiff did, on the

349 \*—day of—1830, at the county

\*See monographic note on "Assumpsit" appended to Kennaird v. Jones, 9 Gratt. 188.

aforesaid, deliver to the said defendant. The plaintiff avers that the said defendant, intending to defraud and deceive him the plaintiff, altogether denied that he had authorized the said plaintiff to receive the said iron from the said David Graham, and also denied that the plaintiff delivered to him the said bar iron, and altogether refused to pay the said David Graham for the said bar iron. Afterwards, to wit, on the—day of—, the said David Graham commenced his suit against the plaintiff in the county court of Wythe for the value of the said quantity of bar iron, and afterwards, to wit, on the 12th day of March 1834, in the county aforesaid, at a court continued and held for the county of Wythe aforesaid, the said David Graham recovered against the plaintiff 36 dollars and 4 cents damages, the price of the bar iron aforesaid, with interest on the said damages from the ninth day of March 1830 until paid, and 56 dollars 36 cents the costs of the said suit, which damages, interest and costs the plaintiff avers he has paid. By reason of the premises, the plaintiff avers that the defendant became justly indebted, liable and bound to pay him the aforesaid damages, interest and costs, and being so indebted, in consideration thereof, afterwards, to wit, on the—day of—1834, at the county aforesaid, the said defendant undertook and faithfully promised to pay the said plaintiff the amount of the aforesaid damages, interest and costs, when he should thereunto be requested. Nevertheless the plaintiff in fact says that the said defendant, although often requested so to do, the said amount of damages, interest and costs, or any part thereof, hath not yet paid to the said plaintiff, but the same to pay hath hitherto refused and still doth refuse."

The second count was for bar iron sold and delivered; and the third, for money had and received.

350 \*To the first count the defendant filed a demurrer, wherein the following causes of demurrer were assigned: 1st. That the count is in case for consequential damages, and not upon a direct undertaking. 2dly. That the count is double, having an averment that the injury resulted from a fraudulent and false refusal to acknowledge an agency, and also an averment that a recovery was had against the plaintiff not as agent, but as purchaser from Graham.

The demurrer being argued and overruled, the defendant pleaded non assumpsit. The jury who tried the issue found a verdict for the plaintiff, and assessed his damages to 161 dollars 32 cents, for which judgment was rendered.

Upon a supersedeas from the circuit court, that court affirmed the judgment.

Whereupon a judge of this court awarded a supersedeas to the judgment of the circuit court.

The attorney general and Preston for plaintiff in error.

M'Comas for defendant in error.

STANARD, J. The objection urged to

the first count is, that the matter set forth in it as the source of the indebtedness therein alleged of the defendant to the plaintiff, is a tort, for which the action of assumpsit is not the proper remedy. This objection is, I think, not well founded. That count substantially states a contract between the plaintiff and defendant, that the plaintiff should receive for and deliver to the defendant a quantity of iron of given value; the performance of the contract by the plaintiff; the resulting duty of the defendant to account and pay for it to the party from whom the plaintiff had received it, so as to protect the plaintiff from responsibility to that party; the failure of the defendant to perform that duty, and the consequent claim on, and suit and judgment against the \*plaintiff, and the payment of the amount thereof.

For whatever the plaintiff was entitled to recover in such a case, the action of assumpsit was a proper remedy. The doubts I have had respecting the sufficiency of the count are, 1st. Whether indebitatus assumpsit would lie in such a case; 2d. Whether, though, in respect to the amount that the plaintiff had been compelled to pay for the iron, it be the proper remedy, it be so for the costs that were recovered of the plaintiff in the suit against him for the iron; and 3d. If not the proper remedy for the costs, whether the union of the claim for the costs with that for the amount recovered and paid as the value of the iron, in the same count, was not a fatal defect of that count.

That the plaintiff might, in respect to the amount recovered of and paid by him as the value of the iron, support the action of assumpsit, and declare on an indebitatus assumpsit, and even use the general count for money paid to the use of the defendant, is a proposition free from any reasonable doubt. Where one man has paid, under legal compulsion, money which ought to have been paid by another, or where, under such compulsion, the property of one has been taken to discharge the debt of another, a remedy is afforded by this action in its most general form. *Exall v. Partridge*, 8 T. R. 308. This being so, it is not necessary to the decision of the question before the court on the demurrer to the first count, that the other doubts I have indicated should be minutely investigated and solved. After much reflection, and against my first impressions, I am satisfied that if the defendant be responsible to the plaintiff for the costs, or rather, that to the extent that the defendant is responsible for the costs, the plaintiff may recover them in the like action wherein he can recover the amount for which he has been made chargeable for the value of the iron, by the suit in which those costs were recovered of him. His action, resulting from that suit

and judgment, must be integral; at least he cannot be compelled to take several remedies, to recover separate portions of the entire redress to which he is entitled. It has already been shewn that indebitatus assumpsit lies for a part of the recovery against him; and if not for the

residue, it is because he is not entitled to charge the defendant with that residue, and no action lies for it. If it was not recoverable in any action, (and on this I give no opinion,) the question resulting on the demurrer, which *pro hac vice* must be taken as a general one, is whether, when the plaintiff claims by his count several sums as constituting the indebtedness of the defendant, some valid and some not so, the count is bad on general demurrer? I think not. A general demurrer to a declaration containing one good and one bad count, would not be sustained.

The modern form of declaring in general indebitatus assumpsit, is to state in the same count several sources of indebtedness for several sums, and charge one assumpsit for the whole. Thus, one and the same count states that the defendant was indebted to the plaintiff in one sum for money had and received, in another sum for goods sold, in another sum for money paid &c. and being so indebted, in consideration thereof undertook and promised to pay the several sums before stated. Suppose such a count had stated that the defendant was indebted, in one of the sums, for so much money that he had promised to give the plaintiff: I cannot doubt that a general demurrer to the count would be overruled. The law distributes the assumpsit to so much of the cause or causes stated in the count as can sustain it, and measures its obligation by the dimensions of those causes; and if one cause be stated not sufficient to sustain the assumpsit in respect to it, the defendant is to seek protection from that invalid claim, not by a general demurrer to the whole count, but by

special demurrer, or by objection urged on the trial. This being \*so, it is unnecessary to the decision upon the demurrer, that the question as to the defendant's liability for the costs claimed by the plaintiff should be considered. And as it does not appear to the court from the record, that the costs were allowed, and included in the verdict of the jury, this court, though it were clearly of opinion that the costs were not recoverable, could not, on that opinion merely, found a judgment that the verdict was wrong, and the judgment of the court below upon it erroneous. My opinion therefore is that the judgment must be affirmed.

PARKER and CABELL, J., concurred.

TUCKER, P. I defer to the opinion of my brethren in this case, though I am compelled to acknowledge that I cannot even now divest myself of very strong doubts of the validity of the first count in the declaration. Judgment affirmed.

### 354 \*Findlay & Mitchell v. Hickman.

July, 1839, Lewisburg.

(Absent STANARD\* and BROOKE, J.)

#### Deed of Trust—Eviction of Purchaser under—Relief

\*He had been employed or consulted as counsel in the case, before his appointment as judge.

†See monographic note on "Deeds of Trust." See foot-note to *Goddin v. Vaughn*, 14 Gratt 102.

**against Cestuis Que Trust—Implied Warranty.**—A negro man being conveyed by deeds of trust to secure debts amounting to more than his value, the grantor sells him, and the purchaser pays to one of the cestuis que trust part of the purchase money, and executes to the other his obligation for the residue, payable some months afterwards. The grantor makes to the purchaser a bill of sale of the negro as a slave, and therein warrants and defends the title to him against the claims of all persons whatsoever. The cestuis que trust do not join in the bill of sale or warranty, but, by the arrangement, their liens on the negro are relinquished to the purchaser, and the payment made by him to one of the cestuis que trust, and the obligation executed by him to the other, discharge the grantor's debt to them pro tanto. It turns out that the negro so purchased is a free man; and judgment being obtained at law against the purchaser upon his obligation, an injunction is awarded him. **Held**, the purchaser can have no relief against the cestuis que trust; and the injunction is therefore dissolved, and the bill dismissed.

By a deed made the 20th of November 1834, William Jones conveyed to Charles C. Gibson a negro man by the name of Allen, in trust for the purpose of securing the payment, on or before the first of January 1835, of 342 dollars 54 cents to Jacob Clarke, and 172 dollars 34 cents to Wallis & Gibson. Clarke, on the 11th of December 1834, transferred his interest in this deed to Findlay & Mitchell. On the same 11th of December 1834, Jones made another deed, conveying to Adam Hickman the same negro Allen and some articles of personal property, in trust for the purpose of securing the payment, on or before the 11th of June 1835, of 600 dollars, with interest from the date, to Findlay & Mitchell.

355 \*On the 7th of March 1835, sale was made of the negro man Allen to Peter Hickman for 900 dollars. Hickman, at the time of the sale, paid to Wallis & Gibson their debt of 172 dollars 34 cents, and executed to Findlay & Mitchell his obligation for 724 dollars 47 cents, payable on the first of September 1835, with interest from the date. Jones at the same time executed a bill of sale, purporting, that for and in consideration of the sum of 900 dollars, he had bargained and sold unto Hickman the negro boy Allen, who was a slave, and that he warranted and defended the title to him against the claims of all persons whatsoever; which bill of sale was witnessed by Alexander Findlay.

It afterwards appeared that Allen was entitled to his freedom.

Findlay & Mitchell having recovered a judgment against Hickman upon his obligation, Hickman obtained an injunction to the judgment.

In Hickman's suit (which was in the circuit court of Washington) the bill, after stating the purchase of Allen from Jones at the price of 900 dollars, and mentioning the creditors provided for in the deeds of trust, proceeds to set forth the case more particularly, as follows: "In making the purchase of said negro, it was necessary to

consult the said creditors of said Jones, and to remove the liens created by said deeds of trust upon said negro. Or in other words, it is substantially true that your orator made the purchase of said negro from said creditors and said Jones jointly. It is true that the bill of sale of said boy to your orator was executed by said Jones only, and was witnessed by said Findlay, which will appear by said bill of sale. It will also appear by said bill of sale, that said negro was sold for a slave, and his title warranted. At the time of the purchase, it was agreed amongst said creditors, Jones, and your orator, that if your orator would pay the said debt due to Wallis & Gibson, and execute his note to Findlay & 356 Mitchell for \*the balance of the price of the said negro, they the said creditors would release and surrender to your orator the liens created by said deeds of trust upon said negro. Your orator, in order to obtain a good and complete title to the said negro, did pay to Wallis & Gibson their said debt, and execute his note to said Findlay & Mitchell for the balance of the price of said negro." The complainant avers that the only consideration that induced him to execute said note to Findlay & Mitchell was to obtain a complete and perfect title to the said negro boy as a slave; that he has received no advantage, directly or indirectly, by the said Findlay & Mitchell and Wallis & Gibson's surrendering and releasing their said liens; and that the said Findlay & Mitchell have suffered no inconvenience or injury, nor have their debts been made less secure, by the said release and surrender. And he insists that both the payment made to Wallis & Gibson, and the note executed to Findlay & Mitchell, are without any consideration whatever. He contends further, that every man who sells or disposes of a right or claim to personal property will be considered as warranting the title which he so sells. Findlay & Mitchell having represented that they had a lien upon the negro as a slave, and a right thereby to sell him as such, and having agreed to surrender, relinquish and transfer to the complainant the said lien, they are bound, he insists, to make the same good, and to shew that they had such a lien on the negro as a slave, as they represented.

The only defendants to the bill were Findlay & Mitchell and Jones.

The answer of Findlay & Mitchell, after mentioning that, Clarke having a prior incumbrance on the property, they paid his debt in order to extinguish his title, and making some other statements not very material, proceeds as follows: "These respondents give a most express and explicit denial to the statement of the bill, that the sale of the negro was a joint one by

357 Jones and \*his creditors to the complainant. On the contrary, the purchase was made by the said Hickman directly from Jones. These respondents were no parties to the sale, were not consulted as to the price at which the negro was sold, and gave no express warranty of

the title of the property. And they are advised and contend that there is nothing in the character of the contract, or the circumstances attending it, which can imply a warranty by them." The answer states further, that "whilst the complainant was treating with Jones for the purchase of the negro, he came to the respondent Findlay, and stated that he was about to buy the negro, and asked how long he could have to pay Jones's debt, saying at the same time that he could and would, if required, pay the money down, but asking a credit until his return from a trip to Mississippi, which he proposed making in a short time. This respondent agreed, according to his request, to postpone the payment until the first of September ensuing. In the evening of the same day, the said Jones made his bill of sale to the complainant, who at the same time executed his note to these respondents for the residue of the purchase money after deducting the sum due Wallis & Gibson. Farther than this, these respondents had no agency whatever in the transaction. The sale was made by Jones alone, these respondents being only consulted to ascertain how long they would wait for their money. They assumed no control over the property, incurred no responsibility for the goodness of the title, or its soundness, and expressly assert that no such responsibility on their part was in the contemplation of any of the parties. Upon receiving Hickman's note, these respondents at once gave Jones a credit on his notes for the amount of Hickman's bond. The consideration of that bond, as between Hickman and these respondents, was not a sale by them of the negro to him, but a release of their debt against  
358 Jones to that extent. That \*release was absolute and unqualified. It was a change of the debtor. If Hickman had become insolvent afterwards, instead of Jones, the debt of these respondents would have been lost. These respondents agreed to run the hazard of Hickman's solvency—Hickman, by taking Jones's warranty, to run the hazard of Jones's solvency; and upon what principle, either of law or equity, a responsibility which they never directly or indirectly assumed, is to be fastened upon them for the benefit of one who, by his own contract, consented to incur that risk, these respondents are at a loss to conceive."

The argument was continued in the answer as follows: "If the complainant's view be the true one, then these respondents are the insurers of the solvency both of Jones and Hickman, and lose their debt in the event of the failure of either—a sort of liability which they never for a moment conceived to rest upon them, and which certainly was not contemplated by the parties at the time. That Jones was intended to be entirely discharged, to the extent of Hickman's responsibility, is evident from the manner in which Hickman's note was taken. If Jones had been intended to be held further liable, the note would have been made payable to Jones, and assigned

by him to these respondents—a mode of transacting business familiar to these respondents, and always adopted by them where a perfect release of one party is not intended. This view is confirmed by the fact, that the complainant has admitted to the respondent Findlay that if he (Hickman) had failed, the debt would have been lost to these respondents, as Jones had been entirely released from that amount according to the contract. Jones taking the same view, considering himself released as to these respondents, and that his warranty of the title to the negro made him responsible to Hickman, at once went to Hickman to secure him from loss, transferring to  
359 him his recourse on Joseph \*Vance, of whom he purchased the negro aforesaid for 450 dollars."

Jones, by his answer, referred to that of Findlay & Mitchell, and adopted it as a part of his own. This respondent says, "that the contract for the sale of said negro was exclusively between himself and complainant, and that he considered his codefendants Findlay & Mitchell as having nothing to do with it, farther than to receive the money which complainant and your respondent agreed should be paid to them. And farther, when respondent went to the house of complainant in order to secure him as far as possible against loss, complainant told this respondent that he supposed he would have the money to pay, and said he wished Findlay & Mitchell to hold on the property on which they had a lien, in order to secure him. And your respondent on that occasion transferred to complainant his claim on Joseph Vance, of whom respondent had purchased the negro aforesaid. Respondent believes that all parties understood the contract to be a sale from this respondent alone to complainant, and complainant required this respondent to give him a bill of sale, which he did."

The depositions taken in the cause proved most clearly that Allen was a free man. John Apperson emancipated his mother on the 19th of February 1806, and Allen was born afterwards. Polly, the daughter of John Apperson, married Joseph Vance in 1813, and Allen seems to have been in the family until after that marriage. He was then bound to Joseph Vance by the overseers of the poor for Washington county.

Vance proved, that two or three years before the sale of Allen to Hickman, he Vance sold Allen to Jones as a slave, at the price of 450 dollars. "After it was ascertained that the boy Allen was free, deponent executed his note, at the instance of John H. Fulton, to the complainant Peter Hickman for the sum of 450 dollars.

360 \*At the time deponent executed his note, the complainant Peter Hickman was not present, and had not any concern with it, known to deponent. Deponent was sued upon his note, and has paid 500 dollars of it, leaving a balance of 40 or 45 dollars which he has not yet paid."

This payment was also proved by Charles C. Gibson, the deputy sheriff who had the execution against Vance. It issued on a

judgment on a forthcoming bond, taken under a fi. fa. for 450 dollars with interest from the 9th of October 1835. Gibson deposited that he received 500 dollars, and paid over 490 dollars 95 cents to the plaintiff's attorney, leaving a balance due on the execution of about 50 dollars. The sum of 490 dollars 95 cents, he said, was, at the time of payment, supposed to be the principal and interest up to the 21st of April 1837.

The other depositions were taken to prove the insolvency of Jones at the time of the contract and subsequently thereto—a fact alleged in the bill, and relied upon by the complainant.

The cause came on to be heard the 25th of October 1837, and the circuit court decreed that the injunction be made perpetual; that the contract for the sale of the negro be rescinded; that the complainant, out of the money recovered by him of Vance, retain the amount paid to Wallis & Gibson for the extinguishment of the trust on the said negro, and interest thereon to the 21st of April 1837, and also retain his costs expended in this suit, and pay the residue of the said money to Findlay & Mitchell; and that Findlay & Mitchell apply the same, or so much thereof as might be necessary, to the extinguishment of the trust transferred to them by Jacob Clarke, and apply the remainder to themselves.

On the petition of Findlay & Mitchell, an appeal was allowed them from this decree.

B. R. Johnston for the appellants.

M'Comas and Patton for the appellee.

361 \*TUCKER, P. I am of opinion that the injunction in this case should have been dissolved and the bill dismissed.

The transaction is simply this. Jones, a debtor, possessing a slave incumbered to more than his value, and no doubt desirous, by private sale, to get as much as possible for him in order to extinguish so much of his debt, sells him to Hickman for 900 dollars, and gives him a bill of sale with warranty of title. Hickman, however, pays him not a cent, because the purchase money was to go of course to pay off the incumbrances: and inasmuch as Hickman could not take off the slave without discharging them, it was necessary to make an arrangement with the creditors, which was done contemporaneously. Indeed, from the fact that Hickman required an extension of the credit from June till September, it seems probable that this credit was agreed upon beforehand, as one of the terms on which he was to make the purchase and become paymaster to the creditors. He accordingly pays off Wallis & Gibson, and gives his bond to Findlay & Mitchell payable in September. It turned out, however, that the negro was free; and Hickman now contends that he should not pay off his bond, because the lien of Findlay & Mitchell was worth nothing. His counsel argues that the transaction was a purchase from them of their incumbrance, and that upon that purchase there was an implied warranty of its goodness.

The allegations of the plaintiff's bill, the responsive statements in the answer, and the facts appearing in the cause, all contradict this position of the counsel. The plaintiff himself says, "At the time of the purchase, it was agreed amongst the said creditors, Jones, and your orator, that if your orator would pay the debt to Wallis & Gibson, and execute his note to Findlay & Mitchell for the balance of the price of the

negro, they the said creditors would 362 release and surrender their liens \*upon the negro." Here then it appears that there was no sale of their lien, from which a warranty is supposed to have been implied, but a mere release, from which no warranty ever can be implied. If, on the one hand, a sale implies a right to sell, a release, on the other, implies nothing more than a surrender or quitclaim of that right which the party has or may have. And though a consideration be given for the release, and it eventually turn out that the right is good for nothing, yet if there be no fraud, there can be no reclamation.

The account of the transaction given in the answer corresponds with that extracted from the bill. The respondents, after stating that they paid Clarke's debt in order to extinguish his prior incumbrance, deny most explicitly a statement made in the bill, that the sale was a joint one by Jones and his creditors. They aver that the consideration of the bond was not a sale by them, but the release of their debt against Jones to that extent; that that release was absolute and unqualified; that it was a change of the debtor, for, upon receiving Hickman's bond, they gave Jones a credit on his note for the amount of that bond. All this is responsive to the matter of the bill, and, it seems to me, is conclusive of the question. Hickman, purchasing from Jones, becomes paymaster to the appellants and Wallis & Gibson, paying the latter in cash, giving his bond to the former for their debt, and thereby discharging the negro from the lien, and Jones from his responsibility; who, having parted absolutely with his property, had a right to a discharge, and was in fact discharged, pro tanto.

All the circumstances in the case concur in sustaining this view of it. Jones, and Jones alone, makes the bill of sale, and he gives an express warranty. If the transaction was joint, then this express warranty by one of the three vendors is a negative of an implied warranty by the others. Again, Hickman, instead of 363 \*giving his bond to Jones, gives it to Findlay & Mitchell. Why? Because Jones having paid the debt by selling his property, it was unreasonable he should be longer bound, which he would have been, had the bond been given to and assigned by him. On the other hand, Findlay & Mitchell, in releasing their lien on the slave, preferred, I presume, the direct responsibility of Hickman, which bound him absolutely, to the indirect course of taking his bond by assignment from Jones, and thus leaving them exposed to possible

equities between Hickman and Jones. This bond constituted a new contract, like the draft in *Corbin's adm'r v. Southgate*, 3 Hen. & Munf. 319. It was a new contract between Findlay & Mitchell and Hickman, by which Hickman paid his own debt to Jones, and Jones's debt to them. It was a contract, too, on valuable consideration, since, in consideration of it, they released a lien on property which was at that time regarded as liable, and also actually credited, or were at least bound to credit, Jones for the amount. And this was all fair. It was perfectly reasonable that they should be irresponsible for the title. For if a sale had been made under the deed of trust, and Hickman had purchased at that sale, they would not have been liable, though the mortgaged subject proved not to be chargeable, or turned out to be the property of a stranger. *Petermans v. Laws*, 6 Leigh 523.

Upon the whole, I am of opinion that there is error in the decree, and that it should be reversed with costs, the injunction dissolved, and the bill dismissed with costs.

**PARKER and CABELL, J.**, concurring, decree reversed with costs, injunction dissolved, and bill dismissed with costs.

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\**Gibbons v. Jackson.*

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Fraudulent Assignments and Purchase\*—Principal and Agent—Declarations of Assignee.**—A vendor binds himself to convey to the vendee, in fee, a certain lot upon the payment of the purchase money. No part of the purchase money being paid, an arrangement is made by an agent of the vendor with the vendee's devisee, by which she is to have the lot during her life, and the vendor is to have the reversion. The vendor then, for value received, sells the lot to another person, to whom he executes a bond to make him a deed, with a reservation of the life estate of the devisee. After this, the agent who had made the arrangement with that devisee, procures from her an assignment to himself of the title bond originally executed to her deviser. He obtains the assignment without agreeing to give her any consideration but that already provided for her, to wit, the life estate, and he obtains it with full knowledge of the sale to the second vendee, and of his having paid the purchase money. The same agent deals also with the second vendee. He does not communicate to the second vendee the fact of the arrangement made by him, on behalf of the vendor, with the first vendee's devisee, but represents the bond to the first vendee as being still valid, and as taking from the vendor all right to convey the lot to the second vendee; and the second vendee, in ignorance or misapprehension of his rights, makes to the agent an assignment, for a pecuniary consideration, of the title bond executed to him by the vendor. **HOLD**, 1. the arrangement made by the

agent, on behalf of his principal, with the devisee of the first vendee, cannot be defeated by that agent for his own benefit, and the assignment to him by the devisee gives him no right whatever; and 2. the ignorance or misapprehension under which the assignment was made by the second vendee, having been produced in some measure by the declarations and conduct of the assignee during the negotiation, the claim under that assignment is also unsustainable.

On the 16th of January 1811, William Robinson junior executed a writing under his hand and seal, whereby he acknowledged that he was bound to Arge Allen to convey to him in fee simple the out lot numbered two, \*in Parkersburg, upon his payment of the purchase money specified in his two notes of equal date therewith, for 94 dollars 37 cents each, one payable the 1st of September 1811, the other the 1st of September 1812.

Arge or Argy Allen was a coloured man, and lived upon the lot mentioned in this obligation, when he made his will, on the 5th of November 1829. By his will, he devised the lot to his wife Jenny. The will was proved and admitted to record in Wood county court, at July term 1830.

Robinson living at Pittsburg, and desiring to make some arrangement with the widow of Argy Allen, made the negotiation through John J. Jackson. On the 4th of August 1831, Jackson wrote to Robinson in these terms: "Argy Allen's widow has acceded to the proposition you made, to give her a lease for life, and she to reconvey to you the lot. The papers will shortly be prepared." On the 27th of October 1831, Jackson wrote to Robinson as follows: "Agreeably to your directions, I have made an arrangement with the widow and devisee of Argy Allen as to the lot he purchased, and she has executed a deed to release and reconvey the lot to you, on your executing to her a lease for life for the lot. This is in exact accordance with your instructions."

Robinson seems to have been under the impression that the lease for life was executed; for on the last letter there was this indorsement, in his handwriting: "The lease for life to the widow of Argy Allen executed in due form, some time subsequent to the date of the within. Wm. Robinson jr."

On the 2d of August 1832, Robinson executed a writing under his hand and seal, witnessing that he had sold the lot to Jefferson Gibbons, and had received 100 dollars as consideration in full for the same, and that he bound himself to Gibbons to make and execute a deed for said lot, with the reservation of the life estate granted by Robinson and wife to the widow of Argy Allen.

366 \*Accordingly, a deed was executed by Robinson and wife to Gibbons, conveying the lot, and warranting the same against all claims, "with the reservation of a certain part of said lot to the use of the widow of Argy Allen, meaning that part she has enclosed and in cultivation, on

\*See monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409, and monographic note on "Agencies" appended to *Silliman v. Fredericksburg, etc.*, R. R. Co., 27 Gratt. 119.

the lower side of Pond run, for the period of her life or stay on said lot, and no longer, being the life estate granted to her by said Robinson and wife." This deed bore date the 2d of August 1832. It was acknowledged before justices the 24th of that month, and admitted to record the 8th of April 1833.

Between the date of the conveyance to Gibbons and of the record thereof, Jackson attempted to acquire a right to the lot. He obtained possession of the title bond from Robinson to Arge Allen, with an indorsement thereon under the hand and seal of Jenny Allen, stating that, for value received, she assigned and set over to John J. Jackson the within covenant, in as ample and full a manner as the same was available to her. This assignment bore date the first of September 1832. It was signed by Jenny Allen with a mark, and was attested by B. Willard.

Jackson also induced Gibbons to deliver up Robinson's title bond to him, and procured Gibbons to sign and seal a writing indorsed thereon, expressing that in consideration of the sum of 108 dollars 50 cents to him in hand paid by Jackson, he assigned, transferred and set over the within covenant and agreement, and moreover that he released, assigned and set over all right, interest and claim he might have to the lot, to Jackson. The date of this assignment was the 26th of February 1833.

Nevertheless Gibbons brought an action of ejectment for the lot. The declaration and notice were served before September term 1833 of Wood circuit court. Jane Allen and John J. Jackson were the defendants. At April term 1835, the jury found a verdict for the plaintiff, subject to the reservation contained in the deed of Robinson and wife to Gibbons, in favour of Jane Allen. Judgment was rendered accordingly, and a writ of possession awarded.

Thereupon, Jackson filed his bill on the chancery side of the court, setting forth the sale to and possession of Argy Allen; stating that the two notes mentioned in his title bond were left in the hands of Thomas Neale deceased, who for several years acted as the agent of Robinson; and charging that Neale received of Argy Allen, in part of the said notes, to the amount of 150 dollars or upwards. The bill states that the notes have been lost and the complainant does not know whether the amount paid was credited or not. After mentioning the devise to Jenny Allen, and her assignment to the complainant, for which he says he secured to her a valuable consideration, he states that under the said assignment he entered into possession, intending to pay off to Robinson the balance due on the notes, and procure a deed, should he be mistaken in a point of law, on which, until the term of court just ended, he had not supposed there could be any doubt, viz. that Allen and his devisee having the uninterrupted possession of the lot for 20 years, there was brought to such a possession the legal title. The title bond from

Robinson to Gibbons is afterwards mentioned, and it is charged that both Gibbons and Robinson well knew, when the same was executed, that Jane Allen was living on the said lot. The bill then proceeds as follows: "Your orator further charges that after the said Gibbons returned from Pittsburgh, your orator suffered him to cut and remove some very large trees that stood on the said lot, as he had others which were obstructing the view between your orator's house and the river. But the said Gibbons being about to sell a part of the said lot to Tarlton Brown, and the said Brown being about to erect a house on said lot, your orator

interfered and forbade the building  
368 \*of the said house, and called on the said Gibbons, gave him a copy of the title bond and assignment, explained to him the title of your orator, and also added that your orator did not attach much importance to the lot, except that part of it which was immediately in front of your orator's house, and to that he attached no other importance except to prevent any person building to intercept the view of the river in front of your orator's house, and that if he would bind himself that no building should be put up on that part of it in front of your orator's house, your orator would give him the benefit of the contract he had made with Jane Allen; and told the said Gibbons to take copies of your orator's papers, submit them to counsel, and give him an answer the next evening; giving him 24 hours to decide. Your orator charges that the matter rested so until the 26th of February 1833, when the said Gibbons came to the office of your orator, and after a great deal of desultory conversation, informed your orator that he did not care any thing like as much for the lot as he had done; that he had contemplated to build on it, but had altered his mind; that he was looking for Mr. Dodge, to whom he owed a considerable sum of money; and he proposed to your orator, that if your orator would give him his money that he had paid, and interest, and his expenses to Pittsburgh, he would relinquish his claim to your orator. After some reflection and conversation, your orator informed him that for the sake of peace, and to prevent hard thoughts, he would do it. The assignment was then written, and presented to Gibbons for signature. He insisted on some alteration: it was made. The paper was then given to Gibbons for signature. Your orator went to the house for the money. When he returned, Gibbons had signed it, and he paid Gibbons the amount he had paid Robinson, the interest, and his expenses to Pittsburgh. He heard no more on the subject until

April, when, the value of property, in  
369 \*the estimation of some, having undergone a considerable improvement, Gibbons applied to your orator to rescind the contract. Your orator declined. He then instituted an action of ejectment." Gibbons and Robinson are made defendants. The prayer is, that the complainant may have a decree for the legal title, on the bond to Allen, or on the assignment from

Gibbons; that Gibbons be enjoined from enforcing his judgment; that he be decreed to convey whatever title he has, to the complainant; and for general relief.

The injunction was awarded.

Gibbons answered, denying that Neale was the agent of Robinson in the matter of the lot, or in any other matter connected with this transaction. Argy Allen never pretended that he had paid, either to Robinson or his agent, any money on account of the lot. His complaint was that he had deposited with Neale some part of the money, to be by him paid over to Robinson or his agent, and that this had not been done, and he would lose the money. At that time Jacob Beeson was the agent of Robinson. After Beeson's death, the complainant became either a general or special agent of Robinson respecting these town lots, or at least gave out that he was. The agency of the complainant in rescinding the contract between Robinson and Argy Allen is then detailed, and it is charged that the assignment by Jenny Allen to the complainant was antedated, and that for it no other consideration was given to Jenny Allen than what Robinson had before provided for her. What transpired after the respondent went to Pittsburg for the purpose of buying the property, is stated by him as follows: "After purchasing it, he returned to Parkersburg, and not getting his deed as soon as promised, he became uneasy and somewhat alarmed about it. The complainant, who owned the property on the opposite side of the street, finding out that this respondent was about putting

up a building upon the lot, came to him \*and claimed the lot as his own, affirming in strong and solemn language that Robinson had no power to sell the same, that Argy Allen had bought the property, and that he had bought Argy Allen's right to it, which was a good and indefeasible right, and would hold the property in spite of Robinson; and further intimated, in pretty strong terms, that the bond given by Robinson to respondent was valueless, not being binding, and expressed great doubts whether Robinson would ever refund to respondent the purchase money for the lot which he had received, and at the same time proposed to this respondent as a matter of favour, that he would endeavour to get back the money from Robinson for him. This respondent, being a man wholly unacquainted with law, and confidently relying upon the legal knowledge and opinion of the complainant (who is a lawyer of very high professional standing in Parkersburg, Virginia, the scene of these transactions, and a practitioner there) and also relying upon his representation of facts as to Robinson's want of means or inclination to refund the money paid him, and being also not a little influenced by a remark of complainant's, that he would not take the same trouble for any body else, nor would he do it for him, but for the respect he felt for the family, inasmuch as respondent's wife was a member of the same church to which he the complainant

belonged—or words to that effect,—(and in truth the complainant was at that time a regular member in full communion with a certain class of christians)—this respondent, thus confidently relying upon the opinion thus expressed by him in relation to the bond of Robinson, in a legal point of view, and upon his morality and integrity as a man and a christian, in his communication of facts, consented to receive back his money and yield the lot, and accordingly surrendered up the title bond of Robinson to him; upon which the complainant sat down to write the matter on

the back of it, which this respondent 371 \*not understanding, declined to sign;

but on the complainant's representing to this respondent, that it was necessary for him to have something to shew Robinson that he had paid the money back to respondent, in order that he might get the money out of Robinson, whose agent he represented himself to be, your respondent signed the paper,—not for the purpose to which it is now ought to be applied, viz. a transfer of his right to the lot, but simply for the purpose of furnishing complainant with the evidence, that he had, for and on account of Robinson, refunded back the money that he (Robinson) had received for the lot from respondent. Some months after this occurrence, the deed for the lot from Robinson and wife to this respondent was brought down the river from Pittsburg, where it had been, some months before, duly executed, acknowledged and deposited for this respondent." The respondent then mentions circumstances which led him to take an unfavourable view of the complainant's conduct, and determined him to probe the matter. "Accordingly" (the answer proceeds) "he called upon complainant, and mentioned to him the conversation had between them, the representations he had made to him, the fact of his not only suppressing the knowledge he had of the Argy Allen contract being abandoned, but also of his representing it as a good, subsisting equitable title, indefeasible in equity,—the fact of his not having drawn on Robinson for his money, and the fact of the arrival of his deed from Robinson for said lot, contrary to his expectations and complainant's representations; when, to his surprise, for the first time he learned that the writing that he had been prevailed on to sign was now said to be, not evidence that complainant had advanced money to respondent for Robinson, but an actual assignment of all respondent's right, title, interest and claim of, in and to the lot aforesaid." The respondent states that he then tendered to complainant the money he had 372 \*received of him, and demanded a surrender of the papers; but he refused to receive the former, or yield the latter; and thereupon the respondent brought his action of ejectment.

Robert S. Smith deposed, that in 1825 or thereabouts, deponent went with Samuel H. Fitzhugh (who was appointed a receiver by the chancellor in a case between Robin-



son and Doddridge) to the residence of Argy Allen; when Fitzhugh told Allen, he had, as receiver, a claim against him for the purchase money for the lot. Allen replied, that he had paid Thomas Neale for the lot, but Neale had broken up, and he (Allen) had nothing to shew for the payment. Fitzhugh then told Allen, if he did not pay for the lot, he (Fitzhugh) would be obliged to bring a suit against him to recover the purchase money. Allen replied, he was not able to pay the money; and after some further conversation, it was agreed by Fitzhugh and Allen, that Allen should give up the lot. It was either so agreed, or else Fitzhugh proposed to Allen to give up the lot, to prevent a suit; but whether it was the one or the other that made the proposition, deponent does not distinctly recollect. At a subsequent period, in a conversation between Robinson and Allen, deponent being present, Robinson told Allen, that if he would give up the lot, he might retain possession of it as long as he lived; and deponent says that Allen did live on the lot till the day of his death.

Benjamin Willard, a witness for the complainant, who drew the will of Argy Allen, deposed to Allen's conversations about the payments made by him; his saying that his widow, without the interposition of friends, might in her old age be deprived of a home; and his requesting the witness to use his best endeavours to effect the best practicable arrangement with Robinson for the benefit of his widow. Willard deposed that he, on behalf of Jenny Allen, had several interviews with Jackson as the agent

373 \*more than a year from Allen's death, Jackson informed deponent that he had made the desired arrangement. Deponent was directed by Jackson to prepare a lease for the lot to Jenny during her life, to be executed by Robinson, upon the execution and return of which, Jenny was to execute a release to Robinson of all her right and title to the lot, to take effect from her death. The lease was prepared accordingly.

It bore date the first of October 1831, and, after mentioning the purchase by Argy Allen, the two obligations executed by him, and the devise to his widow, states that he "departed this life on the 28th day of June 1830, leaving said obligations unsatisfied and unpaid, thereby constituting a good and valid lien on said lot in favour of said Robinson." The grant to Jenny Allen is of lot No. 2, during her life, yielding to Robinson, yearly during the term, the yearly rent of 25 cents.

Willard deposed that the lease so prepared was submitted to the inspection of Jackson some time in October 1831, and by his direction deposited with A. H. Creel, to be carried to Pittsburg; but deponent was repeatedly informed that the lease was not returned, and for that reason the release was not executed by Jenny.

Waterman Palmer deposed that the lease was enclosed by Creel to him, along with other papers; that he shewed the same to

Robinson, and Robinson declined to execute the lease, but told deponent he would write to Parkersburg on the subject. Deponent kept the papers for some time, and in the fall of 1834 returned them to John J. Jackson.

The chief object of Creel's letter to Palmer was to obtain a deed from Robinson to him Creel for another lot (No. 7). About Creel's right to this lot, Robinson seems to have wanted information; and this probably was what caused the delay in executing the papers.

The complainant acknowledged that the assignment of the title bond from 374 Jenny to him was made after he \*heard that Gibbons had purchased the lot. This acknowledgment was written at the foot of Willard's deposition.

Willard deposed that he procured the assignment at the request of Jackson. There was no money paid, but Jackson executed a covenant, by which he guarantied to Jenny, during her life, that part of the lot on this side of Pond run. Deponent cannot say positively whether he guarantied all on this side, or that part only which is enclosed.

It was admitted at the foot of Willard's deposition, that no part of the lot has been fenced, except that part which is reserved to Jenny by the verdict of the jury in the action of ejectment.

The deposition of John A. Hutcheson, taken by the complainant, detailed a conversation at Pittsburg between the deponent and Mrs. Robinson, which the deponent, on his return, repeated to Gibbons. The object of the complainant in taking this deposition was, to infer from the conversation, that there was reason at the time to doubt whether Gibbons would get a deed, and that this, together with the length of the time which had elapsed since the deed was to have been sent, was the cause of his making the arrangement with the complainant.

Tarlton Brown proved Jackson's offer to relinquish his right, if Gibbons would bind himself not to put up a building above the upper end of Jenny's lot, in front of his house; and that Gibbons took a copy of the title bond from Robinson to Argy Allen, to see if it was a good one.

Luther Edgerton detailed a conversation, in his store, between Jackson and Gibbons. Gibbons asked Jackson, whether Robinson would send him Gibbons the deed for the property he had bought of Robinson; saying, he had sent Robinson the money, and had his bond to make a deed. Jackson replied, that Robinson had not the right to make a deed, and that he Gib-

375 bons would lose his money, \*unless he got it back from Robinson. Jackson further said, that if Gibbons would transfer the bond to him, he would pay him Gibbons the money he had paid to Robinson, and run the risk of getting it back from Robinson. During this conversation, deponent believes Jackson said in substance, that Robinson had no right to make a deed, as he had parted with all his right to old Argy, and that consequently

Robinson's bond to Gibbons was good for nothing.

John Cross deposed that he brought to Gibbons the deed from Robinson, in the beginning of April 1833; and when Robinson gave the deed to deponent, he stated that it had been ready some time, but he had no previous opportunity to send it.

Edgerton, in his deposition, after detailing the conversation already mentioned, testified that subsequently thereto, and before May 1833, another conversation between the same parties took place. Gibbons being in the store of deponent, Jackson came in, when Gibbons told Jackson he had received his deed from Robinson, and wished to get the bond back from him Jackson. Gibbons further said, he was ready to pay back to him Jackson the money he had received from him for the bond. Jackson said, he considered it a bargain, and should not give it up. Gibbons said that Jackson had deceived him; and Jackson replied that he had not.

The circuit court, on the 4th of April 1837, pronounced its decree: whereby it was adjudged, that the judgment be perpetually enjoined; that Gibbons execute to Jackson a deed for the lot, with a reservation to Jane Allen widow and devisee of Argy Allen deceased, for her life, of the house occupied by her, and that portion of the lot which she had enclosed at the date of the deed from Robinson and wife to Gibbons, and with a covenant warranting against Gibbons and his heirs, and all persons claiming by, through or under him; and that each party pay his own costs, both at law and in that court.

376 \*On the petition of Gibbons, an appeal was allowed from the decree.

Alexander H. H. Stuart for the appellant. William A. Harrison for the appellee.

STANARD, J. The appellee sought by his bill, and obtained from the court below, an injunction to a judgment in an action of ejectment prosecuted against him by the appellant, and a decree for a conveyance from the appellant of the lot of land in controversy. His claim to the relief he sought was twofold: first, as assignee of a title bond of Robinson to Argy Allen, under an assignment of that bond to him by Jenny Allen the devisee of Argy; secondly, as assignee of an obligation of Robinson to the appellant for the conveyance of the lot in question, under an assignment of that obligation by the appellant. The suit, having regard to either ground of claim, is essentially one for the specific performance of a contract, and the principles which guide the discretion of courts of equity in giving or withholding relief in such cases, should govern in ascertaining the relief that ought to be administered in this. One of those principles, and a fundamental one, is, "that the contract must be certain, fair, and just in all its parts; and if any of these ingredients be wanting in the case, the court will not decree a specific performance." *Buxton v. Lister*, 3 Atk. 385; *Ellard v. Ld. Llandaff*, 1 Ball & Beatty 241. Under the influence of this rule, the aid of

the court to enforce the performance of contracts has been refused where material facts have been concealed, or where the defendant resisting the execution of the contract entered into it under a mistake or material misapprehension of his rights, or of facts affecting those rights, especially if the plaintiff had had any agency in causing that mistake or misapprehension. *Stanley v. Robinson*, 1 Russell & Mylne 527; 4 Cond. Eng. Ch. Rep. 544.

377 \*The appellee had no title to relief under the assignment he procured from the devisee of Argy Allen, of the title bond given by Robinson to Argy Allen. This is perfectly clear, and is conceded by his counsel. But still it is proper to take a brief view of that claim, because of the light it reflects on the situation of the parties to the other assignment, and the consequent influence it may have on the title to relief under that assignment.

In support of the claim under the assignment of Jenny Allen, the appellee, by his bill, suggests that about 150 dollars of the purchase money had been paid, and that he had given a valuable consideration for the assignment. There is, however, no proof, or attempt at proof, of the payment of one dollar of the purchase money. The evidence in the record distinctly shews that the appellee was agent of Robinson, and in pursuance of instructions from Robinson, had, in the fall of the year 1831, made an agreement with Jenny Allen for the surrender of the title bond, in consideration of a life estate to her in the lot. Though the evidence does not distinctly ascertain that this contract was carried into execution, yet it does not shew that there had been any rescission of it. In August 1832, Robinson, in his contract with the appellant, recognizes a contract with Jenny Allen, and treats it as one executed by him; and when the appellee obtained the assignment from Jenny Allen, he confessedly had full notice of the contract of Robinson with the appellant, and Jenny Allen agreed to receive, for the surrender or assignment of the title bond, the same consideration that Robinson had recognized as due and as having been secured to her. The stipulation of the appellee that she should have the consideration which had been provided for her in the contract of Robinson and the appellant, is all the consideration of the assignment to the appellee, and therefore, in effect, none passed from him. The entire consideration

378 \*was already provided for her, and came from Robinson. The appellee, too, was the agent of Robinson, who had been charged with the duty of bargaining for the surrender of Jenny Allen's interest. This being so, the assignment by her of the title bond enured to the benefit of Robinson. If Robinson had not sold to the appellant, I think it clear that he could have successfully resisted the claim of the appellee under the assignment of Jenny Allen. A fortiori, that resistance could be made by a purchaser from Robinson.

The claim of the appellee under the assignment from the appellant is resisted by

him, and he insists he ought to be absolved from his contract, on the ground (among others) that that assignment was procured from him under a misapprehension as to the right alleged by the appellee to exist under the title bond to Argy Allen, and the validity of that claim—a misapprehension produced, as the appellant alleges, by the concealment or misrepresentation of the appellee. The evidence ascertains, beyond any reasonable doubt, that the appellee opposed to the claim of the appellant under his contract, the ostensible claim under the title bond of Allen, (of the assignment of which claim to the appellee, the appellant seems then to have had no notice;) that he insisted on the validity of that claim, and endeavoured to impress on the mind of the appellant the conviction that it was valid, that Robinson could not make him a title, and that he was in danger of losing his money. The evidence as clearly ascertains that the appellant would not have transferred or given up to the appellee his contract with Robinson, but for the apprehension excited respecting the validity of the claim under the title bond to Allen; in producing which the appellee at least participated. The summary notice of the claim under the assignment of that title bond to the appellee has already shewn that that assignment, instead of reviving and

379 aiding a hostile claim against Robinson or \*his vendee, had, in point of law and equity, extinguished it, except to the extent that it was recognized and admitted by the contract between the appellant and Robinson; and no one can doubt that had this been known to the appellant when he made the assignment to the appellee, that contract would not have been made.

Without adverting to other objections urged by the appellant to the relief sought by the appellee, and canvassing the law or evidence on which they rest, what has been said presents a case in which a decree for specific performance ought not to be rendered against the appellant. He ought, however, to return the money he has received from the appellee, because his justified resistance to the execution of his contract leaves the appellee without the consideration for which it was paid. It occurred to me at one time, that the court might and ought to make provision, in this case, to secure the repayment of that money to the appellee. But further reflection has satisfied me that it is neither necessary nor proper: not necessary, because the appellee has a plain and adequate remedy at law to recover it: not proper, because he had not come into equity for that redress; and that being the only claim which, in the view that has been taken of the case, the appellee has on the appellant, if he had asserted that claim only, there would have been no occasion to resort to a court of equity for redress, nor was that the proper forum in which to seek it.

I am of opinion that the decree of the court below is erroneous, and ought to be reversed, and instead thereof a decree ren-

dered dismissing the appellee's bill, and that the appellant recover his costs in this court and the court below.

CABELL, J. The appellee's bill, in one of its aspects, is a bill for specific execution. In all such cases, \*the application is addressed to the discretion of the court; and it is a settled principle, that the plaintiff, to entitle himself to relief, must come in with clean hands and be free from all imputation. He must not have been guilty of any material misrepresentation or suppression of the truth in relation to the transaction.

Robinson sold the lot in controversy to Argy Allen in the year 1811, and gave him a bond to make a title. Argy Allen made his will devising the lot to his widow Jenny Allen, and died in 1830, having never received a deed, or paid any part of the purchase money. After Allen's death, Robinson employed Jackson as his agent to make an arrangement with the widow and devisee of Allen, by which the sale was to be cancelled, and she was to release her interest in the lot to Robinson, on his executing to her a lease of the lot for life, reserving only a nominal rent. This arrangement was actually entered into and agreed upon, between Jenny Allen on the one part, and Jackson, as the agent of Robinson, on the other. It seems, however, not to have been carried into formal execution; the failure to do which is not accounted for in the evidence. But there is no reason to believe that it was ever revoked, annulled or objected to by either party, except possibly that the life estate of Jenny Allen may have been subsequently restricted to a part only of the lot. It is clear that she never afterwards claimed any title to the inheritance, and that Robinson, considering himself as owner, sold the lot to Gibbons, received the purchase money, and gave a bond to execute a deed, "with the reservation of the life estate granted by the said Robinson and wife to the widow of Argy Allen." After this, Jackson, with full knowledge of Gibbons's purchase and of his having paid the purchase money, procured from Jenny Allen an assignment to himself of the title bond which Robinson had originally executed to Argy Allen. For this assignment he gave no other consideration than his own covenant \*that he would secure to her, during her life, the enjoyment of a part of the lot.

It is well established that an agent cannot make himself an adverse party to his principal. What then was the effect of this assignment to Jackson? Shall he be permitted to avail himself of it, so as to defeat, for his own benefit, an arrangement which he, as agent, had previously made for another? Certainly not. The law regards the assignment as enuring to the benefit of his principal, Robinson, and those claiming under him, and gives it the same effect as if it had been made directly to him or them. Jackson's claim under this bond is therefore worthless.

His claim under the assignment of the bond to Gibbons is equally unsustainable

in a court of equity. It is manifest that this assignment was made by Gibbons in ignorance or misapprehension of his rights; that this ignorance or misapprehension was produced, in some measure at least, by the declarations and conduct of Jackson during the negotiation; and that he would not have made the assignment, had he not been thus misled. He represented the prior bond to Argy Allen as being still valid, and as taking from Robinson all right to convey the land to Gibbons, when he well knew that it could not subserve that purpose; and he failed to communicate the material fact of the arrangement, made by his own agency, by which that bond was to be cancelled.

I am of opinion to reverse the decree, to dissolve the injunction, and to dismiss the bill; but without prejudice to any suit which Jackson may be advised to bring for the recovery of the money which he paid to Gibbons.

PARKER, J., and TUCKER, P., concurring, decree reversed, injunction dissolved, and bill dismissed with costs.

382 \*Givens and Others v. Nelson's Ex'or and Others.

July, 1889, Lewisburg.

(Absent BROOKE, J.)

**Principal and Surety—Sureties in Bounds Bond—Subrogation—Indemnity of Original Sureties.**—The principal in a bond, to indemnify his sureties therein, assigns a claim to a trustee, in trust that he shall collect the amount and apply the proceeds to the discharge of the bond. Before this claim is collected, suit is brought upon the bond, and the sureties contribute ratably to its payment. One of the sureties obtains a decree against the principal for what he pays, and upon this decree sues out a ca. sa. which being executed on the principal, he enters into a bounds bond with sureties, and afterwards breaks the condition, whereby the sureties in that bond become liable. The claim assigned to the trustee being afterwards collected by him, the court of chancery allows the sureties in the bounds bond to participate in this trust fund, in the event of their having made payment. **Held** by the court of appeals, that this is erroneous; that the surety who obtained the security of the bounds bond, was bound to proceed thereon

against the sureties in the same, and could only come upon the trust fund for any deficiency in his recovery from them; and that the sureties in the bounds bond could have no right to resort to the trust fund for their reimbursement, except to the extent of any surplus that might remain after the full indemnification of the original sureties.

On the 8th of February 1823, Erasmus Stribling, Alexander R. Givens, James Turk, David Golloday, A. Anderson and Alexander Nelson executed an obligation to pay to Samuel Blackburn, on demand, 3775 dollars, for the payment of which they bound themselves and their heirs, jointly and severally, in the penal sum of 7550 dollars. Upon the obligation there was an indorsement of the same date, under the hand and seal of Stribling, stating it to be the understanding between Blackburn and himself, that the money was to be paid Blackburn at any time when he might need it, on 20 days notice.

383 \*The sum of 471 dollars 87½ cents was paid for the interest to the 8th of March 1825, and the obligation credited therewith.

At the time of commencing an action upon the obligation, Golloday and Anderson were dead. The action was therefore brought against the surviving obligors, and against them Blackburn obtained a judgment on the 31st of August 1827.

The writ of fieri facias issued upon this judgment being levied upon property of Nelson, a bond was given by Stribling, Givens and Nelson for the forthcoming thereof, in which bond George C. Robertson and Hugh Hamilton joined as sureties, at the request of Nelson and Givens, by whom they were indemnified.

The forthcoming bond being forfeited, and it being expected that judgment would soon be rendered thereon, Nelson and Givens, on the 19th of January 1828, filed their bill in the superior court of chancery holden at Staunton, setting forth, that Stribling borrowed the money of Blackburn, and the co-obligors were his sureties; that Stribling has become much embarrassed, and the complainants believe is entirely insolvent; and that their efforts to obtain indemnity from him on account of their suretyship have proved entirely abortive, except that Stribling has transferred for their benefit a claim which they believe will turn out to be altogether unproductive. Under these circumstances, in order that the cosureties may bear an equal proportion of the burthen to which the complainants are subjected, they the complainants seek the equitable interposition of the court. The bill states that the complainants intend to avail themselves of the remedy by motion, as far as practicable, but that that remedy will not afford adequate relief. The administrator of Golloday alleges that he has fully administered the personal assets, and the complainants believe that the same have proved insufficient to pay his debts; but Golloday left considerable \*real estate, which is liable for his propor-

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\*Sureties—Contribution.—See foot-note to Preston v. Preston, 4 Gratt. 88; Garland v. Lynch, 1 Rob. 545.

The principal case is cited in Harnsberger v. Yancey, 83 Gratt. 540; Sherman v. Shaver, 75 Va. 10; Stout v. Vause, 1 Rob. 180.

See monographic note on "Subrogation" appended to Janney v. Stephen, 2 Pat. & H. 11.

**Same—Order of Liability—Injunction Bond—Judgment.**—A principal debtor in a judgment obtains an injunction thereto, and executes an injunction bond, with a third person as surety; the surety in the judgment not being a party to the injunction. The court held that, upon the dissolution of the injunction, the surety in the injunction bond is liable for the debt enjoined, before the surety in the judgment. Bentley v. Harris, 2 Gratt. 261, citing with approval, the principal case, Parsons v. Bridgock, 2 Vern. R. 606; Wright v. Maley, 11 Ves. R. 12; Douglass v. Fagg, 8 Leigh 588.

tion of the debt, both by force of the obligation and by the provisions of his will. Part of the real estate has been sold to Lewis Kellar, who has in his hands about 800 dollars of the purchase money. Another part has been sold to Isaac Sellars; but what amount of purchase money remains in his hands, the complainants are not informed. One of the devisees of Golloday has removed out of the commonwealth, and another is in precarious circumstances. Stribling the principal debtor; Golloday's administrator, widow, heirs and devisees; the purchasers from those devisees; James Turk; and Robert Anderson the executor and devisee of Andrew Anderson, are made defendants. The prayer of the bill is, that Kellar and Sellars, the purchasers from Golloday's devisees, be restrained from paying over to their vendors; that contribution may be enforced against the estate of Golloday; and that the complainants may have such other relief as may be equitable.

An injunction was awarded accordingly. The claim mentioned in the bill as transferred by Stribling, was a claim under an obligation of Daniel Sheffey, bearing date the 25th of September 1826, whereby Sheffey acknowledged that he had received from Erasmus Stribling an assignment of a contract entered into between him and Tagart of the county of Baltimore in Maryland, dated the 22d of August 1826, and which was ratified on the 12th of September 1826 by Mary Tagart, Elizabeth L. Tagart, another Mary Tagart, William Tagart, John Tagart jr. and Samuel Tagart, by which, for certain services to be rendered by the said Stribling, the contracting parties agreed to pay him 5000 dollars, if the debt claimed by them should be wholly recovered from James Caldwell; if not, in proportion to the sum recovered. The undertaking of Sheffey was to account with Stribling for four fifths of whatever amount he might obtain under the agreement assigned to him as aforesaid.

385 \*By an assignment made the 27th of October 1827, Stribling transferred Sheffey's obligation to Nicholas C. Kinney, in trust that he should collect the amount, and apply the proceeds, so far as might be necessary, to the discharge of the forthcoming bond executed to Blackburn.

On the 24th of August 1830, the court of chancery pronounced its decree: wherein it is set forth, that on the motion of Blackburn, execution has been awarded on the forthcoming bond against the obligors therein, for the amount thereby secured, to wit, the sum of 4476 dollars 12 cents, with interest thereon from the 18th of October 1827 till paid, and 7 dollars 12 cents costs; that by reason of said premises, and the insolvent circumstances of Stribling, the plaintiffs became entitled to call on Turk and the estates of Golloday and Anderson, for the respective contributive proportions of Turk, Golloday and Anderson of the principal sum, interest and costs last mentioned; that the plaintiffs have, upon motions for that purpose made, recovered

judgments against Turk and the executor of Anderson for their proportions, on which last mentioned judgments executions have been awarded, and forthcoming bonds taken and forfeited, and executions thereupon awarded; that the plaintiffs are still entitled to recover against the estate of Golloday his contributive proportion, amounting to 896 dollars 64 $\frac{1}{4}$  cents, with interest on 895 dollars 22 $\frac{1}{2}$  cents, part thereof, from the 18th of October 1827 till paid; that the personal assets of Golloday have been fully administered, except a small balance, which will probably be required to defray the current expenses of the administration, and which is moreover probably subject to prior and superior claims to that of the plaintiffs; that of the purchase money for the real estate of Golloday which has been sold, there remains unpaid by Kellar the sum of 800 dollars,

to wit, 400 dollars which fell due on 386 the 1st of September \*1829, and 400 dollars which will fall due on the 1st of September 1830, and in the hands of Sellars more than enough to discharge the balance of the contributive proportion due from the estate of Golloday, with the interest thereon, and the costs expended by the plaintiffs in this suit, after the application thereto of the aforesaid balance of purchase money due from Kellar; that the transfer by Stribling to Kinney, to indemnify his sureties, is not now available for the purpose of such indemnity; and that, in the opinion of the court, the purchase money in the hands of Kellar and Sellars ought to be applied to the aforesaid contributive proportion due from Golloday, with the interest and costs. In conformity with this opinion, the court decreed against Kellar and Sellars. And then the court, declaring Stribling liable for reimbursement to the plaintiffs of their contributive proportions of the debt, interest and costs secured by the forthcoming bond, decreed that he pay to the plaintiff Nelson 896 dollars 64 $\frac{1}{4}$  cents, with interest on 895 dollars 22 $\frac{1}{2}$  cents, part thereof, from the 18th of October 1827, and that he pay as much principal and interest to the plaintiff Givens.

Givens having sued out a fieri facias upon his decree against Stribling, property was taken under it, and sold on the 20th of October 1830. The net proceeds of sale amounted to 474 dollars 74 cents.

Nelson sued out upon his decree a writ of capias ad satisfaciendum, under which Stribling was taken and committed to jail the 30th of October 1830. Stribling on the same day gave bond to the sheriff, with Nicholas C. Kinney, Robert Hemphill, David W. Patteson, Jacob K. Stribling, John C. Bowyer, James Crawford, Benjamin Crawford and William S. Eskridge his sureties, with a condition reciting that the execution under which he was taken, with the legal costs attending the same, amounted to 985 dollars 29 cents after deducting a credit directed by the plaintiff's attorney, and that Stribling

387 \*had taken the benefit of the prison

rules assigned and laid out by the county of Augusta, for one year. The condition was, that if Stribling should not depart from nor go out of the rules or bounds of the said prison, and should render his body to prison in satisfaction of said execution at or before the expiration of one year from the date, then the obligation was to be void.

This condition was broken, and the bond being thereby forfeited, the sheriff assigned it to Nelson.

Nicholas C. Kinney, to whom the assignment of the 27th of October 1827 was made, succeeded in collecting the fund thereby assigned to him, the net amount of which was 4713 dollars 40 cents.

Whereupon Turk, Givens and others contended that the bounds bond enured to the benefit of all Stribling's sureties, and that Nelson should be turned over to his indemnity on said bond, in exoneration of the trust fund. They also contended that the sum of 474 dollars 74 cents, received by Givens on his execution against Stribling, enured to the benefit of all Stribling's sureties, and should be so taken, in exoneration of the trust fund.

On the 21st of June 1837, the court pronounced its opinion that the fund of 4713 dollars 40 cents, together with the amount made by Givens on his execution, with interest on both to the time of division, should be divided into five equal parts, one of which parts should be paid to the plaintiff Givens, another to the executor of Nelson (in whose name the cause had been revived), another to the representatives of Gollday, another to Anderson, and the other fifth to Turk; unless the sureties in the bounds bond had paid the amount due thereon to Nelson's executor, in which case they were to be subrogated to the rights of Nelson's executor, and the part assigned to Nelson's executor was to be paid over to them, according as they might have contributed to the payment of said bounds bond.

388 \*By an indorsement on the bounds bond, it appeared that the sureties therein had paid 500 dollars in part of the amount thereof, and that 750 dollars, other part thereof, had been paid by Nicholas C. Kinney out of the trust fund in his hands. These payments were credited as of the 2d of January 1837.

A decree being entered on the 21st of June 1837 in conformity with the opinion pronounced by the court, an appeal was allowed therefrom on the petition of Givens and Turk, who insisted that the decree ought to be reversed for the following reasons:

1. Because, while it adds to the trust fund the amount made out of the property of Stribling by Givens, it fails to apply the same rule to the sum made out of the sureties in the bounds bond and indorsed as a credit thereon, together with the part of the trust fund credited thereon.

2. Because the executor of Nelson, who has an ample security for his debt in the bounds bond (a security furnished by

Stribling the principal debtor) is admitted by the decree into an equal participation in the trust fund with his cosureties.

3. Because the sureties in the bounds bond, for as much as they pay thereon, are subrogated to the rights of Nelson in the fund. These sureties are not entitled to subrogation. Stribling was the principal debtor, and bound to pay his debt and protect his sureties; and the sureties of Stribling in the bounds bond can occupy no better ground than he does.

Peyton for the appellants.

Michie for the appellees.

STANARD, J. The decree of the court below affirms two propositions: 1st. That it was proper to make Givens account for the amount he had made from Stribling's property, and limit his share of the 389 indemnity \*furnished by the assignment of Tagart's claim, to a sum equal to the excess of an equal aliquot part of the aggregate of the amount so made and the indemnity fund, above the amount so made. 2ndly. That the sureties in the prison bounds bond were entitled to substitution to the original rights of Nelson, so as to enable them to share with Nelson's cosureties the said indemnity fund, in like manner and to like extent as Nelson could, if satisfaction of his claim on Stribling, and consequently on the indemnity fund, had not been obtained from the sureties in the prison bounds bond.

Though, under my present impressions, I should dissent from the first proposition, (strongly inclining to the opinion that the proper rule is to make the amount that Givens recovered in the pursuit of his separate remedy against Stribling, available to the other original sureties so far only as the recovery of that sum lessened the amount required from Givens's equal share of the indemnity fund, to complete his indemnity,) I forbear to enter into an investigation of the question, or to give a definitive opinion on it, because the decree in this respect conforms to the principle that Givens in the court below assented to, and even contended for, and he only is interested in applying the different rule that I incline to think is the correct one.

I dissent from the second proposition, and think this dissent is justified by authority and reason. The proposition is opposed to the direct adjudications, or to principles avowed in or deducible from the cases, of *Parsons v. Briddock*, 2 Vern. 608; *Wright v. Morley*, 11 Ves. 22; *Hull v. Pitfield*, 1 Wils. 46; *Douglass v. Fagg*, 8 Leigh 588. Sound reason equally condemns it.

The fund, to a participation in which the decree admits the sureties in the prison bounds bond in equal degree with the original sureties of Stribling, substituting them to the supposed right of Nelson one of the original sureties, is the produce of an 390 assignment of \*Stribling. To the indemnity of those sureties, including Nelson as one of them, the assignment had dedicated that fund. When the sureties had paid their respective parts of the debt for which they were sureties, they were

severally entitled to demand of Stribling reimbursement of the sums so paid, and they had equal right to resort to this fund as a security for that reimbursement. The right to resort to the fund depended on the continuance of the necessity of that resort, to obtain reimbursement; and the termination of that necessity, by the discharge of any one of the claims of the several sureties on Stribling, liberated the fund from the claim so discharged, and left it liable for those that remained undischarged. The primitive and overruling right of the sureties, as between themselves, was to have it applied to the indemnity of all and each, and it could not be applied to any other object until that was attained. None of the sureties could claim participation in it but for the purpose of indemnity, and the whole fund remained chargeable by each for that purpose until the indemnity was complete or the fund exhausted. Each, then, as a consequence of the nature and quality of their primitive rights, had an interest in the diminution or discharge of the claims of each, as such diminution or discharge lessened or might lessen the charge on the fund. Each, too, was at liberty to seek reimbursement from any other source, and the success of such pursuit by any one of them was incidentally the success of all, so far as it diminished the occasion of that one to draw equally with the others on the indemnity fund to complete his reimbursement. If a new security were acquired by any of them, he held two securities for his reimbursement, while the other sureties held but one; and in such case, under a familiar and clear rule of equity, if, before he made the new security available, he had been reimbursed in whole

or in part from the indemnity fund, 391 the other sureties (the "incumbrancers of that fund) would be entitled to be substituted in his place, and claim under the new security, at least out of the surplus thereof that might be left after he had been fully satisfied, a sum equivalent to that he had received from the indemnity fund. This principle of equity is stated in, and illustrated by, adjudications too numerous and familiar for citation. If the new security be an incumbrance on property of the debtor, no one would question the soundness of this principle, or resist its application. The decree therefore must have proceeded on the supposition, that where the new security is not a lien or charge on the property of the debtor, but the personal responsibility of another, though that responsibility came in the place of some lien on or remedy against the property or person of the debtor, obtained by the pursuit of the creditor, then the principle does not apply. In such a case, according to the principles of the decree, the new security is wholly unavailing to improve the condition of the other original incumbrancers: if it is not enforced by the party who may have obtained it, the other incumbrancers are not entitled to a cession of it, and the enforcement of it is of no benefit to those incumbrancers, as the party against whom it is enforced takes the

place of the creditor he has satisfied, and the original charge on the fund in respect to the debt satisfied is undiminished. Examples illustrating the operation of the principles which conduct to such a consequence, are perhaps the aptest means of testing their soundness. Thus, one or more incumbrancers, who have a security in common with others on a particular fund, in pursuit of additional security or satisfaction from the debtor, obtain judgment against him, sue out execution, and levy it on property sufficient to satisfy the claim. If the property be sold and the claim satisfied, the common fund for the security of all is liberated pro tanto, and remains a security for the others. But 392 instead \*of a sale under the execution,

the property is restored to the debtor on the interposition of a friend as a surety in a forthcoming bond, and his responsibility stands in place of the satisfaction thus intercepted by his intromission; and on this responsibility he is eventually charged and compelled to pay. It seems but reasonable that this payment should produce the same effect on the rights of the incumbrancers, as if satisfaction had been had from the sale of the property levied on. Yet according to the principles of the decree, all this is fruitless of benefit to the incumbrancers, and their rights are the same as if the debt had not been discharged: and this result is produced by the active interposition of a court of equity, in favour of the party whose voluntary intromission has frustrated a satisfaction of the claim, that would have removed it from the incumbered property. This, I think, instead of being sanctioned, is forbidden by the principles of equity. It is not perceived that the sureties in a prison bounds bond would have a better title to substitution than those in a forthcoming bond. The body in execution, though it be not a satisfaction, yet tends to satisfaction, and the sureties in the bond, by becoming bound as such, withdraw the debtor from prison, and enable him, by escape from the bounds, to deprive the creditor of his lien on the body. Their obligation holds the place of that lien, and its value is tested by the amount realized from that obligation.

The proposition on which the decree rests, raises the right of the sureties in the prison bounds bond to participate in the indemnity fund, to an equality with that of the original sureties. The primitive rights of the original sureties to participate in that fund for the purpose of indemnity, were equal, and continued so in each and all, while the fund was required for that purpose. It was the inherent and essential quality of such a right, to terminate in respect to any

393 one of the sureties \*when he should be indemnified, in favour of others not indemnified. When any one obtained indemnity under his separate remedy against the principal for his separate claim on the principal, his right was extinct in favour of the other sureties, from the law and equity applicable to their relations to and interest in the fund, and no remedy or

right remained in him, to which to subrogate the sureties in the prison bounds bond; and it was not the proper function of a court of equity to revive this extinguished right, in favour of sureties that had taken the place of the debtor, and come in the stead of one of the remedies against him, for the purpose of diminishing the legal or equitable rights of those to whose benefit the successful enforcement of that remedy enured. Authority and reason concur in pronouncing a dissent from the second proposition on which the decree is based.

The following decree was concurred in by all the judges:

"The court is of opinion that there is error in the said decree, in so far as it provides that the sureties in the prison bounds bond should participate in the trust fund for the indemnity of the original sureties in the debt to Blackburn, in the event of their having made payment to Nelson. On the contrary, the other sureties for that debt had a right to demand that their cosurety Nelson should prosecute the demand to a recovery against the said sureties in the bounds bond, and should be only entitled to come upon the common fund for any deficiency in his recovery from them; and the sureties in the bounds bond could have no right to resort to the trust fund for their reimbursement, except to the extent of any surplus that might remain after the full indemnification of the original sureties; or if Nelson received any thing from the common fund before a recovery on the prison bounds bond, the other

394 sureties \*were entitled to have the prison bounds bond enforced for their benefit, to the extent of the sum so received by Nelson from the common fund, until those sureties were fully reimbursed the principal and interest of the sums they had respectively paid as original sureties of Stribling." Therefore decree reversed, so far as it is above declared to be erroneous, and cause sent back for further proceedings.

### M'Clung v. Beirne.

July, 1830, Lewisburg.

[34 Am. Dec. 739.]

(Absent BROOKE and CABELL, J.)

**Case at Bar.**—A judgment was rendered the 8th of May 1828, for 148 dollars 68 cents damages, with interest and costs, and on the same day an appeal was allowed. The judgment being affirmed, damages were recovered against the appellant for retarding the execution, and also costs in the appellate court. A fieri facias being then issued and returned nulla bona, the surety in the appeal bond paid 202 dollars 64 cents in satisfaction of the judgment, and within a year after the affirmance, filed a bill to charge real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance. **Held.**

1. **Subrogation—Surety on Appeal Bond.**\*—The surety is to be substituted in the place of the

\***Subrogation—Surety—Judgment.**—Although a judgment is in fact extinguished by payment, yet it

judgment creditor, and to have the benefit of his lien.

2. **Lien of Judgment—Interests Subject to—After-Acquired Realty.**†—The real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance, whether owned by him at the date of the original judgment or acquired afterwards, is subject to the lien.

3. **Same—Same—Costs and Damages in Appellate Court.**‡—The lien is not only for the damages, interest and costs recovered by the original judgment, but also for the damages and costs to which the creditor became entitled by the judgment of affirmance.

4. **Same—Subjection of Lands Aliened—Inverse Order of Alienation.**§—In adjusting the equities between

is kept alive in contemplation of equity for the benefit of the surety. *Buchanan v. Clark*, 10 Gratt. 177; *Johnson v. Young*, 20 W. Va. 661, both citing the principal case; and *Bank United States v. Winston*, 2 Brock. R. 252 (Fed. Cas. No. 944, 2 Fed. Cas. p. 743); *Enders v. Brune*, 4 Rand. 438; *Powell v. White*, 11 Leigh 300; *Robinson v. Sherman*, 2 Gratt. 178; *Leake v. Ferguson*, 2 Gratt. 419; *Watts v. Kinney*, 8 Leigh 372. See foot-notes to *Hill v. Manser*, 11 Gratt. 522; *Buchanan v. Clark*, 10 Gratt. 184.

**Same—Same.**—The doctrine is well settled that where a creditor has two funds, to which he may resort for the satisfaction of his debt, one of which is primarily liable, and the other only secondarily liable for the payment thereof, the person having the right to resort to the latter fund for the payment of his demand stands in the situation of a surety to the owner of the primary fund in the application of the equitable principle of substitution in behalf of sureties, and if the fund secondarily liable be applied by the creditor to the satisfaction of his demand the person who stands in the situation of such surety is entitled to be subrogated to all the rights and remedies held by such creditor for his indemnity. *Nuzum v. Morris*, 25 W. Va. 569, citing *Story's Eq. Juris. sec. 633*; *Bart. Ch. Pr. sec. 328*; *White v. Tudor's L. C. in Eq.* 149-151, 2 Tuck. Com. 492; *Morrill v. Morrill*, 53 Vt. 74; 2 Min. Inst. 173; *McClung v. Beirne*, 10 Leigh 394; *Kent v. Matthews*, 12 Leigh 590; *Eddy v. Traver*, 6 Paige 521; *Hays v. Ward*, 4 Johns. Chy. 180; *Neely v. Jones*, 16 W. Va. 625.

See monographic note on "Subrogation" appended to *Janney v. Stephen*, 3 Pat. & H. 11, and monographic note on "Marshaling Assets" appended to *Carrington v. Didler*, 8 Gratt. 260.

†**Lien of Judgment—Interests Subject to—After-Acquired Realty.**—For the second point in the syllabus, the principal case is cited in *Jeter v. Langhorne*, 5 Gratt. 208; *Bailey v. McCormick*, 23 W. Va. 101.

The principal case is cited in *Jeter v. Langhorne* 5 Gratt. 197, for the proposition that if a judgment be rendered for money, an appeal taken therefrom, and the judgment affirmed, the real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance, whether owned by him at the date of the original judgment, or acquired afterwards, is subject to the lien.

‡**Same—Same—Costs and Damages in Appellate Court.**—The principal case is cited with approval in *McCance v. Taylor*, 10 Gratt. 586; *Michaux v. Brown*, 10 Gratt. 620, 621, and distinguished and explained in *Bailey v. McCormick*, 22 W. Va. 102.

§**Same—Subjection of Lands Aliened—Inverse Order**



the several alienees, the court will not compel them to contribute *pro rata*, but will first subject the land last aliened by the debtor, and  
395 if that "be insufficient, then the land aliened next before the last, and so on.

5. **Same—Same—Equity of Redemption.**—If, however, any parcel of land had been conveyed in trust to secure a debt, and another parcel conveyed afterwards absolutely, the equity of redemption in the land conveyed in trust will be subjected before the land conveyed absolutely.

6. **Same—Decree of Sale—Rents and Profits.**—If

of Alienation.—It is well settled that where land which is subject to the lien of a judgment or other incumbrance, is sold in parcels to different persons by successive alienations, it is chargeable in the hands of the purchaser in the inverse order of alienation. For this proposition the principal case is cited in *Miller v. Holland*, 84 Va. 656, 5 S. E. Rep. 701; *Whitten v. Saunders*, 75 Va. 569; *Payne v. Webb*, 23 W. Va. 564; *Gracey v. Myers*, 15 W. Va. 302; *Alley v. Rogers*, 19 Gratt. 389; *Jones v. Phelan*, 20 Gratt. 241; *Henkle v. Allstadt*, 4 Gratt. 292; *Harman v. Oberdorfer*, 33 Gratt. 506; *McClintic v. Wise*, 25 Gratt. 456.

See also, *Conrad v. Harrison*, 3 Leigh 532; *Jones v. Myrick*, 8 Gratt. 179; *Lynchburg Perpetual B. & L. Ass'n v. Fellers*, 96 Va. 337, 31 S. E. Rep. 506; *Brengle v. Richardson*, 78 Va. 406; *Rodgers v. McCluer*, 4 Gratt. 81, and *note*; *McClaskey v. O'Brien*, 16 W. Va. 791. See *foot-note* to *Alley v. Rogers*, 19 Gratt. 386; monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425, and monographic *note* on "Marshaling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260.

In *Buchanan v. Clark*, 10 Gratt. 179, 181, the court, upon the authority of the principal case held that, "The land not included in the deed of trust should have been first sold, and applied to the prior judgment; and if insufficient to discharge it, then the lands included in the deed of trust should have been sold, and so much of the proceeds thereof as, with the proceeds of the land not conveyed, amount to a moiety of the proceeds of all the said lands, should have been applied if necessary to the satisfaction of said judgment."

**Same—Same—Case Contra Overruled.**—Contrary to the rule set forth above, it was held in *Beverley v. Brooke*, 2 Leigh 425, that where a judgment is obtained against a debtor, who afterwards allens his lands to divers alienees by divers conveyances, all the lands in the hands of the several alienees are alike liable to the judgment creditor, and must contribute *pro rata*. But in *Jones v. Phelan*, 20 Gratt. 243, the court, in discussing the principal case, and *Beverley v. Brooke*, 2 Leigh 425, said: "In the later cases decided by this court on the subject, *McClung v. Beirne*, has been followed, and *Beverley v. Brooke*, has been considered as overruled. *Rodgers v. McCluer*, 4 Gratt. 81; *Henkle v. Allstadt*, 4 Gratt. 284; *Alley v. Rogers*, 19 Gratt. 386." *Beverley v. Brooke*, 2 Leigh 425, was also overruled by the principal case; and doubted, but distinguished in *Conrad v. Harrison*, 3 Leigh 532. The principal case is cited in *Alley v. Rogers*, 19 Gratt. 388; and *Jones v. Phelan*, 20 Gratt. 242.

**Same—Lands Sold Contemporaneously.**—But where the different parcels are sold contemporaneously, they must contribute *pro rata* to the satisfaction of the judgment. *Harman v. Oberdorfer*, 33 Gratt. 497; *Alley v. Rogers*, 19 Gratt. 386.

**Decree for Sale of Land—Enquiry Into Rents and**

none of the parties ask an enquiry to ascertain whether the rents and profits will pay the debt in a reasonable time, there may be a decree for the sale of the property.

7. **Same—Sale of Equity of Redemption, of Lands Aliened—Extent of Sale.**—In selling an equity of redemption, the sale will be out and out—not of a moiety only, but the whole; and as between lands aliened, the whole of the tract aliened last will be sold before any part of the tract aliened first; the sales stopping when the debt has been satisfied, or when lands have been sold equal to half the aggregate value of the whole lands.

8. **Same—Interest.**—In ascertaining the amount to be raised by a sale of the property, interest is not to be allowed on the sum of \$32 dollars 64 cents paid by the surety, but only on the original sum of 148 dollars 63 cents.

**Dissenting Judge—Case Disapproved.**—STANARD, J., dissented on the 3d point, and also on the 4th, and such of the others as conflict with *Beverley v. Brooke et al.*, 2 Leigh 425. The other two judges

**Profits.**—The principal case is cited in *Newlon v. Wade*, 43 W. Va. 287, 27 S. E. Rep. 245; *Rose v. Brown*, 11 W. Va. 138; *Werdenbaugh v. Reid*, 20 W. Va. 591; *Cronie v. Hart*, 18 Gratt. 745. See *foot-notes* to *Manns v. Flinn*, 10 Leigh 93; *Barr v. White*, 30 Gratt. 581, and monographic *note* on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

**Same—Same—No Enquiry Demanded.**—The statute prescribes no particular mode by which it shall be made to appear that the rents and profits will not pay the judgment in five years. When there is doubt about the fact, or an inquiry is demanded by either of the parties, the court will generally direct one of its commissioners to ascertain and report the annual rents and profits of the land. But this is not a necessity in every case. If none of the parties ask such an inquiry there may, in a proper case, be a decree for the sale of the property without it. For this proposition, the principal case is cited in *Ewart v. Saunders*, 25 Gratt. 206; *Brengle v. Richardson*, 78 Va. 411; *Horton v. Bond*, 28 Gratt. 331; *Rose v. Brown*, 11 W. Va. 140.

**Same—Same—Same—Presumption of Waiver.**—And the failure by a defendant to demand an inquiry whether the rents and profits of the land will not satisfy the judgment within a reasonable time raises a presumption that such right is waived. For this proposition the principal case is cited in *Ewart v. Saunders*, 25 Gratt. 206; *Brengle v. Richardson*, 78 Va. 411; *Rose v. Brown*, 11 W. Va. 140.

**Chancery Practice—Conveyance in Trust by Debtor of His Lands.**—It is the settled practice in Virginia, to entertain the suit of the judgment creditor for relief in equity, when the debtor has, subsequent to the judgment, conveyed his land in trust for the payment of debts, or on other trusts authorizing the sale of the land. *Taylor v. Spindle*, 3 Gratt. 70, citing the principal case; *United States v. Morrison*, 4 Peters 124; *Fox v. Rootes*, 4 Leigh 429.

**Jurisdiction—Setting Aside Fraudulent Conveyance—Moiety of Land.**—Upon setting aside a conveyance of real estate as fraudulent, at the suit of a judgment creditor, the court can decree the sale of only one moiety of the land to satisfy the judgment. *McNew v. Smith*, 5 Gratt. 88, citing the principal case; *Stileman v. Ashdown*, 2 Atk. R. 477; *Haleys v. Williams*, 1 Leigh 140.

The principal case is also cited for this proposition in *Buchanan v. Clark*, 10 Gratt. 177.

disapproved that case, and treated it as not a binding authority.

On the 8th of May 1828, James Callison obtained a judgment in the superior court of law for Greenbrier county, against John Mays, for 148 dollars 63 cents damages, with interest from the 7th of September 1825 till paid, and the costs of suit. On the day of the judgment, Mays prayed an appeal to the court of appeals, and upon his entering into an appeal bond with Patrick Beirne as his surety, the appeal was allowed. The bond was with the usual condition, that if the appellant should pay the judgment, and all such costs and damages as should be awarded by the court of appeals in case the judgment should be affirmed, then the obligation was to be void. On the 3d of April 1835, it was considered by the court of appeals that the judgment be affirmed, and that the appellee recover against the appellant damages according to law for the retarding the execution thereof, and also his costs by him expended about his defence in the court of appeals.

396 \*A copy of the decision of the court of appeals was received by the clerk of the circuit superior court of law and chancery for the county of Greenbrier on the 22d of May 1835, and on the 1st of June 1835 a writ of fieri facias was issued, commanding the sheriff that of the goods and chattels of John Mays he should cause to be made the sum of 148 dollars 63 cents, damages, with interest from the 7th of September 1825 until the 8th of May 1828, also 26 dollars 89 cents costs, and damages at the rate of ten per centum per annum on the aforesaid damages and costs, from the said 8th of May 1828 until the 22d of May 1835, and also 32 dollars 76 cents for the costs in the court of appeals, and 1 dollar 58 cents for costs in the circuit superior court. This execution being returned "no property found," Patrick Beirne the surety in the appeal bond, on the 3d of August 1835, paid 362 dollars 64 cents in satisfaction of the judgment.

In the mean time, to wit, between the date of the judgment in the superior court and the date of the affirmance thereof by the court of appeals, Mays and wife, by a deed bearing date the 26th of November 1834, and admitted to record in the office of Greenbrier county court on the 5th of January 1835, conveyed to William M'Clung certain real estate, in trust for the purpose of securing to Samuel M'Clung 1732 dollars 44 cents, with legal interest thereon from the 26th of November 1834.

Mays having, at the suit of one of his creditors, taken the oath of an insolvent debtor, Beirne, on the 22d of January 1836, filed his bill in the circuit court of Greenbrier county, to be substituted to the rights of Callison the judgment creditor, and enforce his lien on the real estate conveyed to M'Clung, which the bill stated had been sold to Thomas Matthews and Hugh Wilson.

The answer of Matthews and Wilson stated, that at the time of the deed to M'Clung, under which they purchased, there was left in the hands of Mays more

397 \*than sufficient real estate to satisfy the judgment; and they insisted that all the real estate so left in the hands of Mays ought to be exhausted before subjecting the property purchased by them. Mays, it was true, had, after the deed to M'Clung under which they purchased, made other conveyances; to wit, a deed of trust of the 1st of December 1834, to Patrick Beirne, to secure a debt to Andrew Beirne; a deed of trust of the 22d of January 1835, to secure a debt to James Withrow; a deed of bargain and sale, of the 27th of January 1835, to William M'Clung; and a deed of bargain and sale, of the 17th of January 1835, to William H. Syme. But they insisted that the judgment debtor could not, by the act of selling or transferring his remaining lands, throw the burthen of that judgment back upon the first purchaser. The land in the hands of the last alienee, they said, should be first subjected, and if insufficient, then the land in the hands of the alienee next preceding the last, and so on until the judgment was satisfied.

Thereupon the complainant Patrick Beirne obtained leave to amend his bill, and at June rules 1837, filed his amended bill, setting forth the deed of trust of the 1st of December 1834, to the complainant, to secure a sum of money to Andrew Beirne; the conveyance of the 17th of January 1835, to Syme; a deed of trust of the 22d of January 1835, to Elisha Callison, for the benefit of James Withrow; and the conveyance of the 27th of January 1835, to William M'Clung: stating further, that one of the lots conveyed to Syme had been conveyed by Syme and wife to John Dunlop: and making Mays, Andrew Beirne, Syme, Dunlop, Callison, Withrow and William M'Clung defendants, in order that the property conveyed by those several deeds, or so much thereof as might be necessary, might, according to the principles of equity, be directed to be sold in satisfaction of the money which the 398 complainant had been \*compelled to pay, with interest, and the costs of this suit.

The defendant William M'Clung, by his answer, insisted that the lien, if it existed at all, was only to the amount of the judgment of the court below, and that the liability of the vendees was in proportion to the value of the land purchased by them respectively from Mays.

The answer of Withrow insisted that the utmost for which a lien could be claimed by force of the original judgment, was the amount of that judgment with interest and costs, excluding the costs and damages in the court of appeals. It admitted that all the lands held by Mays at the date of the original judgment, and those since acquired, were liable to satisfy it, and to that end the several vendees were bound to contribute pro rata. But the respondent added, that he was not satisfied that the complainant had a right to be substituted in the place of Callison the judgment creditor.

The cause being heard the 18th of May 1838, the circuit court was of opinion, that the judgment bound the lands owned by

Mays at the time of the rendition of the judgment against him, or acquired thereafter and before the judgment was satisfied, and that the complainant was entitled to be substituted to the lien of the judgment; but that whatever might have been the rights of the judgment creditor at law, the complainant had no right to ask more than equity, and could not throw the burthen of payment from subsequent to prior alienees. The decree of the court was, that unless the defendants, or some of them, should pay the plaintiff, on or before the 20th of June following, the sum of 362 dollars 64 cents, with interest thereon from the 3d day of August 1835 till paid, and the costs of this suit, there should be a sale of the property conveyed by Mays to William M'Clung, and if the proceeds thereof should not be sufficient, then a sale of the other  
399 property, \*or so much thereof as might be necessary, in the following order, viz. first, the property conveyed by Mays to Callison for the benefit of Withrow; secondly, the property conveyed by Mays to Syme; thirdly, the property conveyed by Mays in trust for the benefit of Andrew Beirne; and fourthly, the property conveyed by Mays in trust for the benefit of Samuel M'Clung.

The equity of redemption of Mays in the property conveyed by the deed of trust to Beirne, had, with other property, been conveyed absolutely to Syme by the deed of the 17th of January 1835. But the property embraced in the deed of the 22d of January 1835, from Mays to Callison, was merely conveyed to secure to Withrow a debt of 631 dollars 20 cents, with interest from the 28th of August 1834. So that, in this property, Mays had still an equity of redemption, at and after his conveyance of the 27th of January 1835 to William M'Clung. But the fact of there being such an equity of redemption, which ought to be subjected before the property conveyed to William M'Clung, does not appear to have been adverted to in the circuit court.

The deed to William M'Clung purported to be in consideration of the sum of 200 dollars. None of the defendants asked for an enquiry to ascertain the annual rents and profits of the property conveyed by this deed or of the property conveyed by any of the deeds.

The terms of sale directed by the decree were, that the purchaser or purchasers should pay one third of the purchase money in hand, and execute bonds with good security for the residue, payable in six and twelve months; and the land sold was directed to be held liable for the payment of the purchase money.

Upon the petition of William M'Clung, an appeal was allowed from the decree.

The cause was argued in this court by Samuel Price for the appellant, and William Smith for the appellee.

400 \*TUCKER, P. I am of opinion that there is no error in the decree in substituting the appellee to all the rights and remedies of Callison under his original judgment. To the benefit of it he had the

clearest right, upon the ordinary and well established principles of the court; nor was it necessary to entitle him to it that he should have been a party to that judgment. It is enough that having paid off the amount of it to Callison, to whom he was bound by the appeal bond, he had a right to demand a cession of every remedy Callison had for the recovery of his demand from his debtor. Among these was the execution by elegit, which reached all the lands of which Mays was seized at the date of that judgment, or at any time afterwards. The decree was therefore right in giving him the benefit of it.

Nor do I think there was any error in charging upon the real estate bound by the original judgment, the damages and costs in the court of appeals. Had an execution by elegit been sued out, it must have included those damages and costs, and must have directed the levy of them, as well as of the amount of the original judgment, by extent of the lands whereof the defendant was seized at its date. They are but emanations of that judgment, which opens to receive them, in like manner as the interest of the debt, and the fee for issuing an execution, though accruing subsequent to the judgment, are considered and taken to be part of it or appendages to it. In England, upon a writ of error in the exchequer chamber or in parliament, to a judgment in the king's bench, the damages are certified to that court, for the purpose of being included in the execution, which can only issue from it, as the record itself still remains there. Tidd's Practice 1244; Tidd's Prac. Forms 539; 14 Vin. Abr. 614; 2 Wms. Saund. 101; z. 2 Lilly's Entries 571. So here, the affirmance and the award of damages are certified to the court below, whose clerk is directed to calculate the  
401 amount, \*and the execution issues including it accordingly. The damages and costs in the appellate court thus become appendages to the original judgment; for the judgment of affirmance is no new judgment. It is but a ratification of the original judgment.

Passing over the objections to the shortness of the credit allowed and the supposed rigour of the terms of sale, which I think are without foundation, these being matters of sound discretion, and there being nothing in the record to shew it was exercised improperly, (see *Perine v. Dunn*, 4 Johns. Ch. Rep. 140, and the act of assembly, 1 Rev. Code, ch. 66, § 41, p. 204, which authorizes a sale for cash or upon credit,) I proceed to consider whether the appellant had a right to demand that the other vendees and incumbrancers should contribute ratably.

In this case it is clear that had Callison the creditor issued his elegit, it must at law have comprehended the whole of the lands in the hands of all the defendants, and a moiety of the whole, without distinction, would have been extended for the payment of his demand. The plaintiff, who seeks in equity to be subrogated to his rights, cannot fairly be shorn of any por-

tion of the remedy by the necessity of coming into equity. He is therefore clearly entitled to charge the whole. But it is no invasion of his rights, to provide that the respective parties should be chargeable as equity would direct, provided he is neither delayed nor deprived of any portion of his security. Of this he does not complain; and indeed, as I understand the decree, he is not delayed; for the whole of the lands are, I take it, to be advertised together, and then sold in immediate succession, until enough is raised to pay the debt. The question then is, whether, as between the defendants, either is entitled to preference, and what should be the order of liability if they are not to be charged pro rata.

402 \*In the case of Conrad v. Harrison et al., 3 Leigh 532, Sisson mortgaged 360 acres of land to Brock. He then mortgaged 285 acres of the same land to Harrison, retaining 75 acres; and he afterwards again mortgaged the whole, including the 75 acres, to Conrad. In this state of the incumbrances, it was decided that as, after the mortgage to Harrison, he had a right to demand that the 75 acres reserved in the hands of Sisson should be first charged by Brock's mortgage, so, after the mortgage to Conrad, he had a right still to insist on subjecting the same 75 acres to the discharge of the prior mortgage as far as it would go, for his indemnification. This decision rested upon the plain and equitable principle, that if there be a mortgage on two acres, and the mortgagor sells one of them, the vendee has a right to demand that the other lot retained by his vendor shall be first sold to satisfy the debt; and as this right at once attaches, it cannot be lost by a sale of the other lot to a third person, but he must sit in the seat of his vendor, and be first liable. This principle had been repeatedly acted upon by chancellor Kent, and is also recognized and approved by the whole court in *Nailer v. Stanley*, 10 Serg. & Rawle 450, 455. By the unanimous judgment of this court, it was approved in the above mentioned case of *Conrad v. Harrison et al.*

In the case of *Beverley v. Brooke et al.*, 2 Leigh 425, it had, however, been decided that where a judgment is obtained against a debtor, who afterwards alienates his lands to divers alienees by divers conveyances, all the lands in the hands of the several alienees are alike liable to the judgment creditor, and must contribute pro rata. This case is different from that of *Conrad v. Harrison et al.* as it is the case of a judgment; and that difference was adverted to by the judges in the decision of *Conrad v. Harrison*, as important. It was not expressly overruled, and it cannot be distinguished, I think, from the case at

403 bar. We must therefore either \*overrule it, or, in deferring to it, we must say that the decree in this case is, upon this point, erroneous.

My own opinion is that that case should be reviewed, as one of the most distinguished judges who decided it, expressly renounced it in *Conrad v. Harrison*, and as

it appears that the point was not fully discussed, nor were the respectable authorities produced which have since been brought before the court. (10 Serg. & Rawle 450; *Clowes v. Dickinson*, 5 Johns. Ch. Rep. 235.) The case was decided by only three judges, one of whom having since distinctly declared that he could not distinguish it from *Conrad v. Harrison et al.* which he yet decided the other way, it stands now as the decision of only two judges, and so is no longer an authority binding upon us.

Upon reviewing this case, and revolving the principles decided in *Clowes v. Dickenson* and *Conrad v. Harrison et al.*, I am compelled to say that I think those principles should govern it. The case put by chancellor Kent, of a judgment binding lands, is precisely the case of *Beverley v. Brooke et al.* and its naked statement exhibits the truth and applicability of the principle laid down by him. The case put by judge Carr, in 3 Leigh 539, 40, is apt and forcible for its illustration. The argument, seems to me unanswerable, that the right of the prior vendee to demand that his vendor's land should, for his relief, be first charged under an elegit, cannot be taken away without his consent. The consequences of the contrary doctrine are also worthy of the gravest consideration. A debtor who, after judgment, has sold part of his lands, has every temptation to defraud his grantee of his right to resort to the residue for his relief. He has every inducement to sell that residue and pocket the price, the purchaser holding it free from more than a pro rata charge. It is worth nothing in his own hands, but by selling it to another, it brings profit to himself.

404 \*It is said, indeed, that the law has settled the rights of the alienees. It has declared that all are in *æquali jure*, and that equity cannot control the law. I do not think so. Admit that all are upon equal footing at law, the question still recurs whether one may not have superior equity to another. This is admitted as it respects the vendor himself. If the elegit takes (as in strictness it must take, and as in fact it usually does take) all the lands, as well the alienee's as the debtor's, the alienee has no relief at law, but yet he may have relief in equity against the debtor himself. Why? Because he has superior equity. So if all are alienees, they are all in *æquali jure* at law, but the prior has superior equity over the latter. He had, before the last alienation, an equitable right to charge the land so aliened. Has he lost that right by the last alienation? Does not the last alienee take subject to that equity? Assuredly, if he purchased with notice of it. He had notice of the judgment, and that it bound his land. If he had notice that there were other lands which were bound by it, and which were previously aliened, he had notice that what he was buying was, in his vendor's hands, bound for their indemnity. If he did not know this, he must protect himself, if at all, by a plea of his purchase without notice

of the equitable rights of prior alienees. This has not been done in the present case. If therefore it be admitted that the last alienee can protect himself at all, it is not upon the principle that he is, in equity, in *æquali jure*, but upon the ground that he purchased without notice of the equity, and is therefore not affected by it. It is possible that this might protect him: but as to this, I do not think it necessary now to give an opinion. It is enough here to say, that where the last alienee cannot so protect himself, he must be the first to suffer in equity.

\*The next error assigned is the failure to ascertain whether the rents and profits would not pay the debt in a reasonable time. To this it may be answered, 1. that the defendant, not having asked the enquiry, is presumed to have waived it. *Manns v. Flinn's adm'r*, reported ante, p. 93.—2. That the price of the property (200 dollars) is a sufficient assurance that the rents of half of it would be inadequate even to pay the interest.

Thus far I have been able to discover no error in the decree. But I am of opinion that in some other points it is clearly erroneous. First, the decree is for interest on the aggregate sum of 362 dollars 64 cents, instead of the original sum of 148 dollars 63 cents. Secondly, the equity of redemption in the land conveyed in trust for Withrow should have been first sold out and out,—not a moiety only, but the whole. *Haleys v. Williams*, 1 Leigh 140,—3. If that fell short of satisfying the demand, then the tract conveyed to the appellant should have been next sold, and so in succession, until the debt should be satisfied, or one half in value of the whole lands should be sold. For had the *elegit* been executed, one half of each tract would not be extended, but one half of the whole lands, and that half which was last sold should bare the burden. See *Harvey v. Woodhouse*, *Kelyng's Rep.* 3.

STANARD, J., dissented from the opinion that the lien existed from the date of the original judgment, for the damages and costs to which the creditor became entitled by the judgment of affirmance; and also from the opinion that a court of equity should not compel the alienees to contribute *pro rata*, considering that on this point, and those flowing from it, the decision ought to conform to that in *Beverley v. Brooke et al.* But

PARKER, J., concurring with the president, the decree was merely reversed in those things wherein it was declared to be erroneous in the opinion of the president, and in all other things was affirmed. The cause was sent back, that the decree might be reformed, and the case proceeded in according to the principles declared by the majority of the court.

**Pierce's Adm'r &c. v. Trigg's Heirs.**

July, 1839, Lewisburg.

(Absent STANARD\* and BROOKE, J.)

**Chancery Jurisdiction—Sale of Infant's Land.**†—The

\*He had been counsel for the appellants.

†Chancery Jurisdiction—Sale of Infant's Land.—It has

question, whether there exists in the courts of chancery of Virginia, in any other cases than those in which the statute gives it, power to decree the sale of infant's real estate upon the ground that it will be for his advantage, examined by TUCKER, P.

**Partnership—Real Estate—When Partnership Property—Rights of Surviving Partner.**‡—Where land is purchased by two partners for partnership purposes with partnership funds, and is used as a part of the stock in trade, a court of equity deems such land partnership property; and though, if the conveyance has been made to both partners, there will, upon the death of one, pass to his heirs a legal title, yet the whole beneficial interest devolved upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would dispose of the personal estate of the firm. So held by TUCKER, P., and CABELL, J.,—dissentiente PARKER, J.

been supposed and contended by some, and even decided by courts, that a court of chancery is a general guardian of infants within its jurisdiction, and has an inherent power to decree a sale of their real estate whenever it is for their advantage to do so. In Virginia, there has been, I believe, no express adjudication of the question. PRESIDENT TUCKER pronounced a very decided opinion against such jurisdiction in the case of *Pierce v. Trigg*, 10 Leigh 406, and though what he said on that subject was only an *obiter dictum*, yet it has been generally regarded and acted upon as a sound exposition of the law. I think, however, that the question ought now to be considered as settled in this state, and in accordance with the views of PRESIDENT TUCKER, especially as that seems also to have been the view on which the legislature of the state has always acted, first in passing special acts for the sale of real estate of infants, as was formerly the case, and then in passing general acts on the subject, and extending them from time to time, as necessity or convenience seemed to require. It is under these general acts, or one or more of them, therefore, that the jurisdiction of a court of equity to sell the real estate of infants, on the ground of infancy merely, must be derived. PRESIDENT MONCURE, delivering the opinion of the court, in *Faulkner v. Davis*, 18 Gratt. 663. JUDGE MONCURE then proceeds to briefly review these statutes.

The principal case was also cited on this subject, in *Rinker v. Streit*, 33 Gratt. 667; *Cumming v. Simpson* (Va.), 1 S. E. Rep. 662. See also, monographic note on "Infants" appended to *Caperton v. Gregory*, 11 Gratt. 506; monographic note on "Guardian and Ward" appended to *Barnum v. Frost*, 17 Gratt. 308.

‡Partnerships—Real Estate—When Partnership Property.—As a general rule, real estate purchased for partnership purposes and appropriated to those purposes, and paid for with partnership funds, becomes partnership property. *Hancock v. Talley*, 1 Va. Dec. 442; foot-note to *Brooke v. Washington*, 8 Gratt. 248.

Same—Same—Personality.—In equity, real estate purchased with partnership funds for partnership purposes is treated as personality, and not as realty, and is held liable to the satisfaction of the debts of co-partnership, including debts due to any one or more members of the firm, in preference to the individual debts of the partners. *Diggs v. Brown*, 78 Va. 295, citing principal case. To the same effect, see principal case also cited in foot-note to *Christian*

**Chancery Practice—Partnership Land—Decree for Sale Binding on Infant—Heirs of Deceased Partner.**

—A bill by a surviving partner against the heirs of a deceased partner, seeks a sale of lands purchased by the two partners, upon the ground that such sale will be for the benefit of all interested in the property; and a decree is accordingly made for the sale, reserving liberty to the heirs, who are infants, to shew cause against it within a certain time after they come of age. After the sale has been made and confirmed, and the purchasers under the decree have sold again, the infants attain full age, come forward within the time limited, and shew cause by an answer to the first bill, and by a cross bill. The fact that the land was originally purchased for partnership purposes with partnership funds, though not the ground of the original decree, and not sufficiently \*appearing at that time, is now

clearly ascertained from the bill, answers and cross bill. **Held**, that as this fact, if it had appeared to the court which made the decree of sale, would have been sufficient to authorize that decree, the same ought not now to be set aside. By **TUCKER, P.**, and **CABELL, J.**,—dissentiente **PARKER, J.**

**Same—Same—Same.**—Upon a bill by a surviving partner against the infant heirs of a deceased partner, for the sale of partnership land, a decree for the sale being made, after the infants come of age they shew for cause against the decree, that the surviving partner was largely indebted to the firm. Per **TUCKER, P.**,—the fact does not appear, and if it had appeared at the date of the decree, it could not have arrested the sale, but would only have arrested the funds.

**Same—Judicial Sale—Protection of Purchaser without Notice—Case at Bar.**—A sale being made under a decree, the deed from the commissioner to the purchaser recites the decree, and the cause in which it was made, and also the fact of the purchase money not being payable at the time of making the deed. The proceedings in that cause shew, that when the court confirmed the sale by the commissioner, it directed the bond to be filed

v. **Ellis**, 1 Gratt. 306; **Wheatley v. Calhoun**, 12 Leigh 273.

**§Decrees against Infants—Effect.**—An infant cannot annul a decree without cause, simply because of infancy, as the statute demands that he shew cause. An infant is as much bound by a decree as an adult. It is just as final and conclusive as to matters properly adjudged, only that he is saved the right, without regard to limitation barring adults, until six months after his majority, without going to an appellate court, to shew cause to the same court which rendered the decree why it ought to set it aside. That cause must be just what would relieve an adult from it,—error in the record, fraud, or surprise. **Lafferty v. Lafferty**, 42 W. Va. 785, 26 S. E. Rep. 203, citing the principal case; **Hull v. Hull**, 26 W. Va. 1; **Zirkle v. McCue**, 26 Gratt. 517 (which also cited the principal case); **Parker v. McCoy**, 10 Gratt. 604.

See further, monographic note on "Infants" appended to **Caperton v. Gregory**, 11 Gratt. 505; monographic note on "Decrees" appended to **Evans v. Spurgin**, 11 Gratt. 615.

**Judicial Sales—Validity—Purchaser Must Be a Party.**—See, on this subject, *foot-note* to **London v. Echols**, 17 Gratt. 15; *foot-note* to **Buchanan v. Clark**, 10 Gratt. 165; *foot-note* to **Parker v. McCoy**, 10 Gratt.

subject to the future order of the court, but instead of retaining the title to the land until the purchase money should be paid, it directed the commissioner to convey the land to the purchaser. The proceedings do not shew that any order was ever made by the court for delivering up the bond; but the fact appears to be that the clerk, without such order, delivered it up, on a receipt being filed for the amount thereof. This receipt was given by a person in his own right, as to part, and in right of certain infants for whom he was guardian, as to the residue. When the infants come of age, their guardian and his sureties are insolvent. The infants allege that though the receipt was given, no money was in fact paid, and for their proportion of the purchase money they seek to charge the property in the hands of a defendant who obtained title from the person to whom the commissioner conveyed the property. The defendant claims to be a purchaser for valuable consideration without notice; and there is no proof that if the money had not been paid, the defendant knew that fact when he purchased. **Held** by two judges, that the defendant is not responsible for the purchase money.

**Same—Partnership Land—Sale Subject to Incumbrances—Node of Relief—Case at Bar.**—A sale being made, under a decree, of partnership lands, the title to a moiety whereof was in the infant children of the deceased partner, they, upon coming of age, under the liberty reserved to them, shew cause against the decree, and seek to set the sale aside. This the court refuses to do. But inasmuch as the sale was made subject to the claims to dower of one widow who had no title thereto, and of another who does not appear ever to have

\*asserted a title, and as thereby the property may have been sold for less than it would have brought if sold free of incumbrances, **Held** that proceedings should be instituted to ascertain the true value of the property at the date of the sale, if the same had been sold free of all incumbrances, on the credit allowed by the decree; and that one half the excess, if any, over and above the price for which it was then sold, be decreed to be paid into court to the credit of the personal representative of the deceased partner, and if not paid by a short day, that it be made chargeable upon the property.

596. The principal case was cited in **London v. Echols**, 17 Gratt. 19; **Heermans v. Montague**, 2 Va. Dec. 18; **Estill v. McClintic**, 11 W. Va. 425.

See generally, monographic note on "Judicial Sales" appended to **Walker v. Page**, 21 Gratt. 686.

**§Partnership Realty—Dower.**—It is well settled in Virginia, as it is in England, that real estate purchased with partnership funds for partnership purposes is so far considered as personality as not to be subject to dower or curtesy in favor of the consort of a deceased partner. **Parrish v. Parrish**, 88 Va. 582, 14 S. E. Rep. 325, citing the principal case.

In **Martin v. Smith**, 25 W. Va. 583, the principal case is cited as authority for the proposition that a widow is not entitled to dower in partnership lands purchased with partnership funds for partnership purposes until the partnership debts have been paid.

The principal case was distinguished in **Wilson v. Davison**, 2 Rob. 401.

See further on this subject, monographic note on "Dower" appended to **Davis v. Davis**, 25 Gratt. 587; article in 4 Va. Law Reg. 310-316.

On the 17th of October 1814, Lilburn Henderson filed a bill in the superior court of chancery holden at Wythe courthouse, setting forth, that in the lifetime of William Trigg, a mercantile partnership existed between the complainant and him, which continued until his death. That during their said partnership, they purchased a lot, with the buildings thereon, on the main street in the town of Abingdon, and two back lots in said town. That the said lots were conveyed to them jointly, and occupied by them for some time. That Trigg died without having dissolved the copartnership, or made any arrangement for a division of the property. That the property is of such a nature, and so situated, that it cannot be divided, nor can it be rented for a sum by any means adequate to its value; that it is daily decaying, and fast going to ruin; that large repairs are necessary to be made, to preserve it and render it tenantable; but that each of the parties interested is unwilling and refuses to expend money in repairs. That very little rent can be obtained for the property, and the prospect of renting daily becomes worse. That although the property cannot be rented for a sum sufficient to pay the taxes and keep it in tenantable repair, yet it could be sold for its value, which is considerable, and there is a prospect at present of selling it very advantageously. That the complainant has intermarried with Rachael, aged 22, the widow of William

Trigg, and thereby, in addition to his 409 partnership interest in said property, acquired his wife's right of dower therein. That as the partner of Trigg, he acquired by the purchase a moiety of the property. That a certain Sarah Hamilton, a young woman, and widow of Frederick Hamilton who formerly owned the said property, claims dower therein and has brought suit therefor; and if her right of dower cannot be purchased, the said property will be absolutely worthless during the continuance of her interest therein; but the complainant is not, nor are the heirs of Trigg, willing to advance money for the purchase of her right of dower. That Trigg died leaving four children, William, Daniel, Connally and Lilburn, who are his heirs, and John J. Trigg has, by the county court of Washington, been appointed their guardian. That John J. Trigg is fully sensible of the necessity of selling the said property, and the great advantage his wards would derive therefrom, but doubts his power, as guardian, to sell the lands of his wards. The prayer of the bill is, that the children of Trigg before named, by their said guardian, may be made defendants and answer the same; that the court will decree a sale of the property on such terms and in such manner as it shall deem most beneficial to all parties; and that the complainant have such other and farther relief as is just and equitable.

On the day the bill was filed, John J. Trigg answered it in his own name. The respondent states, "that he believes the allegations in said bill are true: that a sale

of said property will be beneficial to his wards, and this respondent would have sold the same himself, had the law conferred upon him sufficient power. He therefore has no objection that your honour shall enter up a decree directing a sale of said houses and lots for cash." The answer was sworn to.

On the day that the bill and answer were filed, the cause, by consent of the complainant and of the guardian, was set for hearing thereupon, and the next day 410 \*it came on to be heard. The court was of opinion, however, that it was not ready for a decree, inasmuch as the answer of the infant defendants was not filed, and therefore continued the cause until the next term, and gave leave to the said defendants to file their answer by their said guardian.

Before the next term, John J. Trigg resigned his guardianship, and the county court appointed Henderson guardian.

On the 15th of May 1815, on the motion of the plaintiff and for reasons appearing to the court of chancery, it was ordered that Abram B. Trigg be appointed guardian ad litem to the defendants.

The next day, an answer was filed in the name of the infant defendants by their said guardian ad litem, stating, "that they believe it is true that their father William Trigg deceased and the complainant were partners in merchandise for a considerable time before the death of the said William, and that the houses and lots now sought to be sold by the complainant were purchased out of the joint funds of the said partners; that the same were always considered as forming so much stock in the said trade of merchandise, the most valuable part of which houses and lots was made use of by them as a storehouse. They farther state, that they are perfectly willing the said houses and lots shall be sold as prayed for by the complainant in his bill, because they think it would conduce much to their interest, whether the same be viewed as real or personal estate. The continual decay of the houses, the destruction which houses always experience when rented, their situation in a town where there are no adequate means provided for preventing or suppressing fire, and where a recent event proves that danger is not only to be apprehended from that quarter by accident, but that there is good reason to believe some person

or persons are so hostile to the said 411 town, or some of its inhabitants, \*as to put into operation, willingly, that destructive element—are all reasons for disposing of said property. In addition to which, the respondents state that if the said property shall be considered as real estate, its being held jointly by these respondents and the complainant, and the indivisible nature of the property, make the management of it extremely inconvenient, and, should not the utmost harmony prevail between the complainant and these respondents or their guardian, utterly impracticable."

On the 19th of May 1815, the court, upon

the bill and answers, decreed that the houses and lots in the bill mentioned be sold, subject to the claim of dower of Rachael Henderson and Sarah Hamilton. The time and place of sale were directed to be advertised at the door of the courthouse of Washington county, and in the newspaper published nearest the premises, for at least six weeks, and the sale was directed to be upon the premises, to the highest bidder, upon a credit of twelve months, bond with good security being taken from the purchaser for the payment of the purchase money.

Benjamin Estill, who by the decree was authorized to act as commissioner, reported that sale was made pursuant to the decree, on the 20th of July 1815; that Martin Beatty and Lilburn L. Henderson, merchants of the town of Abingdon, became the purchasers for the sum of 2500 dollars; and that they had entered into bond, with sufficient security, to pay that sum at the expiration of twelve months.

There being no exceptions to the report, the court, on the 18th of October 1815, decreed that the same be confirmed; that the bond be filed subject to the future order of the court; that the commissioner convey the property to Henderson & Beatty, with special warranty; and that each party pay his own costs.

412 \*The commissioner had in fact made a conveyance before the order directing the same. The deed bears date the 27th of July 1815, and was admitted to record the same day. It recites the previous decree, and the sale in pursuance thereof, and purports to be in consideration of a note executed by Martin Beatty and Lilburn L. Henderson for the sum of \$2500 dollars, payable twelve months after the day of sale.

The bond filed subject to the future order of the court, was delivered up, without such order, on the 17th of July 1817, upon the following receipt being filed:

"Abingdon, 31st March 1817. This day received of the firm of Henderson & Beatty 2500 dollars and the interest thereon, in full of a note executed to Benjamin Estill esq. commissioner &c. for that sum payable at 12 months, which note was executed to the commissioner for the purchase of the houses and lots in the town of Abingdon by the said Henderson & Beatty, and was by the said commissioner filed among the papers in the high court of chancery at Wythe courthouse, in the cause L. L. Henderson surviving partner of Henderson & Trigg, plaintiff, against William, Daniel, Connally and Lilburn Trigg, heirs of William Trigg deceased; which sum I, Lilburn L. Henderson guardian of the infant children of William Trigg deceased have this day received in my character as guardian aforesaid." (Signed) "L. L. Henderson, for himself and as guardian of the said defendants."

"Teate, Daniel Rogan."

Before the 19th of April 1820, Henderson died. On that day, Rachael Henderson, his widow, and the mother of the infant

defendants, was by the county court appointed their guardian.

On the 2d of May 1820, a deed was made between Martin Beatty surviving partner of Henderson & Beatty, and Rachael Henderson the widow of Lilburn L. Hen-

413 derson, \*of the one part, and David Pierce of the other, purporting to be in consideration of the sum of 5000 dollars, and for that consideration conveying the property to Pierce, excepting, however, the dower claim of Sarah Hamilton in one of the lots. Rachael Henderson by this deed releases to Pierce all claim which she may have to dower in the lots, either by her marriage with William Trigg her first husband, or with Lilburn L. Henderson her last.

The deed was made and the transaction managed by John H. Fulton, as the attorney in fact of Beatty who had gone out of the commonwealth. Fulton paid mrs. Henderson, for the dower rights so released by her, 500 dollars in bonds &c. belonging to the firm. And Pierce gave the firm of Henderson & Beatty credit, in their account with him, for 5000 dollars the price of the property so conveyed to him, leaving the balance of Pierce's account against Henderson & Beatty still due.

Time having been allowed the infant defendants, by the decree of the 19th of May 1815, to shew cause against the same for six months after they should respectively attain the age of 21 years, and William Trigg, the eldest of them, having attained his age on the 8th of January 1828, application was made by him on the 4th of June 1828 to be permitted to shew such cause. The case was thereupon revived in the name of Daniel Rogan and Joseph C. Trigg as executors of Henderson, and William Trigg filed his answer, insisting that when the sale was made, it was not necessary or proper. The language of the answer is as follows: "The said firm of Henderson & Trigg was not indebted at the death of William Trigg, having made a handsome profit during the partnership. The private estate of William Trigg did not require a sale of said property, his personal estate having been, at the period of his death, if honestly administered, not only sufficient for the payment of his debts, but also sufficient to maintain and educate his

414 \*children, and afford, in addition, a handsome property to each of his children." The respondent further contends that the price obtained for the property was inadequate. Then, after mentioning that Henderson procured himself to be appointed guardian for the respondent and his brothers, the answer proceeds as follows:

"The said Lilburn L. Henderson, a short time after his appointment as guardian of this respondent and his brothers, executed a receipt, from himself in his own right and as guardian as aforesaid, to himself, or rather to said Henderson & Beatty, for the purchase money due on the bond for the said property, which had been placed in this court by the commissioner who sold



the said property under the decree aforesaid, and thus obtained possession of the same. Your respondent expressly charges, however, that the said firm of Henderson & Beatty had not, at the time when the said receipt was given, paid any part of said bond, nor have they yet paid any part of the same. On the contrary, the said firm of Henderson & Beatty was at that very time largely indebted to the firm of Henderson & Trigg for goods, which debt yet remains unpaid. The said Lilburn, as your respondent expressly charges, executed the said receipt for the fraudulent purpose of possessing himself of said bond without having paid any part thereof. The said bond yet remains entirely due and unpaid. It is of no benefit to this respondent that he might perhaps charge the sureties which the said Henderson gave on his bond as guardian, because they are also chargeable with other very large sums which came into the hands of said Henderson as guardian of your respondent and his brothers, for which he hath never accounted, and which the said sureties are utterly unable to pay, as well as to pay this sum." The answer then insists that the sale ought either to be entirely annulled, or the respondent and his brothers held entitled to their lien on the property for the said purchase money and interest.

415 \*On the 27th of May 1829, upon the motion of the defendants, leave was given them to file a cross bill; and David Pierce and John M. Preston were ordered to be made defendants.

The cross bill was accordingly filed the next day, in the name of William K. Trigg. This bill sets forth that William Trigg deceased, in his lifetime, formed a partnership with Henderson, which was carried on for several years before his death, and realized a large profit, one half of which, in addition to the whole of the capital stock furnished by him, belonged to William Trigg. It also sets forth that during the continuance of the partnership, the houses and lots mentioned in the original bill were bought with the partnership funds. And it insists that when the original suit was brought for the sale of said houses and lots, there was not only no necessity for the sale of said property, but as Henderson had received and applied to his own use the whole of the capital of Henderson & Trigg, as well as the profits, which had been great, he ought not to have been permitted to take any portion of the real property, which had been bought with the partnership funds, and ought to have been considered as part of the mercantile capital. The bill sets forth the rights of the complainant and his brothers under the will of their father, whereof Henderson was executor; and states that Henderson was largely in arrear, both as executor and guardian, and while in this condition sold and conveyed the houses and lots to David Pierce, who sold and conveyed the same to John M. Preston, both of whom, it alleges, had full notice of the foregoing facts and of the equitable claims of the respondent and his brothers,

when they respectively purchased. The bill also sets forth in what manner the bond of Henderson & Beatty for the purchase money discharged; the fact of their being insolvent, and their surety so nearly so, as to render a suit against him 416 hopeless, even if the \*bond had not been withdrawn from the court; and the fact that Henderson died largely indebted as executor and guardian, insolvent himself, and the sureties whom he gave as guardian also insolvent. The prayer of the bill is, that Henderson's executors, Pierce, and Preston, be made defendants; that an account be taken to ascertain what amount is due from Henderson as guardian, and what amount was due when Pierce and Preston purchased; that an account be taken also of the partnership of Henderson & Trigg, shewing the state of the accounts as well at the time of the sale of the property as since that time; that the sale be either entirely set aside, or the property subjected to pay the complainant and his brothers their proportion of the purchase money and its interest; and that such further relief be granted as is suited to the case.

On the 22d of October 1829, on the motion of Daniel Trigg, who had then attained the age of 21 years, leave was given him to appear in the original suit, and shew cause against the decrees of the 19th of May and 18th of October 1815; and thereupon he filed his answer, in which he refers to that of his brother, as detailing correctly the circumstances of the case, and asks the same relief that his brother had asked.

At November rules 1829, Pierce and Preston answered the cross bill. Pierce, by his answer, admits that Trigg and Henderson were partners in a mercantile establishment at Abingdon, and that the house and lot which he purchased was mercantile property, procured with their partnership funds; but he does not admit that the capital of the firm was furnished exclusively by Trigg, and requires proof of that fact, if it be material. He contends, that the house and lot being mercantile property, Henderson the surviving partner had a right, upon the death of Trigg, to sell the same, and relies upon the facts alleged in the bill in the original suit, and the proceedings 417 and decree in that suit. He \*states from whom and under what circumstances he purchased; denies that he had any notice of the claim or pretended claim of the complainant and his brothers, at the time he purchased, or for several years thereafter; and having obtained the legal title, and fully paid the purchase money, before he had any knowledge of any defect or claim adverse thereto, he claims the protection of the court as an innocent purchaser.

Preston's answer states, that he purchased the property from Pierce, and has received from him a deed in fee simple, with general warranty. He admits that he was aware of the complainant's claim at the time he purchased and received the deed, but contends that if the complainant be

entitled to recover any thing, a decree ought to be rendered against Pierce for the amount, and that the respondent ought not to be disturbed in his possession of the property, as Pierce is possessed of an estate fully ample to meet any decree which may be rendered.

On the 15th of September 1831, an order was made by the circuit superior court of Wythe county, directing an account to ascertain the original capital vested in the firm of Henderson & Trigg, and by whom the same was furnished; also to ascertain the balance, if any, due from Henderson at the time of the decree of the 19th of May 1815, and whether the said balance has ever been paid; also to ascertain the state of the accounts between the said firm and Trigg, or his estate, at the date of said decree, and whether the balance due thereon has ever been paid.

On the 15th of February 1833, on the motion of Connally Trigg, who had then attained the age of 21 years, leave was given him to appear in the original suit, and shew cause against the decrees of the 19th of May and 18th of October 1815; and thereupon he filed an answer, similar to that of his brother Daniel.

418 \*David Pierce dying, an order was made on the 21st of February 1834, by consent of John Foster his administrator, reviving the second suit against the said administrator.

On the 28th of April 1835, leave was given the plaintiff in the second suit to amend his bill, so as to make Daniel, Connally and Lilburn L. Trigg parties plaintiffs, and the widow, heirs and devisees of Lilburn L. Henderson parties defendants.

Under the order of account, a report was made by a commissioner; but being considered by the court ex parte, it was recommended, and the commissioner further directed to state the guardianship account of Henderson.

At the same term at which this recommendation took place, to wit, on the 28th of September 1835, the causes being heard upon the bills, amended bills, answers, exhibits, and examinations of witnesses, the court decreed, that the decree of the 19th of May 1815, directing a sale of the houses and lots in the original bill mentioned, and that of the 18th of October 1815, confirming the said sale, be rescinded and annulled; that the original bill be dismissed; and that the defendants thereto recover against the plaintiff their costs by them in their defence expended. And it was further decreed that an account be taken to ascertain whether the firm of Henderson & Trigg was indebted to William Trigg as a partner, on the 19th of May 1815, and to what extent.

Upon the petition of John Foster administrator of David Pierce, and John M. Preston, an appeal was allowed from the decree.

The cause was argued in this court by M'Comas and Patton for the appellants, and by Beverley R. Johnston for the appellees.

419 \*TUCKER, P. In the view which I take of this case, it is altogether un-

necessary to enter upon the enquiry, so earnestly prosecuted in the argument, of the power of a court of chancery to change the real estate of an infant into personal, by a sale of his inheritance. I beg leave, however, to state my impressions on the subject, as it has been so earnestly pressed.

Notwithstanding the difference between the powers of the english chancellor over the estates and persons of infants, and those which are exercised with us by the superior courts of law and chancery, I shall not rest my opposition to the power which is claimed, solely upon that difference. It is indeed a grave consideration, that if the power exists at all, it is peculiarly within the province of the county courts, who alone possess the power of appointing guardians, and before whom their accounts are to be audited and passed. Yet it would seem questionable whether it could ever have been intended by the legislature to give so broad a discretion to the county court, (organized as it is,) to sell the landed estate of an infant, at the instance perhaps of an interested and unprincipled guardian, or of designing connexions and friends. It is, I think, notorious that no such power has ever been exercised in Virginia, except under the particular provisions of the statutes, 1 Rev. Code, ch. 96, § 20; Id. ch. 108, § 16-23; pp. 358. 409, 10. It is notorious, that until the passing of these statutes, no sale of an infant's real estate was ever made except under the authority of a private act of assembly: and both these statutes distinctly indicate the legislative understanding, that the power asserted could only be exercised under legislative authority.

I take, however, a broader ground. I deny that there is any power in the chancellor of England to sell an infant's inheritance upon the pretext that the sale will be for his advantage, if we are justified in denying the "power by the dictum of one of their ablest chancellors, sustained by the fact that no instance of such a sale is to be found in their judicial history. Cases indeed are numerous of the conversion of money and other personalty into real estate, though even the exercise of this power is fenced about with rules to prevent its curtailing the infant's legal powers, and to secure the succession of the estate as if no such conversion had been made. *Earl of Winchelsea v. Norcliff*, 2 Freem. 96; S. C. 1 Vern. 435; *Ex parte Phillips*, 19 Ves. 122. So, too, there are instances of authority to cut timber on the lands of an infant tenant in tail: but this on the one hand involved no difficulty as to the execution of conveyances, and on the other it has probably been regarded in the light of one of the profits of the estate, since the tenant in tail is not impeachable for waste, and as he may die without issue, the fair benefits of the estate may be lost to him, as the inheritance must pass over to another. There are other cases, also, respecting timber on fee simple estates, which is permitted to be cut and sold to raise a fund for repairs; but this, it is obvious, is far different from the conversion

of the inheritance by sale out and out, which involves a power to execute a deed for the infant, or a power to compel him to execute it, *volens*, when of age. Cases occur, too, in which there is an election in an infant to take land or money, and the court elects for him. *Turner v. Street*, 2 Rand. 404. But there the legal title is not in the infant: it is in some other who is bound as trustee, and must convey as the court directs: and as to the infant, until election, non constat whether the estate is real or personal, and the election for him, therefore, operates no conversion. But the power to decree a sale of the inheritance out and out, and a conveyance of title by a commissioner, or by the infant himself when adult, in invitum, is disclaimed by one of the first judges of England. In *Taylor v. Phillips*, 2 Ves.

421 \*sen. 23, lord Hardwicke said, "There is no instance of this court's binding the inheritance of an infant by any discretionary act of the court. As to personal things, as the composition of debts, it has been done; but never as to the inheritance; for that would be taking on the court a legislative authority, doing that which is properly the subject of a private bill." And when *Chetwynd's case*, 1 Bro. P. C. 300, was mentioned, he took the distinction—"There was an election to be made; something was necessary to be done. I remember I was of opinion with the decree, when it came afterwards in the house of lords." It is said that this was but a dictum; yet if so (and that does not appear) it was the dictum of a great man, and is more solemnly repeated in another case. And what are the contrary opinions but dicta? Some of the judges assert the power to change the nature of the infant's property, but not an instance is to be found in the english books of such a change of realty, except in the qualified manner above mentioned. Nor have I met with such an instance in the decisions of our sister states, except that in 3 Desauss. 22, which is unsupported by any previous case. Upon the whole, therefore, I cannot think the decree for sale in this case is sustained by the existence of the power which has been so zealously asserted.

I proceed to the next question which arises in this case, and which is no less interesting than the former. Is freehold estate, purchased by partners in trade for partnership purposes, and so used, to be considered, on the death of one partner, as personal estate devolving upon the surviving partner, and subject to distribution as other personal estate of the firm? On this subject there has been much diversity and fluctuation of opinion. The early cases looked upon lands purchased for partnership purposes out of partnership funds, as personal estate. *Jeffereys v. Small*, 1

422 Vern. 217. Lord \*Thurlow thought otherwise, unless there was an express agreement. *Thornton v. Dixon*, 3 Bro. C. C. 200. Sir William Grant followed him in two cases; *Bell v. Phyn*, 7 Ves. 453, and *Balmain v. Shore*, 9 Ves. 500. After this, lord Eldon, in several cases, seems to have

been undecided upon the question; but at length in *Selkirk v. Davies & Salt*, 2 Dow's P. C. 242, he is said to have declared his opinion that real estate so circumstanced ought to be considered as personal. Subsequently, however, he once more doubted in *Crawshay v. Maule*, 1 Swanst. 508, 521; though he had before decided, in *Townsend v. Devaynes*, cited in *Montague on Partn.* 97, that such was the law. On the foundation of this opinion, the principle was recognized in England in the case of *Phillips v. Phillips*, 1 Mylne & Keene 649, 7 Cond. Eng. Ch. Rep. 208; after an able argument by the bar, and a full consideration by sir John Leach, master of the rolls. I think, then, the doctrine laid down in *Gow on Partn.* 51, and 3 Kent's Comm. 37, may now be taken as settled in England; namely, that real estate purchased for partnership purposes with partnership funds, and used as a part of the stock in trade, is to be considered to every intent as personal property, not only as between the members of the partnership respectively, and their creditors, but also as between the surviving partner and the representatives of the deceased. The legal title may indeed be in the heir, but let the legal title be in whom it may, it is in equity deemed partnership property, and the partners are deemed *cestui que trust* thereof, while the holder of the legal title is but a trustee for the partnership.

This doctrine is perfectly reasonable, is founded in justice, and is entirely consistent with the equitable principles. For the purchase having been made with partnership funds for partnership purposes, it is a purchase by one or by both, for the benefit of both in their social character, and to whomsoever the legal title 423 may \*be conveyed, he becomes trustee, not for himself and his copartner as individuals, but for the partnership itself, considered as a separate and distinct person, invested with rights separate and distinct from each of the partners. This artificial person, then, being the *cestui que trust*, has all the rights of a *cestui que trust*. The complete ownership is in it. It can sell this portion of the partnership stock at pleasure, but neither partner can lawfully sell his moiety, though, if the legal title be in him, a purchaser from him without notice will be protected, as in the case of purchases from other trustees. Thus we see that in the individual partners there is but a naked legal title, and of course, upon the death of one, a mere legal title passes to his heirs, while the whole beneficial interest passes to the survivor, for the purposes of the partnership in the first instance, and when they are satisfied, the surplus is to be divided between himself and the representatives of the deceased partner. But until the concern is wound up, the whole control of the partnership stock is in the survivor, unless for adequate cause his powers are restrained or superseded by a court of equity. *Gow on Partn.* 378. Possessing this control, being now the sole *cestui que trust* (though liable to account

with the representatives of the deceased partner) he has the right to sue the trustee (the heir at law) and to compel a sale for the purpose of distribution. The representatives of the deceased partner, indeed, may also insist upon a sale, if the surviving partner is backward. Gow 256. But beyond doubt, the survivor may apply to equity to decree a sale. For neither party has a right to compel a division of the specific subject in kind, or require the other to accept what, according to a valuation, his interest may be worth. Gow 257. Equity always directs the value of the subject to be ascertained in the way in which

it can best be ascertained, namely, by sale and conversion into money. \*Gow 257. *Crawshay v. Collins*, 15 Ves. 226; *Crawshay v. Maule*, 1 Swanst. 506.

And who are these personal representatives who must be made parties, and to whom the distributable surplus is to be paid? There is no question that the interest of the deceased in so much of the partnership stock as in its nature is strictly personal, must pass to the executors. But, as already observed, it has been a vexed question in England, whether the interest of the decedent in the real estate belonging to the firm, and the proceeds of the sale of that interest, belong to the personal representative or to the heir. The better opinion gives the fund to the former; and with reason; since, upon familiar principles, as the land was purchased with the personalty and was brought into the firm as stock, it ought, as between the executor and the heir, to replace the fund withdrawn from the personal estate. By placing it as stock in a partnership fund, the deceased evinced a design to treat it as personalty, and it ought to go accordingly. The representatives of the deceased can only claim it as stock; and as stock in trade, it is, *ex vi termini*, personal.

This has been the real point of difference between the judges in England. I think that a doubt is no where expressed, that as between the survivor and the personal representative, the real property is to be taken as personalty, and dealt with as such. On the contrary, this seems to be a concession in argument. See *Phillips v. Phillips*, 1 Mylne & Keene 649; 7 Cond. Eng. Ch. Rep. 210.

With these views of the English law, let us see whether there is any decided case in Virginia, which is at war with the doctrines of that law. I say in Virginia; for the decisions of our sister states are conflicting, and the opinions of two most eminent jurists, propound, as the true principles, the doctrines of Westminster hall. See *Coles v.*

*Coles*, 15 Johns. Rep. 159, and Goodwin v. \*Richardson, 11 Mass. Rep. 469, which stand, I think, alone; and *M'Dermot v. Laurence*, 7 Serg. & Rawle 438, which may be referred, I think, to the principle of *Forde v. Herron*, 4 Munf. 316. — *Winalow v. Chiffelle*, South Car. Eq. Rep. 235; *M'Alister v. Montgomery*, 3 Hayw. 96; *Greene v. Greene*, 1 Hammond's Ohio

Rep. 535, are said to follow the principles of the English courts.

In Virginia there are but few cases on the subject. In *Edgar v. Donnally*, 2 Munf. 387, a right to land had been acquired with partnership stock, and a title taken in the name of the survivor. A claimant under the deceased partner was held entitled in equity to a moiety of the land, against a purchaser from the survivor with notice of the partnership right. In *Forde v. Herron*, 4 Munf. 316, the character of the property, and its liability to the partnership demands, are admitted, though it is decided that if the parties take their deeds in such form as not to disclose the connexion of the title with the partnership, a purchaser without notice will be protected against the partners or their creditors. Lastly comes the case of *Deloney v. Hutcheson*, 2 Rand. 183. That case was decided by a court of three judges, and only one of these touched upon this question; nor was it necessary to the decision of the cause. The opinion of judge Green, however imposing, does not appear to me to be sound. He seems to take the rule in equity in England "to depend upon the existence there of the *jus accrescendi* in lands, whereby, upon the death of one partner, the legal title to the whole is vested in the other; and that if the representatives claim the advantage of the principle of equity which considers the joint interest of partners as an estate in common, they must submit to pay to the surviving partner whatever is due him upon the partnership transactions. In Virginia, there being no *jus accrescendi*, the legal title is in the heirs, and the representatives

426 \*therefore can be put under no such conditions." With the most profound respect for the opinions of this able judge, I apprehend the rule in England rests on entirely different grounds. Where a purchase is made by partners with partnership funds, for the purposes of the partnership, it is admitted by the learned judge that there is a trust for them in their character of partners, although the conveyance be to the partners in their individual characters; and I will add, that although the purchase was made in the name of the deceased partner, yet he is held but a trustee for the partnership concern. Gow 255; *Smith v. Smith*, 5 Ves. 189. In that case, the conveyance was made to one of the partners, and the question was whether his wife had a right of dower. The court decided that she had, but upon the specific provisions in the deed, which proved that the purchase was made with the express agreement that her husband, to whom the deed was executed, should not hold for the firm, but in his own right, and be held debtor to the firm for the money advanced. The chancellor held that but for this specific agreement, "although the deed was taken to one of the partners, the estate would have been regarded as partnership property," and so the wife would not have been entitled to dower. See also *sir S. Romilly's* argument in *Bell v. Phyn*, 7 Ves. 456.

A case has been mentioned by my brother Parker, of *Taylor v. Thomson*, not reported, in which this court allowed dower to the widow of a partner who had purchased property with the partnership funds. I did not sit in that cause, having been concerned in it in the courts below, and my recollection is very imperfect as to the facts. One important fact I do remember. The estate purchased was a valuable farm, the conveyance of which was made to Taylor alone. It was not bought for partnership purposes, nor so held, although it was paid for,  
427 I think, out of partnership \*funds.

It resembles therefore the case of *Smith v. Smith*, 5 Ves. 189, and it is probable the court considered Thomson as having a mere equity to charge the estate, which could not prevail against the widow's legal right of dower. Be this as it may, the facts of the case are too obscurely recollected to enable me to follow it as a guide.

Upon the whole, I am of opinion that the late English cases propound the true rule, and that real estate purchased with partnership funds and for partnership purposes, must be regarded as partnership stock, and treated as personalty.

We come now to look to the character of this case as disclosed by the record. That the houses and lots in the proceedings mentioned were purchased with partnership funds by the partners jointly, sufficiently appears, I think, from the whole of this record. The bill states that during the life of Trigg, a mercantile partnership existed between him and Henderson: that during its existence they purchased the lots, which were conveyed to them jointly, and occupied by them for some time. The guardian ad litem yet more distinctly states, that the houses and lots were purchased out of the joint funds of the said partners, and were always considered as forming so much stock in their trade, and the most valuable was made use of by them as a storehouse. The statement of the guardian ad litem cannot prejudice the infant, it is true, where he contests it in his own subsequent answer. But in the answers in this case, it is not alleged that the facts stated by the guardian were untrue or mistaken, but the objection made is that the firm was not indebted, and that therefore no sale was necessary; clearly implying that the property was liable to the debts of the firm, had a sale been necessary for their payment. And moreover, in the cross bill filed by one of the heirs, they allege that the property was bought during the continuance of the partnership,  
428 \*out of the partnership funds, and they contest the sale on the ground that Henderson ought not to have been permitted to take any portion of the real property which had been bought with partnership funds and ought to be considered as part of the mercantile capital. Now the cross bill is part of the defence, and has always been so considered. 3 Atk. 812. In answering this charge in the bill, the defendant Pierce also admits that the property was mercantile property, procured with the partnership funds; so that the fact

seems to be conceded by all the parties in the cause.

But it is contended that this case is not made by the bill, and that though such was the fact, it did not appear by any proofs in the cause at the time the decree was rendered, and so the decree was erroneous and ought to be set aside. I do not think the conclusion is warranted by the premises. The infant defendants are permitted to come in and shew cause against the decree; and if they had shewn this for cause, without more saying, it would have been difficult to sustain it. But when, instead of doing so, they set forth facts in their answers which fully sustain the decree; when they go farther, and file a cross bill claiming to charge Henderson's moiety of the property as part of the partnership stock, can this court say that the chancellor has improperly treated this property as mercantile stock? Can it set aside this decree, pronounced twenty-four years ago, under which a judicial sale has been made, upon the faith of which successive purchases and conveyances have taken place—by persons too having no notice of any equity on the part of the plaintiffs, but on the contrary having notice, I presume, of the fact stated by the heirs themselves, that the property in question was partnership property, and therefore properly sold? I think not. The privilege given to infants to answer anew and shew cause against a decree, is given to enable them to set aside that which is done to their prejudice,  
429 \*and not to overthrow what has been justly done, because of some technical objection to the proceedings. The decree against an infant, though it gives him a day to answer, is of the nature of a final decree, and is carried into execution as such, nor is it reversible but for error, or fraud and collusion. 1 Grant's Ch. Pr. 226. The form of the decree giving time is thus: "And this decree is to be binding on the infant, unless &c. he shew to the court good cause to the contrary"—that is, that it ought not to be binding. Powell on Mortg. 980; Tennent's heirs v. Pattons, 6 Leigh 208, per Carr, J., citing Bingham on Infancy, 131, 2. And hence it is, that even in the case of a mortgage, he is not permitted to go into the accounts, nor to redeem by paying what is reported due, but can only shew error in the decree, or that it was unjust. Powell on Mortg. 983; 3 P. Wms. 352. And it seems now to be the common course to pray a sale in the case of an infant, that he may be bound. 1 Vern. 295; Powell on Mortg. 983. And even if he be foreclosed, he is bound. "For an infant may be foreclosed. You can have your decree against him. He can do nothing but shew error. He is foreclosed to all intents. You may go to market with it, and the purchaser is only liable to be overhauled in the account." Bishop of Winchester v. Beavor, 3 Ves. 317. And if no day is given the infant, and he files his bill to set aside the decree for fraud and collusion, if no fraud appears, it will not be set aside unless it be shewn to be unjust. Richmond v. Tay-

leur, 1 P. Wms. 736. And so in *Williamson v. Gordon*, 19 Ves. 115, lord Eldon, admitting the right of the infant to shew cause, said, "but he cannot do that, if the decree would have been right against him had he been adult. He can shew nothing but error in the decree; and a decree of foreclosure is not error, according to my notion." In this case, had the heirs been adults

430 and answered, they "must have answered shewing the facts now stated by them; and if so, the sale must have been decreed. And even now, if, upon the case as it now stands, a sale ought to have been decreed, *cui bono* set aside the former decree, and then decree the same thing over again? There can be no difference, except the unjust effect of setting aside a fair judicial sale (made under the faith of the decree) against purchasers as to whom no unfairness can be alleged.

I am aware it is contended that as Henderson was largely debtor to the firm, no sale ought to have been made. But the fact does not appear, and if it had appeared at the date of the decree, it could not have arrested the sale, but would only have arrested the funds; for (as has been already shewn) upon the death of one partner, the partnership stock of every description must be sold, in order to a division between the partners.

Upon the whole, I am of opinion that the decree of 1815 must stand, and the sale under it be held unimpeachable. And as to the purchase money, whether paid or not, the purchasers Pierce and Preston were in no wise responsible for it. No lien was retained on the land. The bond given by the purchasers was taken up, and a receipt filed by the guardian and executor. If this transaction was fraudulent, it is not proved to have been so, and still less is it proved that Pierce knew of the fraud: and having the legal title, and having received it before notice of the claim of the representatives of Trigg, they must be protected, even if it be conceded that the heirs, and not the executor, were entitled to the money.

The original decree must stand, and the cross bill be dismissed as to Pierce's representative and Preston; the land in their hands not being responsible to Trigg's representatives for any amount due them from Henderson.

431 \*As, however, the sale in this case was made subject to the claims of dower of Rachael Henderson and Sarah Hamilton, one of which has never been asserted and the other of which was never valid, and as the price of the lots may have been affected by the supposed existence of those incumbrances, it has been suggested by my brother Cabell, that in so far the infants have been injured and are entitled to relief. To this suggestion I have yielded, though I do not think the chancellor who entered the decree of 1815 could have done otherwise. On the one hand, not having the claimants before him, he could not pronounce definitively on their claims; and on the other, as the sale was required for winding up the partnership concern, and was

equally demanded by the state of the property, and pressed by the surviving partner, who was also the executor of the deceased partner, and by the guardian of the heirs or distributees, he could not properly have delayed the sale until the claimants were made parties (if indeed that was practicable) and their rights definitively settled. Yet as the price may have been affected to the detriment of the appellees, and as, without disturbing the sale, redress may be afforded, I do not think it ought to be denied. To disturb the sale would be to establish a precedent pregnant with mischief and in conflict with all authority. The cases already cited shew that in foreclosures, or in sales under mortgage decrees, the infant cannot redeem, or set aside the sales. Relief, when afforded, is given without interfering with the foreclosure or the sale. The necessity of attributing the highest sanctity to judicial sales, where the authority to sell is without question, is sustained by the gravest considerations. Who would buy, but at a ruinous sacrifice, if, after the lapse of 21 years, upon the determination of the infancy of a newborn child, his purchase might be set aside? Who, if he made such a purchase, could venture to improve? And with these difficulties,

432 \*what prospect would there be that the property of the infant would ever be sold for an adequate price? It is then for the benefit of infants that the rule is established. It is to prevent the ruinous sacrifice of their property, that purchasers under judicial sales of their estates are to be protected in their purchases, and that all proper redress should be afforded the infants without invalidating their title.

In this case, then, I am of opinion that the decree of September 1835 should be reversed, and the cause sent back, with directions to institute such proceeding as may seem most expedient for ascertaining what was the true value of the houses and lots in the proceedings mentioned, on the 20th of July 1815, (the day of the former sale,) if sold upon a credit of twelve months, free of all incumbrances; to enter a decree in favour of the appellees for one half of any excess above the price at which the property was formerly sold, with interest from the 20th of July 1816 till paid; and to make the same, (*viz.* the moiety of the said excess, if any, with the interest as aforesaid) a charge upon the premises in the hands of the appellant Preston, who, upon the payment thereof, should have a decree over against the estate of David Pierce deceased.

PARKER, J., dissented from the foregoing opinion, except so much thereof as relates to the general power of a court of chancery to decree the sale of the lands of infants. But

CABELL, J., concurred with the president in entering the following decree:

The court is of opinion that there is error in the decree of the circuit superior court of law and chancery in the original cause, in rescinding and annulling the decrees of May 1815 and October 1815, and in

433 dismissing \*the plaintiff's bill; the court being of opinion that the said decree of May 1815, directing a sale of the premises in the proceedings mentioned, and that of October 1815, confirming the sale, ought to stand and be affirmed. But forasmuch as the said sale was made subject to the claims of dower of Mrs. Henderson, who had no title thereto, and of Mrs. Hamilton, who appears never to have asserted a title, and as thereby the houses and lots may have been sold for less than they would have brought if sold free of incumbrances, it is reasonable that the estate of William Trigg deceased should have relief. Therefore it is adjudged and decreed, that the said decree in the original cause be reversed with costs, and that the cause be remanded to the said circuit superior court to be further proceeded in, with directions to institute such proceeding as may be deemed expedient for ascertaining the true value of the premises at the date of the sale of the 20th July 1815, if the same had been sold free of all incumbrances, on a credit of twelve months; and to decree one half the excess, if any, over and above the price for which they were then sold, to be paid into court to the credit of the personal representative of the said William Trigg deceased; the sum so decreed to be chargeable upon the premises, if not paid by a short day: and in case the same be paid by the appellant Preston, he to have a decree over against the proper representatives of Pierce, and they in their turn, if they ask it, over against their vendor.

And in the cross cause, the court is of opinion that there is error in this, that forasmuch as the houses and lots in the hands of the appellant Preston are not chargeable with any demand of the appellees, or of the estate of William Trigg deceased, against Henderson, the said bill, as to the appellants, should have been dismissed with costs.

Therefore, both decrees reversed with costs.

#### 434 \*Shugart's Adm'r v. Thompson's Adm'r.

July, 1830, Lewisburg.

(Absent BROOKE and CABELL, J.)

**Settled Accounts—Bill to Impeach—Practice in Chancery.**\*—A bill alleges matters as grounds for impeaching or setting aside a settled account, and all of those matters are denied by the answer; but an order of account being made, proofs are adduced, which, though they do not sustain the specific objections taken in the bill, ascertain that the settlement may be justly surcharged in other respects. **Held**, although, according to the strictest and most formal practice, the plaintiff may be required to amend his bill and urge therein the objections to the settlement shewn by the evidence, yet it is competent to the court to dispense with this proceeding, and permit the plaintiff to proceed in respect to the objections shewn by the evidence, in like manner as if they had been noticed by the bill.

**Same—Same—Same.**\*—In such case, if the defendant

object that he is surprised by the new objections to the account, the court may and ought to give him time to combat them: and if he urge the privilege he would have by answer to an amended bill, to explain and defend the account in these respects, that privilege may and ought to be secured to him, by allowing him to file his affidavit containing such explanation and defence, and by giving to such affidavit the like credit and effect.

**Chancery.**—In *Chapman v. Shepherd*, 24 Gratt. 390, it is said: "The rule that administration accounts settled *ex parte*, returned and recorded in the proper court, are to be taken as *prima facie* correct: liable only to be surcharged and falsified by proper averments, has received the sanction of this court in numerous cases. The inconvenience of the rule has been often felt, and in some few instances exceptions and modifications have been allowed when necessary to attain the justice of the case. The case of *Shugart's Adm'r v. Thompson*, 10 Leigh 443, is a familiar illustration. There the answer denied all the allegations of the bill intended to impeach the *ex parte* settlements: it was not therefore proper to send the cause to account in the absence of evidence to sustain these allegations. Nevertheless an order of account was made, and the parties proceeded with their proofs before the commissioner. The facts there established did not sustain the specific objections urged in the bill to the settled accounts, but they showed other grounds for surcharging the settlement. **JUDGE STANARD** said, the court might have required the plaintiff to amend his bill by inserting the further matters of surcharge and falsification, so as to afford defendants the benefit of an explanation and defence by way of answer; or dispensing with that circuitous and formal proceeding, the court might have permitted the commissioner to proceed with the investigation in like manner as if the matters had been noticed in the bill. If the defendant should object he was taken by surprise, the court should give him time to combat the new charges. If he urged his privilege of defending himself by answer, that privilege might be secured to him by allowing him to file his affidavit, and giving it all the effect of an answer."

And in *Corbin v. Mills*, 19 Gratt. 465, it is said: "When an account has been ordered upon a proper bill, an additional objection to the settled accounts may be discovered in the progress of the case. It would be attended with inconvenience and delay to require the plaintiff in any such case to amend his bill for the purpose of alleging the additional objections. It will save time and expense, and generally be attended with no inconvenience to allow the plaintiff to raise the objection before the commissioner with a proper specification in writing, and to allow the defendant to meet the objection by an affidavit, giving to the affidavit the same weight which would have been given to an answer if the matter had been alleged in the bill. This is the full extent to which the settled rule of practice can be safely and conveniently relaxed, and this is the extent to which, as I understand it, **JUDGE STANARD** meant to go in *Shugart's Adm'r v. Thompson's Adm'r*, 10 Leigh 434."

See principal case also cited in *Rossett v. Fisher*, 11 Gratt. 503; *Radford v. Fowkes*, 85 Va. 846, 8 S. E. Rep. 817; *McGuire v. Wright*, 18 W. Va. 511; *Varner v. Core*, 20 W. Va. 479; *Seabright v. Seabright*, 28 W. Va. 434, 435, 436, 437.

**Same—Prima Facie Correct—Bill to Surcharge.**—The

\*Settled Accounts—Bill to Impeach—Practice in

as his answer containing the like matter would be entitled to. Per STANARD, J.

**Same—Same—Measure of Relief.**—On a bill impeaching a settled account, the title of the complainant to relief depends on his success in shewing errors against him in the settlement, and when the court directs an account to be taken, the commissioner, in executing the order of account, should confine himself to a statement of those errors, the sum of which is the proper measure of relief.

**Vendor and Vendee—Compromise—Case at Bar.**—Articles of agreement are several times made between the same parties, each for the sale of a separate parcel of the same tract of land. The articles, on most occasions, import that a good and sufficient title is to be made by a specified time, and that the vendee is to pay when such title free of all incumbrance is made. In some of the articles it is stated, that the vendee is to pay in one month after such title is made; and on one occasion the articles, after mentioning that the money is to be paid so soon as such title is made, and after specifying the time when the title is to be made, proceed to state that if the vendee

435 pay "sooner, he is to have interest for the amount paid, and peaceable possession of the land until the obligation is complied with. By virtue of these stipulations and agreements, the vendee (although in possession and receiving the profits) claims interest on all sums paid by him before a title is made him free of incumbrance. "This claim is afterwards compromised. The commissioner, and the court below, disregard the compromise as well as the articles of sale, and allow the vendee interest on his payments, only until he obtains possession. HELD, the compromise ought not to be disturbed, unless on specific allegation and proof of fraud, imposition or mistake.

On the 5th of February 1815, Evan S. Thompson executed to Zachariah Shugart his bond for £218. 6. 7½. payable on the 1st of March following.

This bond remaining unpaid on the 11th of February 1816, a sale was made on that day by Thompson to Shugart, of part of the tract of land on which Thompson lived. In the articles of agreement, the number of acres is not stated, but the boundaries are prescribed, and it is stated that, for the land sold, "the said Shugart is to pay Evan S. Thompson 20 dollars per acre, whenever a good and sufficient title is made, clear of all incumbrance, or sooner if said Shugart thinks proper, in the following manner, to wit: one bay horse, 100 dollars, the price agreed on by E. Thompson and Z. Shugart (the said Shugart is to keep said horse till first of October next at his expense, and

no longer, if not taken away sooner) and bonds and notes for the balance of the land. The land to be run and surveyed, and a good and sufficient title to be made to said Zachariah Shugart, his heirs or assigns, at or before the 10th day of October next. The said Shugart is to have one third of the ground as soon as it is pulled this fall, and if Callahars seeds it, said Shugart is to have one third of the small grain."

On each of the following days, to wit, the 27th of May 1817, the 25th of June 1817, the — day of — 1817, the 28th of 436 July 1817, and the first of \*December 1817, other articles of agreement were made between Thompson and Shugart, witnessing the sale on each of those days, by Thompson to Shugart, of one or more parcels of the tract of land on which Shugart lived.

In the articles of the 27th of May 1817, it is stated that the two parcels therein mentioned are sold "for the sum of 7. dollars per acre, to be paid by said Shugart as followeth, to wit: to pay William Love about 28 dollars, and the balance in bonds or notes on other persons, with said Shugart's indorsement, as soon as a good and sufficient right and title is made to said Shugart, clear of all incumbrance, to said land; the title to be made at June court next. If said Shugart pay any sooner, he is to have interest for the amount paid, and peaceable possession of the above mentioned land until the above obligation is complied with."

In the articles of the 25th of June 1817, it is stated that, for the parcel thereby sold, Shugart is to pay Thompson "30 dollars in notes on other people, with his indorsement, as soon as he the said Thompson makes said Shugart a good and sufficient right or title, clear of all incumbrances; the title to be made at the July court next."

In the articles of the — day of — 1817, it is stated that the parcel therein mentioned is sold for ten dollars per acre. "Said Shugart is to pay the above sum in one month after said Thompson makes him a good and sufficient deed, clear of all incumbrance; the deed to be made at the first court held in Abingdon."

In the articles of the 28th of July 1817, it is stated that, for the land thereby sold, payment is to be made in the following manner: "200 dollars to Charles Tate; the balance in good bonds and notes on other people, in one month after said Evan S. Thompson makes said Shugart a good and sufficient title, clear of all incum- 437 brance \*whatsoever; title to be made at August court next."

And in the articles of the 1st of December 1817, it is stated that, for the two parcels thereby sold, payment is to be made by Shugart, in one month after said Evan S. Thompson makes him a good and sufficient right and title, clear of all incumbrance whatsoever, in notes on other people, with his indorsement."

Surveys were made, on the 4th of April 1818, of the parcels of land embraced in

principle is well settled that the *ex parte* settlement of a fiduciary is only *prima facie* correct, and parties interested may file a bill to surcharge and partly file the accounts so settled. Leach v. Buckner, 19 W. Va. 48, citing the principal case. See the principal case also cited in Boggs v. Johnson, 26 W. Va. 827.

For further authority on this subject, see *foot-note* to Peale v. Hickle, 9 Gratt. 437: *foot-note* to Corbin v. Mills, 19 Gratt. 438.

**Same—Bill to impeach—Measure of Relief.**—The principal case was cited in Windon v. Stewart, 43 W. Va. 721, 28 S. E. Rep. 780.



these various articles of agreement, and the whole quantity according to those surveys was 193 acres. A deed was thereupon made conveying the same to Shugart; the consideration expressed in which conveyance is the sum of 2740 dollars. The deed bears date the 18th of April 1818, and on its face purports to be the deed, of that date, of both Thompson and wife. But the privy examination of Mrs. Thompson was not taken till the 17th of August 1819, and the certificate thereof was not returned to the clerk's office till the 20th of October 1819.

In April 1822, the parties applied to Benjamin Estill to assist them in adjusting the principles upon which a settlement contemplated between them was to be made. In the suit in equity of Thompson herein after mentioned, the deposition of Estill was taken for Shugart on the 24th of March 1824. Estill deposed that the parties differed principally about the interest which Shugart charged upon the payments made for the land. Thompson contended, that as Shugart had the land in possession and was receiving the profits, he Thompson ought not to pay interest; that if he paid interest, Shugart ought to pay rent. This, Estill considered to be natural justice. But Shugart contended, that by various contracts he was to have interest on all payments, till he got his title, clear of all incumbrance; and that being the contract, he claimed it as a right. The mother of

Thompson, Shugart said, had a life estate in all the lands sold, this part of the land having been assigned her for her dower in a larger tract. He anticipated difficulty and expense in extinguishing her title, and was moreover liable to her for rents and profits. He therefore conceived it fair and reasonable that he should have interest on his money. Estill proposed a compromise, to which the parties consented; Shugart with apparent reluctance. On the same day, he prepared the writing containing the compromise; which was executed, and attested by him. This writing bears date the 20th of April 1822. It is under the hands and seals of Shugart and Thompson, and witnesses "that the said Thompson and Shugart have agreed to settle their accounts relating to the purchase and payment of Thompson's land by Shugart, on the following terms: said Thompson will immediately procure to be conveyed to Shugart his mother's right of dower in those lands, and will allow said Shugart interest on all payments made therefor before the lands were conveyed by Thompson and wife to Shugart, or within one month after the conveyance was made, excepting such sums as Shugart was bound by his various articles of agreement to pay immediately, or before a title was made to him; such as the 28 dollars to William Love, the 100 dollar horse, the 200 dollars to Colo. Tate, &c. on all which class of payments no interest is to be allowed to Shugart. Said Shugart is also to be allowed interest on all bonds, notes &c. held by him on Thompson until one month after the said conveyance was made by Thompson

and wife. Said settlement to be made on these principles, within two weeks from this date."

On the 3d of May 1822, the parties met at the house of William Love in order to have a settlement, and an account was then drawn up by Love, by direction of Shugart: but Thompson claiming credit for more land than was allowed for by Shugart, and objecting to some items claimed by Shugart, the disagreement between the parties prevented any settlement being made.

439 \*Shortly afterwards, Shugart brought an action at law in the county court of Washington, against Thompson, upon his bond of the 5th of February 1815, and at November term 1822 obtained judgment for the amount thereof. Execution was issued immediately, and levied on Thompson's slaves.

On the 14th of December 1822, Thompson's mother relinquished her right to the lands sold Shugart, and her deed was admitted to record.

Upon this relinquishment being made, the sale of the slaves was suspended.

On the 25th of January 1823, the sheriff who had levied the execution, Charles Tate, met Thompson and Shugart, at the request of Thompson and at his house, for the purpose of assisting in making a settlement between them. Thompson produced no vouchers, but a settlement was made by the account and vouchers of Shugart. At this settlement, credits were given to Thompson for the land bought of him by Shugart, amounting to 2563 dollars 9½ cents; credits were given to Shugart for payments, interest and setoffs (exclusive of the bond on which judgment had been obtained) to the amount of 2441 dollars 22 cents; and for the difference, amounting to 121 dollars 87½ cents, Shugart gave Thompson a due bill, or rather a memorandum, stating that he would account for that amount, subject to a deduction for the costs of a chancery suit which Shugart had brought against Thompson and his mother. At the same time, Shugart wrote an order to his attorney to dismiss that suit, and Thompson signed a receipt for 2563 dollars 9½ cents, in full for the land conveyed to Shugart.

Thompson desiring a new settlement, delivered up that due bill, and asked that the receipt which he had signed should be returned to him. Shugart declined this, but deducted from the amount of the due bill 34 dollars for the costs of the chancery suit, and 22 dollars \*75 cents upon another account; and the balance of 65 dollars 12½ cents he credited upon the forthcoming bond which Thompson had been compelled to give.

In this state of the accounts, Thompson, on the 9th of May 1823, presented a bill to the judge of the superior court of chancery at Wythe courthouse, alleging, that at the time of the settlement of the 25th of January 1823, he was at the mercy of Shugart and compelled to submit to any terms he might dictate, and had for that reason submitted to the settlement which he now impeached. The bill sets forth credits

improperly omitted and charges improperly made, and claims that Shugart is indebted to the complainant more than 1100 dollars.

An injunction being prayed for by the bill, to restrain Shugart from proceeding farther on the forthcoming bond, the chancellor awarded the same.

On the 27th of May 1823, Shugart filed his answer, denying all the matters alleged in the bill as grounds for impeaching or setting aside the settlement of the 25th of January 1823, and shewing some of those allegations to be unfounded.

Two days after the answer was filed, a motion was made to dissolve the injunction; but the court overruled the motion, and ordered that an account be taken between the parties before commissioner Johnston.

The commissioner, upon the proofs before him, reported various sums as having been either charged twice by the defendant, or charged for greater amount than was proper; but the surcharges established by these proofs were not those alleged in the bill. The commissioner allowed the defendant interest on his payments until he obtained possession of the lands, but no longer. And the result of his report was, that the bond upon which judgment had been obtained at law was paid, and there was a balance due Thompson, as of the 15th of October 1823, of 534 dollars 2 cents.

441 \*On the motion of the defendant, supported by his affidavit, the court, on the 23d of October 1823, recommitted the report to the commissioner. There being, in the opinion of the commissioner, farther proof establishing an additional overcharge, the result shewn by this second report was, that the bond was paid off, and a balance due Thompson, as of the 15th of October 1823, of 716 dollars 22½ cents.

To this report the defendant filed ten exceptions. The 8th was in these words: "Because the commissioner did not conform, in stating the accounts between the parties, to the agreement entered into on the 20th day of April 1822, which is not pretended to be impeached, either on account of fraud, incapacity, or any other ground, either alleged or supported." The 9th exception was because the commissioner did not conform his statement of the accounts between the parties to the settlement made between them on the 25th of January 1823.

The cause coming on to be heard upon the bill, answer, exhibits, examinations of witnesses, and the report of commissioner Johnston with the exceptions thereto, the court, on consideration thereof, decreed that the first and fourth exceptions be sustained, and that all the others be overruled, except the fifth, which was sustained in part. And the report was thereupon recommitted to commissioner Matthews, to be reformed accordingly.

After the court had made this decree, it is a little remarkable that at the next term, on the motion of the defendant, it was ordered that the report of commissioner Johnston be recommitted to commissioner

Matthews, who was directed to consider the same with the exceptions filed thereto, and report thereupon.

Commissioner Matthews fixed on the first of January 1818, as the date from 442 which interest was to be allowed \*the plaintiff on the whole amount of purchase money. On the sums paid by the defendant he allowed interest from the time of payment, with the exception of the 100 dollars for a horse, 28 dollars to William Love, 200 dollars to Charles Tate, and one other payment particularly provided for in the articles. On these sums the commissioner did not allow interest until after the first of January 1818. On some of the other matters which were the subject of exception, the views of commissioner Matthews were different from those of commissioner Johnston. His report resulted in shewing a balance due Shugart's estate on the 1st of January 1824, of 372 dollars. And exceptions thereto were filed by the plaintiff.

Before a decision upon these exceptions, both parties died, and the cause was revived in the name of the plaintiff's administrator against the defendant's administrator.

At April term 1838 of the circuit court of Wythe, the administrator of Shugart presented a petition for a rehearing. Besides insisting that there was error in overruling the 5th exception to the report of commissioner Johnston (an exception involving no principle whatever, but depending entirely upon the evidence), the petitioner urged that there was error in overruling the 8th exception.

On the 23d of April 1838, the court decreed that the rehearing prayed for be refused, that the exceptions of the complainant to the report of commissioner Matthews be sustained, that the same be recommitted to him, and that he make out his report in conformity with the opinion of the court before given.

On the petition of Shugart's administrator, an appeal was allowed.

M'Comas argued the cause in this court for the appellant. There was no counsel for the appellee.

443 \*STANARD, J. After the answer had come in, denying all the facts on which the bill sought to impeach or set aside the settlement of January 1823, and indeed shewing some of them to be unfounded, it was not regular to send the cause to account, as was done in this case, on a motion to dissolve the injunction, when there was at that time no evidence in the case to sustain the allegations of the bill, or to impeach the settlement in the particulars specified in the bill, or in respect to matters not so specified: nor could the court at that time have properly dismissed the bill, as the cause was not before the court on a hearing. But the order of account having been made, the parties proceeded with their proofs before the commissioner; and the facts developed there, if they do not sustain the specific objections to the settlement taken in the bill, and in those respects establish a surcharge thereof,

ascertain to my satisfaction that the settlement may be justly surcharged in other respects. This being so, one of two courses might have been taken by the court below. If that court had pursued the strictest and most technical rule of practice, it might have declined to proceed to grant the plaintiff relief in respect to the objections to the settlement shewn by the evidence though not noticed by the bill, unless the plaintiff amended his bill in this respect, and urged those objections as further matter of surcharge and falsification of the account, so as to afford the defendant the benefit of the explanation and defence he might make by his answer to such amended bill. Or, dispensing with this circuitous and formal proceeding, the court might permit the commissioner to proceed in respect of the matters embraced by the objections so developed, in like manner as if they had been noticed by the bill. My opinion is, that it was within the competency of the court to take the latter course. Such a practice seems to me recommended by many considerations. It is more compendious and

444 \*less expensive, and tends to prevent or shorten those delays in the administration of justice, which are grievances admitted by all, and by many urged as a reproach to its ministers. Every object of the more formal proceeding, and every privilege of defence it would afford, may be attained under this more summary practice. If the defendant should object that he is surprised by the new objections to the account, the court may and ought to give him time to combat them; and if he urges the privilege he would have by answer to an amended bill, to explain and defend the account in these respects, that privilege may and ought to be secured to him, by allowing time to file his affidavit containing such explanation and defence, and giving to such affidavit the like credit and effect as his answer containing the like matter would be entitled to. Thinking that several errors are shewn in the settlement of January 1823, by the proofs in the case and the investigations of the commissioner, my opinion is that the proposition of the appellant, that the bill ought to be dismissed because those errors had not been specifically noticed therein, cannot be sustained.

Proceeding to the other questions brought before this court by the appeal, the first and most important is that presented by the 8th exception of the appellant to the report of commissioner Johnston. My opinion is that that exception ought to have been sustained. By it the appellant insists, that the charge of interest on his payments should be governed by the agreement of the parties, made the 20th of April 1822; and that the court below, in overruling that exception, in effect not only cancelled that agreement, but also the former agreements made by the parties, under which, if carried into effect, the appellant would have been entitled to a large allowance of interest. Waiving the investigation of the question how far the stipulations in some of the contracts between the

parties, that the purchase money 445 \*should be payable when a complete and unincumbered title should be made, would postpone the accrual of interest on the purchase money until such title should be made, even though the purchaser had possession before that time; and without scrutinizing the particular agreements made by the parties in regard to the interest on some of the payments made immediately between the contracts of purchase and the conveyance of a complete title, I have no doubt that the claims of the appellant founded on such stipulations and agreements might be compromised by the parties, and that a compromise of them ought not to be disturbed unless on specific allegation and proof of fraud, imposition or mistake. In this case, the agreement in question was a compromise of the claims aforesaid, and so far from being impeached by the bill, there is no allusion to it in the bill, and the only evidence in respect to it (that of B. Estill) instead of fastening on it the stain of fraud or imposition, tends to free it from that imputation.

Besides, if this compromise were disregarded, and the rights of the parties depended on the effect of the stipulations and previous agreements aforesaid, it is at least problematical whether more interest would not be allowed to the appellant, or withheld from the appellee, than is so under the compromise. The result is, that in the settlement of the accounts, that compromise ought to regulate the charge or allowance of interest on the payments that were to bear interest, and on the purchase money. I am further of opinion that the settlement of January 1823 should be the basis of a resettlement, rejecting from that account such items of charges to the appellee as are ascertained to be incorrect or improper, and giving him the proper credits that have been omitted.

[The judge proceeded to express an opinion on such of the details of the case as had been brought under the notice of the court below, and pointed out the 446 credits \*omitted in the settled account which should be given to the appellee, and the charges against him therein which were improperly made; and concluded as follows:]

One of the results of the view I have taken of the case is, that the reports of both the commissioners are entirely wrong in the frame they have given the accounts. The balance appearing due on the settlement of January 1823 having been paid by the appellant, and his due bill taken in, the extent of the errors of that settlement was ascertainable by adding the errors of the charges to the appellee to the amount of the omissions of credit, and the sum was the measure of relief to which he was entitled. If that sum exceeded the enjoined judgment, the court should have perpetuated the injunction, and decreed in favour of the appellee for the excess; if it was less than the judgment, it should have been set off against the judgment, the injunction dissolved for the excess of the judgment and

perpetuated for the amount set off, and in both cases the costs ought to have been decreed to the appellee, and in the latter case the court should have certified against damages on the sum for which the injunction was dissolved.

The decree of the court of appeals was in conformity with the foregoing opinion. This decree (in which all the judges concurred) declared, that the title of the appellee to the relief he sought in the court below, depended on his success in shewing errors in the settlement of January 1823, either in the charges made against him or the credits allowed him in that settlement; and that, as a consequence of this, when the commissioner proceeded to execute the order of account made by the court below, he should have confined himself to a statement of those errors, the sum of which was the proper measure of relief to which

447 the appellee was entitled. It further declared, that in executing the order of account, the commissioner should have been governed by the agreement between the parties dated the 20th of April 1822, in relation to the allowance of interest on the payments of the appellant, before the 20th of November 1819, on account of his several purchases of land, and the allowance of interest to the appellee on the purchase money of the lands sold the appellant; interest on that purchase money not accruing, under that agreement, before the said 20th of November 1819.

On the proofs in the record, the settlement of January 1823 was declared to be surchargeable, for omitting to credit the appellee with particular sums, and improperly charging him with others; all of which were specified in the decree. It was then declared, that the reports of both the commissioners are radically wrong in the manner of stating the accounts, as well as erroneous in many respects; and that they should be entirely set aside, and a new account taken, which should not go at large into the transactions, between the parties, but should simply state the erroneous charges to the appellee, and the credits to which he was entitled but which were omitted, in the settled account of January 1823, the aggregate of which is the proper measure of relief to which he is entitled; and if that aggregate should exceed the amount of the enjoined judgment, the injunction should be perpetuated and a decree rendered in favour of the appellee for the excess, and if not equal to the judgment, it should be set off against it, and the injunction should be dissolved for the excess of the judgment; and in either case the costs in the court below should be decreed to the appellee, and in the latter the court should certify against damages on the amount for which the injunction may be dissolved. The court therefore adjudged and decreed, that so much of the interlocutory

448 orders of the circuit superior court of Wythe, made in this cause, as may conflict with the foregoing opinions be reversed and annulled, and that the appel-

lant recover of the appellee the costs by him expended in the prosecution of his appeal in this court, to be levied &c. And the cause was remanded to the said circuit superior court of law and chancery, for further proceedings according to the principles of this decree.

448 **Jackson v. Jackson.**

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Promissory Note—Assumpsit—Declaration—Averring Consideration\*—Quere.**—Question whether, in Virginia, assumpsit can be maintained on a promissory note, without averring a consideration in the declaration. Per TUCKER, P. and PARKER, J., the action cannot be maintained. STANARD and CABELL, J., contra.

The writing on which this action was founded was in these words:

"I agree to settle with Thomas Bland sheriff of Lewis county, who has an execution in his hands against H. Jackson, in the name of Vandeverter and others, to the amount of 320 dollars, and then to pay unto H. Jackson the further sum of 255 dollars, and it is to be understood that the said Cummins Jackson is to have a credit for the above 255 dollars, or what Hyer Jackson may agree to pay for four lots back of the courthouse in Weston and county of Lewis, this 15th day of September 1835. C. E. Jackson."

The action was assumpsit in the circuit court of Lewis, by Henry Jackson against Cummins E. Jackson; and the declaration contained seven counts.

449 \*The first count charged the defendant with being indebted to the plaintiff in the sum of 575 dollars (the aggregate of the two sums mentioned in the writing) for divers goods and chattels, slaves &c. before that time sold and delivered to the defendant, at his special instance and request.

The second count was on the writing,

\***Promissory Note—Assumpsit—Declaration—Averring Consideration.**—The principal case was distinguished in *Averett v. Booker*, 15 Gratt. 164, 165. JUDGE LEE, in delivering the opinion of the court, said: "The case of *Jackson v. Jackson*, above cited, so far as it is of any authority, having been decided by a court equally divided, shows that it is not necessary in such a case even to aver a consideration. For the declaration without averring such consideration was sustained by the court below, and that judgment was affirmed by the division of this court. But it is unnecessary to go into this question in this case, because whilst the declaration in all its counts sufficiently avers a consideration, it is not pretended that the paper offered in evidence contained any thing that could by any construction be held to be an express promise to pay the sum of money mentioned in it. And not being a bill of exchange, no promise is raised by law in favor of the payee against the drawer from the failure of the drawee to accept or to pay."

See further, monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622; monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

setting out its terms, and laying a consideration in the sale of a slave. The failure of the defendant to convey to Hyer Jackson the son of Henry is alleged, and from that failure is deduced the defendant's indebtedness for the 255 dollars.

The third count was also on the writing, but omits any mention of the lots, and claims the 255 dollars absolutely. A consideration is likewise averred in this count.

The fourth count was to the following effect: "And for that also the said defendant, heretofore, to wit, on the 15th day of September 1835, at &c. made and executed his certain other agreement in writing, and then and there signed and subscribed his abbreviated name of C. E. Jackson thereto, and then and there delivered the same, so made and subscribed, to the said plaintiff, by which said writing he the said defendant then and there agreed to settle with Thomas Bland sheriff of Lewis county (meaning one Thomas Bland deputy for James M. Camp high sheriff of Lewis county) who had an execution in his hands against H. Jackson (to wit, the said plaintiff) in the name of Vandeventer (viz. one Rachel Vandeventer) and others, to the amount of 320 dollars, and then to pay unto the plaintiff, by the abbreviated name of H. Jackson, the further sum of 255 dollars. By means whereof the said defendant then and there became liable, among other things, to pay to the said plaintiff the said sum of 255 dollars in this count specified, according to the tenour and effect of said agreement, and being so liable, he  
450 the said defendant, \*in consideration thereof, then and there, to wit, on &c. at &c. undertook and then and there faithfully promised him the said plaintiff to pay him the last mentioned sum of 255 dollars, when he should be thereunto afterwards requested."

The fifth count was substantially, and almost literally, the same as the fourth.

The sixth count was precisely like the fourth and fifth, except that it described the agreement as one by which the defendant agreed to pay to the plaintiff the further sum of 255 dollars &c. (saying nothing of that part of the agreement by which the defendant undertook to settle with Thomas Bland to the amount of 320 dollars).

To the whole declaration, and to each count thereof, the defendant demurred; and the plaintiff joined in the demurrers.

The court overruled the demurrers; and then a trial being had upon the general issue, a verdict was found for the plaintiff for 255 dollars damages, with interest from the 15th of September 1835 till paid, and judgment was rendered thereupon.

On the petition of Cummins E. Jackson, a supersedeas was allowed.

William A. Harrison, for the plaintiff in error, said that the 4th, 5th and 6th counts, stating an assumpsit in writing but laying no consideration, were defective, according to the decisions in Hall v. Smith, 3 Munf. 550; Beverleys v. Holmes, 4 Munf. 95, and Moseley v. Jones, 5 Munf. 23.

George H. Lee, for the defendant in

error, insisted that a declaration in assumpsit on a promissory note for the payment of money may be sustained without averring a consideration. 1 Chitty's Pl. 320; Chitty on Bills 356; Grant v. Da Costa, 3 Mau. & Selw. 352; Coombs v. Ingram,

4 Dow. & Ry. 211; 16 Eng. Com. 451 \*Law Rep. 194. The cases cited on the other side were upon instruments of a different character. Hall v. Smith was upon an assignment of a bond or note. Beverleys v. Holmes was on a written promise to pay Augusta bonds. Moseley v. Jones was on a written contract to deliver corn and pay money, and the form of the declaration does not appear.

(Before Harrison replied, Stanard, J., observed, that in England there is no action of debt on the note per se. The note is only evidence of debt. Here, debt lies on the note itself. And the question arises, whether this may not authorize the declaration in assumpsit to be framed in Virginia differently from what would otherwise be requisite.)

Harrison, in reply. There is no distinction between a verbal promise and a promise in writing. A consideration is equally necessary to both. In England, promissory notes are placed on the footing of bills of exchange. Not so here.

PARKER, J. The only question in this case arises upon the 4th, 5th and 6th counts, and it is only necessary to analyze one of them, all being liable to the same objection, viz. that no consideration for the promise is alleged. The fourth count avers that the defendant, on the 15th of September 1835, at &c. executed his certain other agreement in writing, undertaking to settle with Thomas Bland &c. 320 dollars, and then to pay to the plaintiff the further sum of 255 dollars according to the tenour and effect of the said agreement, and being so liable, he the defendant, in consideration thereof, promised to pay to the plaintiff the last mentioned sum of 255 dollars. Whether this count is defective or not, depends altogether on the question how far, in an action of assumpsit on a writing of this character, the plaintiff is bound to allege and prove a consideration for the promises and undertakings set forth in it. I am clearly of opinion he must do both.

452 \*That in general the plaintiff who brings an action of assumpsit must state a consideration, no one doubts. But in assumpsit on a promissory note, it is said that no consideration need be averred and proved, because our act of assembly allows an action of debt to be brought on the note itself, without laying or proving a consideration; (see Peasley v. Boatwright, 2 Leigh 195; Crawford v. Daigh, 2 va. Cas. 521,) and it is supposed that this provision authorizes us to imply a consideration from the nature of the instrument, in the same manner that, in an action of assumpsit on a promissory note in England, a sufficient consideration is presumed. But there it is not owing to the form of the bill or note, nor to the circumstance of its being in

writing, that the law gives it that effect, but because it is commercial paper. Chitty on Bills, p. 9, 10. Previous to the statute of 3 and 4 Ann. c. 9, an action of debt could not be maintained on a promissory note, as of itself importing a debt, but the plaintiff was obliged to declare on the contract as in assumpsit, stating and proving the real consideration at large. By that statute, and "to the intent to encourage trade and commerce," (which, says the preamble, "will be much advanced if such notes shall have the same effect as inland bills of exchange,") notes in writing promising to pay money were in all respects put upon the footing of inland bills; and after that, no question could arise concerning the necessity of alleging a consideration in any form of action upon them. It was a peculiar privilege conferred upon them by the force of the statute, that (as in bills of exchange) a sufficient consideration should be implied from the commercial nature of the instrument. But that does not seem to me to be the effect of our act of 1730, 4 Hen. Stat. at large, p. 275. It simply allowed an action of debt on the note, to the end that the recovery of the money "might be rendered more easy." It did not change the nature of the instrument, nor give to it the character

453 \*of a bill of exchange; nor do I conceive it would have been impressed with the character, had the clause allowing discounts been omitted, unless it had been expressly assimilated to an inland bill, or other commercial paper. The only effect of the act seems to me to be, to allow a new form of action to be brought on the writing itself, namely, an action of debt, and, if that action is brought, to dispense with the averment or proof of consideration. If, however, debt is brought on the original contract, it is still necessary to shew a consideration to support it; and a fortiori if assumpsit is brought, which is always on the original contract, the same consequence must follow. In the case of Crawford v. Daigh, the judge delivering the opinion of the court declares expressly, that it was not intended to interfere with the action of assumpsit; and judge Carr, in Peasley v. Boatwright, carefully confines his observations to the action of debt: so that this case is one of the first impression in this court, although I am satisfied the general opinion of the profession has heretofore been, that in all actions of assumpsit brought in this state, except on bills of exchange and notes placed expressly on the same footing, it is necessary to aver and prove a consideration. The counsel for the appellee accounted for the omission in some of the counts in this declaration, by candidly avowing that it was because he feared no consideration could be proved; and the probability is that the verdict was obtained without such proof.

There is another consideration entitled to weight in this cause. The assumpsit is brought upon an instrument promising to settle with the sheriff a certain sum of money, and to pay another sum to the plain-

tiff by having a credit for it with Hyer Jackson in the sale of lots. I doubt much whether any action of debt could be maintained on it. Certainly it could not be brought on the promise to settle with another; and as the two are joined in this fourth count, it would seem that the count could only be in assumpsit, unless two actions, one in assumpsit and the other in debt, could be brought on the same written agreement. In this respect it is very similar to the case of Moseley v. Jones, 5 Munf. 23, where the court decided that the judgment was erroneous, there being no consideration laid in the declaration. It is, however, useless to enlarge on this point, since, on the other, I am of opinion that the demurrer to the 4th, 5th and 6th counts ought to have been sustained, and that, for overruling it, the judgment should be reversed.

TUCKER, P., concurred. But STANARD and CABELL, J., being of a different opinion, and the court being thereby equally divided, the judgment was affirmed.

### Sayre v. The Northwestern Turnpike Road.

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Corporations—Northwestern Turnpike Road—Liability to Action.**—An action will not lie against the president and directors of the northwestern turnpike road; the company being composed exclusively of officers of the government, having no personal interest in it, or in its concerns, and only acting as the organ of the commonwealth in effecting a great public improvement.

The declaration in this case was in these words:

Squire Sayre complains of the president and directors of the northwestern turnpike road, in custody &c. of a plea of trespass

\***Northwestern Turnpike Road—Liability to Action.**—In the case of *Sayre v. Northwestern Turnpike Road*, 10 Leigh 454, which was an action of trespass on the case to recover damages for the washing away of the plaintiff's saw and grist mills and milldam, caused by the alleged negligent planning and construction of a bridge by the defendant corporation over the stream upon which they were built, it was held that the action would not lie because the defendant corporation was composed, in the language of PRESIDENT TUCKER, who delivered the unanimous opinion of the court, exclusively of officers of the government, having no personal interest in it, or in its concerns, and only acting as the organ of the commonwealth in effecting a great public improvement. This conclusion is fully sustained, we think, by the weight of authority. BUCHANAN, J., delivering the opinion of the court in *Maia v. Eastern State Hospital*, 97 Va. 511, 34 S. E. Rep. 617.

*Dunningtons v. Northwestern Turnpike Road*, 6 Gratt. 160, was an action of assumpsit against the president and directors of the northwestern turnpike road for work and labor done and materials furnished; and it was held that the action would lie. JUDGE ALLEN, delivering the opinion of the court, in distinguishing the case at bar from the principal case, said: "The question really is not

on the case. For that heretofore, to wit, on the 19th day of March 1831, by an act passed by the legislature of Virginia, entitled "an act to provide for the construction of a turnpike road from

455 \*Winchester to some point on the Ohio river," the said defendants were incorporated by the name of "the president and directors of the northwestern turnpike road" as aforesaid, with power, among other things, to sue and be sued, and to cause to be constructed a road from Winchester in the county of Frederick to some point on the Ohio river, to be selected by the principal engineer, and to erect bridges across streams of water, at such sites as the said principal engineer should indicate; as by the said act will more fully appear. And the plaintiff further saith, that after the passage of the said act, to wit, on the — day of — 1834, the principal engineer, under and by virtue of said act, and in pursuance of the orders and directions of the said defendants, located said road from Winchester aforesaid to Parkersburg in the county of Wood, on the Ohio river, and in making his said location the said engineer designated a site for a bridge across Middle Island creek, near Lewisport in Harrison county. And the plaintiff further saith, that afterwards, to wit, on the — day of — 1837, the said defendants, by their agents and servants, erected and caused to be constructed at the said site, a bridge across said Middle Island creek; and the plaintiff then and there owned and possessed a certain water grist and saw mill and milldam, near to and below said bridge, which said water grist and saw mill and milldam the plaintiff had, for a long time

before the erection of said bridge, used and possessed for grinding and sawing, and was of great value, to wit, of the value of 2000 dollars. Yet the said defendants, well knowing the premises, so negligently, defectively and unskillfully planned and constructed their said bridge, that by reason thereof, afterwards, to wit, on the — day of November 1837, the water running and flowing down said creek, then and there removed and washed said bridge away from said site where it had been constructed as aforesaid, against \*the 456 said grist and saw mill and milldam of the plaintiff, and then and there destroyed said mill and milldam, the plaintiff being then and there the owner and possessor of said grist and saw mill and milldam. By reason whereof, the plaintiff saith he has sustained damage to the amount of 2000 dollars. Therefore he sues &c.

The defendants demurred generally to the declaration, and the plaintiff joined in the demurrer.

The circuit court of Harrison sustained the demurrer, and rendered judgment for the defendants; and on the petition of the plaintiff, a supersedeas was awarded.

William A. Harrison for the plaintiff in error.

George H. Lee for the defendants in error.

TUCKER, P. The court, not deciding the other questions argued in this case at the bar, are unanimously of opinion that the action does not lie in this case against the northwestern turnpike company, composed as it is exclusively of officers of the government, having no personal interest in it, or in its concerns, and only acting

whether any action will lie against this company, but whether, having regard to the objects of the corporation, the action will lie for the particular grievance complained of. It was not decided in the case of *Sayre v. The N. W. Turnpike Road*, 10 Leigh 454, that no action will lie against this corporation; all that the case decided, was that the action would not lie against this company for the injury there complained of. The suit was brought to recover damages for a remote and consequential injury to the property of the plaintiff. The declaration averred, that owing to the defective construction of a bridge by the company, it fell, and was carried by the stream against the mill and dam of the plaintiff, whereby they were destroyed. The reasons which governed the court, in holding that an action for such an injury could not be maintained against this company, are not given. The case was probably considered as falling under the influence of the case of the Governor and Co. of the British Cast Plate Manufacturers v. Meredith, 4 T. R. 794; Boulton v. Crowther, 9 Eng. C. L. R. 227, and Lansing v. Smith, 8 Cow. R. 146; in which it was held that commissioners or trustees, acting under the authority of law, to effect a public improvement for public purposes, in which they have no direct private interest, and who do not exceed their jurisdiction, are not liable to an action for a consequential injury resulting from an act they are authorized to do. The present case is not of that character; it is founded upon contract, such as the company was necessarily authorized to make for the purpose of preserving

the work committed to its charge; and there is nothing in the words or spirit of the law which exempts the company from such an action."

See the principal case also distinguished in *James River, etc., Co. v. Early*, 13 Gratt. 553, 555.

In *Tompkins v. Kanawha Board*, 19 W. Va. 200, 261, 264, *PRESIDENT JOHNSON*, after setting forth the facts and decisions in the principal case, *Dunningtons v. Northwestern Turnpike Road*, 6 Gratt. 160, and *James River, etc., Co. v. Early*, 13 Gratt. 541, and quoting at some length from each of these cases, said: "As we understand the ground, upon which the decree in *Sayre v. Northwestern Turnpike Road*, 10 Leigh, *supra*, was placed, that case was virtually overruled by the case in 6 Gratt. (*Dunningtons v. Northwestern Turnpike Co.*)" But see *Mala v. Eastern Hospital*, 97 Va. 513, 34 S. E. Rep. 617, where it is said that *Dunningtons v. Northwestern Turnpike Co.*, 6 Gratt. 160, distinguishes the case at bar from the principal case. In this same case (*Mala v. Eastern Hospital*), it is said that no conflict exists between the principal case and *Eastern Lunatic Asylum v. Garrett*, 27 Gratt. 163.

**Corporations—Liability—How Question Raised.**—If the cause of action stated in the declaration is one for which the corporation is not liable, a demurrer is the proper and usual way to raise the question. *Duncan v. City of Lynchburg*, 2 Va. Dec. 706, citing principal case; *Noble v. City of Richmond*, 31 Gratt. 271; *Orme v. City of Richmond*, 79 Va. 86; *Powell v. Town of Wytheville*, 96 Va. 73, 27 S. E. Rep. 805; *Mala v. Eastern Hospital*, 97 Va. 507, 34 S. E. Rep. 617.

as the organ of the commonwealth in effecting a great public improvement.

Therefore it is considered that the judgment be affirmed, and that the appellees recover of the appellant their costs by them about their defence in this behalf expended.

457 \*Doe, Lessee of Taylor and Others  
v. Hill.

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Ejectment—Tenant in Common against Cotenant—Actual Ouster.**—In ejectment against a tenant in common by a cotenant, if the jury return a special verdict, actual ouster must be found therein, to entitle the plaintiff to judgment.

**Same—Same—Same—Effect of Consent Rule.**—The necessity of finding this fact is not dispensed with by the entry made, in Virginia, when the tenant in possession is admitted defendant, that he "confesses the lease, entry and ouster in the declaration supposed, and agrees to insist on the title only, at the trial." The confession that Richard Roe ousted John Doe, is not a confession that the real defendant ousted the real plaintiff: and when this latter ouster forms a part of the plaintiff's title to recover (as it does between tenants in common), the fact of such ouster must be proved.

The declaration in this action of ejectment contained three counts, in the name of John Doe; the first upon a demise by Samuel Taylor and Letitia his wife, formerly Letitia James, Robert Teller junior and Sarah his wife, formerly Sarah James, Robert P. James, Ann James widow of Robert James deceased, and Benjamin Taylor, made the 2d of December 1824, alleging an ouster by Richard Roe on the 10th of December 1824; the second upon a

demise by the same parties on the 23d of August 1830, alleging an ouster by the same casual ejector on the 24th of August 1830; and the third upon a demise by Van B. Reynolds and Franklin Reynolds, with an allegation of ouster by the same casual ejector.

The declaration was filed in the circuit court of Kanawha on the 22d of October 1831; and thereupon George Hill, tenant in possession, on his motion was admitted defendant to the suit, in the room of the said Roe. The entry proceeds to state that, by his attorney, he "comes and defends the force and injury, when &c. pleads the general issue, confesses the lease, entry  
458 "and ouster in the declaration supposed, and agrees to insist on the title only, at the trial."

On the 25th of May 1833, the jury returned a special verdict, finding that a patent issued to Robert James, Frederick Molineaux and John Pollock, bearing date the first day of August 1800, for 93026½ acres of land, then lying and being in the county of Kanawha, to wit, unto James 59017½ acres, to Molineaux 28308½ acres, and to Pollock 5700 acres; which patent is set forth in hæc verba: that the said Robert James departed this life before the institution of this suit, leaving the lessors of the plaintiff, Letitia Taylor the wife of the said Samuel Taylor, Sarah Teller the wife of Robert Teller junior, Robert B. James and Ann James, with Mary Honeyman now the wife of Samuel Honeyman, his children and heirs at law: that no division of the said land patented as aforesaid has ever been made between the said patentees or their representatives, so far as the testimony before this jury extends, but that a certain deed was duly executed to Van B. Reynolds and Franklin Reynolds, two of the lessors of the plaintiff, which deed is set forth in hæc verba, and purports to have been made the 25th of August 1830, "between Samuel D. Honeyman and Mary his wife, Samuel Taylor and Letitia his wife, Robert Teller junior and Sarah his wife, and Robert B. James, (the said Mary, Letitia, Sarah and Robert B. James being the legitimate heirs at law of the late Robert B. James deceased, and Ann James the widow of the late Robert B. James deceased, and Benjamin Taylor (who, by indenture executed before the signing hereof, by all the parties in interest, is the proprietor of an undivided fifth part of all the real estate of the said Robert B. James deceased lying in the state of Virginia,) of the first part, and Van B. Reynolds and Franklin Reynolds of the second part." This deed recites the patent of the first of August 1800;

recites also, that "by a decree of partition rendered in \*the superior court of chancery holden in Lewisburg, the part of said land to which the said Robert B. James was entitled by virtue of said patent, was set apart and allotted to said parties hereto of the first part," and that the parties of the first part are desirous to convey a portion of the land so set apart and allotted to them, unto the parties of the

**\*Ejectment—Tenant in Common against Cotenant—Actual Ouster.**—In *Buchanan v. King*, 22 Gratt. 428, it is said: "It has been the established doctrine of the courts, that a tenant in common cannot maintain ejectment against his companion without proof of an actual ouster. Difficulties often occur in determining whether certain acts constitute an ouster. Parties otherwise entitled to recover are defeated from an inability to prove it. It was, therefore, provided (Va. Code 1800, ch. 135, § 15; Va. Code 1887, § 2736), it should be sufficient for the plaintiff to prove some act amounting to a total denial of the plaintiff's right as cotenant. It was not intended to alter well established principles of law governing the relations of joint tenants or tenants in common to each other, but simply to enlarge existing remedies. *Doe, Lessee of Taylor v. Hill*, 10 Leigh 457."

Va. Code 1800, ch. 135, § 15; Va. Code 1887, § 2736, provides "If the action be by one or more tenants in common, joint tenants or coparceners, against their cotenants, the plaintiff shall be bound to prove actual ouster or some other act amounting to total denial of the plaintiff's right as cotenant."

On matters pertaining to ejectment, see monographic note on "Ejectment" appended to Tapscott v. Cobbs, 11 Gratt. 172.

For the law pertaining to tenants in common, see monographic note on "Joint Tenants and Tenants in Common."



second part, to wit, all that portion thereof which lies on the right hand fork of Cole river, commonly called Little Cole, and its waters or creeks; and then follows the conveyance. The jury find that the defendant has had possession of 100 acres of land, described in a patent to him bearing date the 25th of June 1813, and set forth in hæc verba, which possession was adverse to the plaintiff and those under whom he claims, and was so for more than 20 years before the institution of this suit, and extended to the limits of the said patent: that the defendant is in possession of the land described in a deed from Samuel Honeyman and wife to him, set forth in hæc verba, which deed bears date the 6th of October 1825, and conveys a parcel of land on Cole river by metes and bounds, said to contain about 500 acres, and to be part of the tract patented to James, Molineaux and Pollock: that the defendant has been in possession of the land described in the deed to him from Honeyman and wife, from the date of that deed to the time of the verdict: that this deed includes the defendant's tract of 100 acres, and is included within the limits and bounds of the tract of 93026½ acres. And the jury further find that the defendant has never had possession of any other part of the land in controversy in this suit.

If the law arising from these facts be for the plaintiff, and authorize his recovery of any part of the land in possession of the defendant, then the jury find for the plaintiff such part of the land as he may rightfully recover on the facts, and one 460 cent damages. But if the \*law be altogether for the defendant, then the jury find for the defendant.

The circuit court, being of opinion that the law was for the defendant, entered judgment for him.

On the petition of the lessors of the plaintiff, a supersedeas was awarded.

B. H. Smith, for the plaintiff in error, remarked, that the reason assigned in the court below for the judgment was, that the special verdict shewed the lessors of the plaintiff to be tenants in common with the defendant, and did not find any actual ouster. The record, he said, shews that the defendant confessed lease, entry and ouster, and agreed to rely upon title only, at the trial. This is not only an admission of the fact which it is said is not proved, but an agreement also that no such proof will be required at the trial. The object is to narrow the issue, supersede useless evidence, and render the proceedings in ejectment more simple. Where a tenant in common is sued by his cotenant, and denies the ouster, upon application to the court, supported by affidavit denying the ouster, he is permitted to confess lease and entry only, and deny the ouster. This course is in perfect accordance with the principles of the action. The court prescribe the terms on which the tenant shall be permitted to defend, and every fact which may not tend to settle the title, is required to be admitted on the record. But when a defendant shews to the court good reason why a particular

fact, usually admitted, ought not to be admitted, he is permitted to appear without making the admission, and a special consent rule is entered, suited to the case. The plaintiff is then notified that the fact so denied must be proved, and prepare his proof accordingly. When the special consent rule, however, is not entered—when lease, entry and ouster are confessed on the record, the party is not required to prove that which has been confessed.

461 \*Adams on Eject. 236, 7, and notes; 7 Mod. 39; Wigfall v. Bryden, Burr. 296; Little v. Heaton, Ld. Raym. 750; Doe e. d. Gigner v. Roe, 2 Taunt. 397.

Dunbar, for the defendant in error. The lessors of the plaintiff in the two first counts are tenants in common with Molineaux and Pollock, to the extent of the patent lines, as well as tenants in common with Honeyman and wife in the subordinate quantity of 59017 acres. Dividing the 59017 acres among James's heirs, it gives 11805 acres to each. Hill was found to be in possession of 400 acres under a conveyance from Honeyman and wife. Supposing the pleadings and proofs to shew an ouster as to those 400 acres, then as to this land the deed to Van B. and Franklin Reynolds, made while Hill was in possession, is void, the third count must be left out of view, and the case decided on the two other counts. Is there such an ouster as will authorize a recovery upon the first and second counts, against Hill, who holds to his exclusive use and benefit 400 acres of the land? To maintain ejectment by one tenant in common against another, the ouster must be actual; that is, there must be an actual adversary possession by the defendant, and an actual dispossession of the lessors of the plaintiff, of the land held in common. Adams on Eject. 55; Burr. 2604; Barnitz's lessee v. Casey, 7 Cranch 457. Now here, the land held in common being 59017 acres, it is obvious that the holding by one tenant in common of 400 acres to his exclusive use cannot constitute an actual ouster of his cotenants or either of them. Every tenant in common is equally entitled to possession according to his interest, and if the tenant in possession of the 400 acres is subject to a recovery, he may equally recover against his cotenants in proportion to his interest in every farm on the 93026 acre tract which may be held and exclusively enjoyed under any one of the heirs of Robert James. The actual ouster required to maintain ejectment

462 by one tenant in common \*against another is not only an exclusive and separate possession, by one of the tenants, of a part of the common property, but an entire dispossession of his cotenants. Doe e. d. Hellings v. Bird, 11 East 49; Jackson e. d. Jones v. Lyons, 18 Johns. Rep. 400. Where they are in unequal possession, the remedy is by writ of partition under the statute, or by bill in chancery. In this view, the authorities cited on the other side cannot be of any avail. They only establish that the confession of lease, entry and ouster is sufficient evidence of actual ouster

from the land in controversy. They do not establish that it is evidence of ouster from the whole of the property which was held in common. And such ouster must be established, to authorize a recovery against a tenant in common before partition. If the plaintiffs can take from the defendant a part of the 400 acres in his possession, including his improvements, Pollock and Molineaux, and every other tenant in common, can do the same thing. All holding in common, each would recover a possession equal to his interest. To permit this, would answer no good purpose, as the parties would at last be forced to resort to a court of equity to settle their rights. Thus far, supposing the position to be correct, that the confession of lease, entry and ouster will, in the courts of Virginia, render proof of actual ouster unnecessary. But is that position correct? It is not denied that the practice in England, as well as in New York, is as contended for. But this practice has never been adopted in Virginia, or in any of the states except New York. On the contrary, in the case of *Barnitz's lessee v. Casey*, 7 Cranch 463, 471, in which the question was raised and discussed, the supreme court of the United States decided that notwithstanding the confession of lease, entry and ouster, the plaintiff in ejectment must prove an actual ouster, to entitle him to a recovery against his cotenant in common.

463 \*Smith, in reply. The lessors of the plaintiff have an interest in the land held by Hill. Hill has no interest in any other portion. And they have a right to come into the enjoyment of their portion of what he is holding. Whether or no there was a confession of lease, entry and ouster in the case in 7 Cranch, does not appear, except from the statement of counsel in the argument. The point seems to have received very slight consideration. No authorities were cited by counsel, nor does the court refer to any. It was decided only by a majority of the court, and it does not appear who were the dissenting judges. If the chief justice was one, that would much weaken the authority of the case. The weight of authority elsewhere, the history of the action of ejectment, and the difficulties in practice out of which it sprung, as well as precision and propriety in pleading, are all opposed to the decision. The legislature, too, has been extending the remedy, by authorizing tenants in common to join, 1 Rob. Prac. 465, and it has given it greater simplicity, by providing that after issue joined, no objection shall be taken to the substance or form of the declaration; 1 Rob. Prac. 452, and remarks of Green, J., in *Whittington &c. v. Christian &c.*, 2 Rand. 356. When the legislature is thus enlarging and encouraging the remedy, it would be remarkable if the courts should make decisions counteracting that liberal policy. Convenience requires that the practice should be settled as now contended for. If the party who means to deny the ouster be required to enter into the consent rule specially, there can be no

surprise. And when it is entered into, if possession be all the plaintiff seeks, he can take possession and dismiss his suit.

PARKER, J. This is an action of ejectment against one tenant in common, by several others. The defendant appeared and entered into the common rule, according \*to the form in Robinson's Forms, p. 12.\* A special verdict was rendered, which omits to find the ouster; and the court gave judgment for the defendant. It is now contended that it was not necessary to prove the ouster, because it was confessed, and that for the same reason it was not necessary for the jury to find the fact.

In England, when an ejectment is brought by a joint tenant, parcener or tenant in common against his companion (to support which an actual ouster is necessary) the practice is for the defendant to apply to the court, upon affidavit, for leave to enter into a special rule, requiring him to confess lease and entry at the trial, but not ouster also, unless an actual ouster of the plaintiff's lessor by him the defendant should be proved. *Adams on Ejectm.* 236. But I regard this as a mere point of practice, conformable to rules invented from time to time by the courts to advance the remedy by ejectment, and to force the parties to go to trial on the merits, without being entangled by formal objections to fictitious averments in the declaration. There are, however, essential differences between the rules of the several english courts themselves, and between those courts and our own. I do not believe we have ever adopted the special rule, the form of which is given in the appendix to *Adams on Ejectm.* No. 25, but in all cases our clerks make the entry of the consent rule in the form given by Robinson. Under it, I see no reason why the defendant should be bound by his confession of the fictitious ouster laid in the declaration, unless an actual ouster of the plaintiff's lessor be proved, in which event the plaintiff ought not to be called upon to prove the ouster of the fictitious lessee. Otherwise the defendant cannot avail himself of the real merits of his defence, and must have the costs\* of the suit

thrown upon him, although there has been no \*actual ouster of his cotenant.

The court will always so mould the proceedings as that the real merits of the controversy shall be tried, without entrapping either party by the rules it has itself prescribed; and if it has admitted a tenant in common to defend the action, only on his confession of lease, entry and ouster, it will give such effect to that confession as is consistent with a trial of the merits. Such was the decision of the supreme court of the United States in the case of *Barnitz's lessee v. Casey*, 7 Cranch 456, where the defendants, tenants in common, having confessed lease, entry and ouster, it was insisted that an actual ouster need not be proved. But the court decided that as a tenant in common could not in general

\*In the new edition, vol. 1, p. 176, No. 10.

maintain an action of ejectment against his cotenant, and there were no facts found in the case to prove an actual ouster and take it out of the general rule, the judgment in favour of the tenant should be affirmed. There, as here, I infer that a special verdict had been found.

But if the confession so far dispensed with the proof of actual ouster as to authorize the jury to find it as a fact in the cause, yet as they have not found it, I am of opinion that we, in deciding on the special verdict, cannot infer it. Facts admitted by the pleadings of the parties need not perhaps be found; but I do not think that this rule extends to the pro forma confessions of facts not actually existing, required under a rule of court to bring the merits of a controversy under judicial decision. We ought not to hold that a confession that Richard Roe ejected John Doe, not only precludes the necessity of proving that the real defendant ousted the real plaintiff, but also the necessity of the jury's finding that fact, without the existence of which the plaintiff ought not to succeed. It is clear that if, in a special verdict not uncertain in itself, the case made  
466 \*by the plaintiff is a defective case or a defective title, the judgment should be for the defendant, and a venire de novo should not be granted. *Brown & Sons v. Ferguson*, 4 Leigh, 51, 56. Therefore I am for affirming the judgment, and especially as the plaintiff may bring his new ejectment, and prove, if he can, the actual ouster.

STANARD, J., dissented. But TUCKER, P., and CABELL, J., concurring, the judgment was affirmed.

467 \**Ruddle's Ex'or v. Ben.*

July, 1839, Lewisburg.

(Absent CABELL and BROOKE, J.)

**Emancipated Slaves—Subjection to Debt of Former Owner—Habeas Corpus.**—A slave, after being emancipated, is taken by execution to satisfy the debt of a former owner, contracted before he executed a bill of sale for the slave to the person by whom the emancipation has been made: **Held**,

\***Emancipated Slaves—Subjection to Debt of Former Owner—Habeas Corpus.**—In *Shue v. Turk*, 15 Gratt. 259, JUDGE ROBERTSON delivering the opinion of the court said: "It is settled that a negro, claimed and held as a slave, cannot litigate his right to freedom under a writ of habeas corpus. In this case, however, the petitioner produces his papers showing, on their face, that he has been regularly emancipated, and registered as a free negro; and it appears upon the return and evidence, that those holding him in custody do not claim him as their slave, but that he is held by virtue of an execution levied for the purpose of subjecting him to a debt due from A. Hanna. The matter in controversy is not whether the petitioner is a freeman or a slave; but whether, as an emancipated negro, he is liable for a debt of Hanna, his former owner—that is to say, whether, being free, he is subject to a lien, the enforcement of which may have the effect of reducing him again to the condition of slavery.

"In *Ruddle's Ex'or v. Ben.*, 10 Leigh 467, it was held

a writ of habeas corpus is the appropriate remedy; and on this writ, it may be determined whether or no the bill of sale is valid against creditors. By two judges.

**Slaves—Sale of—When Not Voluntary—Case at Bar.**—

The owner of a slave permits him to act for him—

that a writ of habeas corpus is an appropriate remedy in such case. This decision, however, was made by a court composed of three judges only, one of whom dissented; and so is not of binding authority. But I think that the decision of the majority, upon this question, was right; and the reasons given by JUDGE PARKER in support of it, are so clear and forcible, that I cannot do better than refer to that portion of his opinion, expressing my entire concurrence in the views presented by him, upon this point."

In this same case, JUDGE LEE, dissenting from the opinion of the court, said: "I am of opinion that the writ of habeas corpus is not the appropriate remedy for the assertion of the right to freedom claimed by the plaintiff in this case. It is true it was sustained by the opinion of two of the three judges who sat in the case of *Ruddle's Ex'or v. Ben.*, 10 Leigh 467, but the reasons on which it was rested are to my mind quite unsatisfactory. That the claimant produces a deed of emancipation cannot, as it seems to me, change the remedy for the enforcement of the right which it is alleged to confer, and it is conceded that in general this right cannot be litigated upon a writ of habeas corpus; and although those who claim his custody, do not claim as masters that he is their slave, they do claim that to them the deed of emancipation is ineffectual and that they have the right to treat him as property and subject to be sold as the slave of the debtor party. The question at last is one of freedom or slavery, absolute freedom or qualified slavery, and should be tried in a more convenient and appropriate proceeding than a habeas corpus."

See generally, monographic note on "Habeas Corpus" appended to *Ex parte Pool*, 2 Va. Cas. 276.

†**Slaves—Emancipation in Pursuance of Contract between Master and Slave—Liability for Debt of Master.**—In *Shue v. Turk*, 15 Gratt. 266, the proposition is laid down that a slave, who has, under a contract for his future emancipation, paid his master the stipulated price for his freedom, and who has been actually emancipated in consequence thereof, is liable to be subjected to the payment of any debt of his master, existing at the time of the emancipation. The reason given is because the emancipation in such case is without any valuable consideration—the price paid by the slave not constituting such consideration, inasmuch as not only the slave himself, but everything made by or belonging to him, is in law the property of his master.

Concerning the principal case, the court says: "It is true, that the opinion of a majority of the court, in *Ruddle's Ex'or v. Ben.*, 10 Leigh 467, appears to be in conflict with this view; but, as has been already stated, that case is not binding as authority; and the decision in this respect (as indeed is shown by JUDGE TUCKER, who dissented on this point,) is so opposed to the necessary consequences resulting from the relation of master and slave, that it cannot be regarded as law."

In *Shue v. Turk*, 15 Gratt. 276, LEE, J., in delivering his dissenting opinion, said that the principal case is not a binding authority upon any point.

**Chancery Jurisdiction—Emancipated Slaves—Cred-**

self, paying the owner a hire. During three years that he so acts, the slave, besides paying the hire, earns \$200, of which he deposits \$75 with the owner. The owner, contemplating an eventual emancipation, makes a bill of sale, and delivers to the grantee possession of the slave, for the consideration of \$200, of which the \$75 in his hands is taken as part. The other earnings of the slave (\$125) are afterwards collected and paid over in satisfaction of the balance of the consideration money. In the transaction, there is no intent to defraud the grantor's creditors. The grantee afterwards emancipates the slave, and the slave so emancipated is taken by execution to satisfy a debt of the first owner, contracted before he executed the bill of sale. **Held**, the bill of sale cannot be considered a purely voluntary one, and the slave so emancipated should, upon a habeas corpus, be discharged from custody, leaving the creditor to resort to equity to set aside the bill of sale and the instrument of emancipation, if he can properly do so, because of the inadequacy of the consideration for the bill of sale, or upon any other ground. By two judges—dissentiente **TUCKER, P.**

Adam Dirting owning a man of colour named Ben, sometimes called Ben Ware, as his slave, died intestate, leaving his sons John Dirting and Adam Dirting his sole distributees, who received the slave from the administrator of their father's estate, in a course of distribution. Afterwards, to wit, on the 6th of May 1830, Adam Dirting, for the consideration of 200 dollars, sold to John Dirting his moiety of the slave, and from that time John had him as sole owner.

Subsequently John Dirting executed  
468 \*a bill of sale for Ben to Michael Barr, and Barr executed an instrument in writing emancipating and setting free Ben. The bill of sale from John Dirting was for the consideration of 200 dollars, and was executed the 31st of December 1833; and possession of Ben was then delivered by Dirting to Barr. The instrument of emancipation likewise bore date on the 31st of December 1833; but the 11th of July 1836 was the day on which it was acknowledged and admitted to record in the court of Shenandoah county. In this county the parties resided.

James Ruddle executor of Isaac Ruddle was a creditor of Mary Koontz, who died intestate. Administration of her estate was granted to John Dirting on the 13th of February 1832, and bond was given by the

administrator, with Adam Dirting and Henry J. Wunder as sureties. Soon after John Dirting's qualification as administrator, to wit, on the 24th of February 1832, assets to the amount of the debt due Ruddle's executor came to the hands of John Dirting as administrator, and were wasted or misapplied by him. Ruddle's executor, on the 21st of June 1834, brought a suit in chancery against the administrator and his sureties, and on the 16th of August 1838 obtained a decree against them for 86 dollars 38 cents, with interest from the 1st of February 1833 till paid, and the costs. Upon this decree an execution was issued, directed to the sheriff of Shenandoah, and the same was levied on Ben.

Ben, being detained in custody under this execution, applied to the judge of the circuit court of Shenandoah for a writ of habeas corpus ad subjiciendum, and shewed, by the affidavit of another person, probable cause to believe that he was detained in custody without lawful authority. Thereupon the judge, (requiring bond with security in the penalty of 40 dollars, conditioned for the payment of such costs and damages as might be awarded against the prisoner, and that he would not \*escape by the way,) granted the writ of habeas corpus, directed to the sheriff of Shenandoah, returnable immediately before him; and the sheriff accordingly brought the prisoner before the judge, and certified the cause of his detainer; whereby it appeared, that under the execution before mentioned, he was levied on as the property of John Dirting, and that he was detained for no other cause.

Upon the trial, the judge caused all the material facts proved to be made a part of the record.

In the opinion of the judge, the fact was sufficiently proved, that at the time of the execution of the bill of sale from John Dirting to Michael Barr, neither party intended thereby to delay, hinder or defraud the creditors of Dirting. It appeared that on the 31st of December 1833, all the debts then due and owing by Dirting (including the claim of Ruddle's executor) amounted to about 200 dollars, and Dirting had then property more than sufficient to pay all his debts. He had paper to the amount of 150 dollars, a horse that afterwards sold for 70 dollars, some other property (the particular value of which was not ascertained) and the money which had been and was thereafter to be paid him by Ben, as is presently mentioned.

Though the consideration for the bill of sale from Dirting was 200 dollars, yet Barr himself paid no part of that consideration, nor did he assume or promise to pay any part, but the whole amount was paid to Dirting by Ben. Whilst Dirting was the owner of Ben, he permitted him to work out, Ben paying him 1 dollar per week or 50 dollars per year; and all he earned over that sum was to be his own. Ben regularly paid Dirting the hire, and previously to the 31st of December 1833, deposited with him a little upwards of 75 dollars of his own

**Issues.**—In *Jincey v. Winfield*, 9 Gratt. 713, it is said: "A court of chancery has jurisdiction to adjust the rights of the creditors and of the freed men. It will enjoin the creditors' execution, even after it is levied on the freed men, until it can ascertain, by proper inquiries, whether there be any other property which should be applied to their exoneration; and will not utterly reject their claim 'until it is found that no possibility exists of effectuating their emancipation.' That such is the law, and such the mode of its administration, will plainly appear by reference to the cases of *Woodley v. Abby*, 5 Call 336; *Patty v. Colln*, 1 Hen. & Munf. 519; *Dunn v. Amey*, 1 Leigh 465; *Elder v. Elder*, 4 Leigh 262; *Nicholas v. Burruss*, Id. 289; *Parks v. Hewlett*, 9 Leigh 511; *Ruddle's Ex'or v. Ben*, 10 Leigh 467."

money, which was taken and considered as part of the 200 dollars, the consideration for which the bill of sale was executed.

470 Dirting relied \*on the promise of Ben to pay him the balance in a short time; and the same was so paid by Ben. There was paid, on the 25th of January 1834, 50 dollars, and on the 11th of October 1834, 25 dollars. The dates of the other payments were not precisely ascertained, no receipts having been given; but those payments were made very shortly after December 1833; and all the money had been earned by Ben before that time, though not then collected.

As to the value of Ben at the time the bill of sale was executed, there was conflicting evidence. Upon the whole thereof, the judge stated the fact to be that his value was 350 dollars; believing, from the evidence, that if he had been brought into market, he would have sold for about that sum.

When the bill of sale was executed, on the 31st of December 1833, Michael Barr signed a paper writing in which he stipulated that Ben should be free at his death.

From the 31st of December 1836, Barr exercised acts of ownership over Ben as his slave, by giving him orders permitting him to work for certain individuals and to receive the pay, and at one time a general order permitting him to work for any person he might choose. The earnings of Ben were in part received by him, and in part collected by Barr and paid over to him. Ben performed work for Barr, for some of which he was paid; for some he was not paid, as he did not claim anything. Ben's wife was a slave belonging to Barr.

On the 11th of July 1836, a second bill of sale was executed by John Dirting, conveying Ben to Barr; and it was acknowledged in court the same day. This bill of sale bears date, on its face, the 31st of December 1833, the day of the execution of the first bill of sale, and the time when possession of Ben was delivered by Dirting to Barr.

The reason assigned for taking 471 the \*second bill of sale, and which appeared to be the true reason, was that neither Barr nor his counsel was then apprized of the fact that Adam Dirting had ever conveyed his interest in Ben to his brother John. The second bill of sale was therefore prepared, antedated as of the date of the first, and Adam Dirting procured to witness it, that he might thereby impliedly waive any right or claim he might have to Ben. Afterwards the bill of sale of the 6th of May 1830 from Adam to John was discovered.

The deed of emancipation from Barr to Ben was executed by Barr in consequence of the advice of an attorney whom he consulted, that he was liable to be presented by the grand jury for permitting Ben to work and trade as he did. This deed of emancipation, though dated the 31st of December 1833, was not executed until July 1836. It was antedated at Barr's request, with a view to shield him from prosecution for the time past, although he was told by

the scrivener (who was the attorney he consulted) that the deed of emancipation could have no effect before it was recorded.

There was in the hands of the sheriff of Shenandoah, an execution on behalf of Sybert Jordan & Co. against Dirting, for a debt of 23 dollars 41 cents, due before the bill of sale of the 31st of December 1833 was executed: but Jordan & Co. to secure that debt, took of Dirting, on the 11th of November 1834, a deed of trust on property sufficient at the time to pay the debt. The judgment had been obtained since.

Dirting, in consequence of not paying for the support of a bastard child, was imprisoned, and took the oath of insolvency on the 11th of November 1834. The child, it appeared, was not born till the 4th of September 1834. Ben was not included in Dirting's schedule.

472 \*An indemnifying bond was required by the sheriff who levied on Ben, before he would make the levy; and the bond was given by Ruddle's executor. Wunder, the surety, gave to Ruddle's executor a counter indemnity.

The judge of the circuit court, being of opinion that the law and the evidence required that he should discharge Ben, ordered that he be discharged accordingly; and Ben, by his counsel, waiving all claim to judgment for costs, no costs or charges were awarded against either party.

The proceedings and judgment were signed by the judge, certified by him, and entered among the records of the circuit court of Shenandoah. And Ruddle's executor feeling himself aggrieved by the judgment, the court of appeals, on his petition, granted a writ of error.

G. B. Samuels, for the plaintiff in error. All the money paid to Dirting as the price of Ben, was earned by Ben whilst the slave of Dirting. The slave could not be entitled to the money as his property, but the wages earned by him during his slavery belonged to his master. The money received by Dirting as the price of Ben, being Dirting's own money, the conveyance to Barr was therefore without valuable consideration, and void as to creditors. The record further discloses that Dirting and Barr meditated a fraud on the law, by permitting Ben to stay in Virginia against the policy of the statute requiring emancipated slaves to remove from the commonwealth. Dirting, if able, might have emancipated Ben at once; but he would then have been required to leave the state. To evade the law in this respect, the title was conveyed gratuitously to Barr, who permitted Ben to act as a free man, paying him—the master paying his own slaves—for all the labour he ever performed. Unless we are concluded by

473 \*the opinion of the judge, there is also enough in the record to shew that Dirting and Barr intended a fraud upon creditors. The consideration, even if paid by Barr, was wholly inadequate; the sum of 200 dollars having been received for a slave worth, in the opinion of the judge, 350 dollars. Dirting was deeply involved in debt, and, in less than a year afterwards,

had to take the benefit of the act for the relief of insolvent debtors. Ruddle's executor, moreover, was an antecedent creditor. As to him, the transaction should be treated as fraudulent and void, without regard to the amount of Dirting's debts, the value of his property, or his circumstances. *Reade's adm'r v. Livingston & others*, 3 Johns. Ch. Rep. 481; *Townshend v. Windham*, 2 Ves. sen. 11. If Dirting himself had manumitted Ben, it is clear, under the statute 1 Rev. Code, ch. 111, § 54, p. 434, that Ben would have been liable to be taken by execution to satisfy debts contracted by Dirting before making the emancipation. Now here, Dirting has voluntarily conveyed Ben to Barr, upon an understanding that he is to treat him as a free man from the first, and afterwards manumit him. If Dirting can thus evade the payment of his debts, he does that indirectly which he could not do directly.

Alexander Anderson, for defendant in error. To make a deed voluntary, it must be without any, the least, valuable consideration. *Seward v. Jackson*, 8 Cow. 407. If any thing valuable pass between the parties, the transaction is a purchase. *Jackson v. Peek*, 4 Wend. 301. Here, the money earned by the slave, and paid as the consideration for the sale, is to be regarded as a valuable consideration, if there be any analogy to the state of villenage. *Co. Lit.* 117a, note 161, and 118a, § 177. But even if the conveyance be regarded as voluntary, the doctrine of setting aside such conveyances by persons indebted at the time, does not go to the extent contended for.

474 *Tunno v. Trezevant*, 2 Desauss. \*270. A trifling indebtedness, where the grantor retains under his control property sufficient to meet his debts, is not enough to avoid a voluntary conveyance. In the case of such a conveyance, as in any other case, the question is whether there was actual fraud. And this question is to be determined upon the whole evidence. *Jackson v. Peek*, 4 Wend. 301. Here, it cannot be alleged that there was the intent to delay, hinder or defraud creditors. Such an allegation is precluded by the state of the facts, as certified by the judge of the circuit court. Nor is there any other aspect in which the conveyance can be held fraudulent as to Dirting's creditors. See *Edwards v. Harben*, 2 T. R. 587; *Hamilton v. Russel*, 1 Cranch 309; *Sydnor v. Gee*, 4 Leigh 535; *Wheaton v. Sexton's lessee*, 4 Wheat. 503; *Sexton's lessee v. Wheaton*, 8 Wheat. 229, and *Hinde's lessee v. Longworth*, 11 Wheat. 199. Neither the sale to Barr, nor the subsequent emancipation by him, was in fraudem legis; because, 1st. Dirting's object was neither the immediate nor remote emancipation of Ben: 2dly, Barr bought him because he was the owner of his wife, and intended that Ben should be his slave, at least during Barr's own life. Nor can the emancipation be impeached on the ground that Barr was induced to it by fear of prosecution for a violation of law in reference to his duties and obligations as master. The grounds

on which the rights of the defendant in error can be assailed must be such as derive their efficacy from considerations affecting the conduct of Dirting, and him alone.

Though it be supposed that Dirting designed a fraud upon his creditors, still, if Barr was a bona fide purchaser, his title is not to be affected. *Sands v. Hildreth*, 14 Johns. Rep. 498. The doctrine has moreover been sanctioned even by this court, that a fair and bona fide purchaser from one who was a volunteer under a fraudulent grantee, is entitled to protection

475 against the \*creditors of the grantor. *Coleman v. Cocke*, 6 Rand. 618. Ben may be regarded as an innocent purchaser without notice, and on that ground entitled to his freedom. See also *Eppes &c. v. Randolph*, 2 Call 183; *Garland v. Rives*, 4 Rand. 282; 1 Rev. Code, ch. 101, § 3, p. 373, and *Fletcher v. Peck*, 6 Cranch 87.

PARKER, J. A preliminary question has been suggested in this case, which meets us in limine. It is whether the matters in controversy between these parties could be properly tried upon a writ of habeas corpus. If the issue was one of slavery or no slavery, and the right of the defendant in error to freedom was the litigated point, presenting some real and not merely colourable ground for controversy, I should concede that it ought not to be determined upon the habeas corpus, for the reasons assigned in the case of *De Lacy v. Antoine & others*, 7 Leigh 438. But it appears here that the matter in question is not the right to freedom, but the right to levy an execution on one who has been duly emancipated by an acknowledged owner. Ben is a free man under the act of assembly, but the claim is to make him liable for the antecedent debts of Dirting, because Dirting's conveyance to Barr, being purely voluntary, was not binding on creditors, although it was binding on Dirting. The real question is, whether Ben is illegally confined in custody; and the solution of that question depends not upon the enquiry whether he was duly and properly emancipated, but whether, being emancipated, he is not liable to a charge which, if allowed, may or may not reduce him to his original state of slavery. No person is claiming to be his master, no person is detaining him as a slave, so as to authorize him to petition a court to be allowed to sue in forma pauperis for the recovery of his freedom, under our act of assembly; but the return to the writ of habeas corpus is,

476 that he has been taken in execution to \*satisfy a debt due from his former master, and the validity of that return depends on considerations extraneous of the question whether or no he is a slave. Although the enquiry thus presented may be complicated and difficult, involving questions of fact as well as law, yet that is no reason for denying to the petitioner the benefit of the great and salutary writ of habeas corpus. If often happens that a judge is forced to decide the most embarrassing and delicate questions on the return to that writ. The writ itself applies to all

cases of illegal detention of the person, except that which grows out of the relation of master and slave; and it would apply to that also, but that another remedy is provided which seems virtually to exclude a resort to the habeas corpus. If the petitioner were allowed to sue in forma pauperis one detaining him as a slave, and should recover in the action, still that decision would not determine the questions raised on this record, or preclude the creditors of Dirting from levying their executions. Therefore I think we may now adjudicate the right of the petitioner to be discharged from the custody of the sheriff of Shenandoah, in this proceeding by habeas corpus.

There is no difficulty about the facts of the case. [Here the judge detailed them.]

In applying the law to these facts, we must recollect that the deed of emancipation from Barr to Ben is not assailed, and that it was not for a debt contracted by the person emancipating, before such emancipation was made, that the petitioner was taken in execution, (see 1 Rev. Code, ch. 111, § 54, p. 434,) but for the debt of Dirting, who had conveyed to the emancipator, and received at the same time a paper writing stipulating that Ben should be free at the emancipator's death. Nor is the conveyance to Barr made utterly void as to creditors by the act of fraudulent conveyances;

because the facts certified negative 477 the idea that it was "contrived, \*of malice, fraud, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors;" and because, if the consideration paid to Dirting is not "deemed valuable in law," the conveyance was by deed duly proved and recorded, and possession delivered by the grantor. Although therefore, if the deed be voluntary, creditors may certainly avoid it, yet it may be doubted whether, under the circumstances, this execution could be levied on the petitioner, who had been duly emancipated by Barr and was then in the enjoyment of all the rights of a freeman, without first setting aside the deed from Dirting to Barr, and the deed of emancipation from Barr to the defendant in error. But waiving this enquiry, I cannot bring my mind to the conclusion that the deed to Barr, with the view of ultimate emancipation, was a purely voluntary one: without which the plaintiff in error cannot subject Ben to the debt due from Dirting to his testator. Dirting had permitted his slave to act for himself, upon being paid a hire which is not proved to be an inadequate one. During the three years that he thus acted, the petitioner earned the 200 dollars which was afterwards paid to his master as the consideration for the conveyance to Barr. This money, if in the slave's possession, might have been taken from him by Dirting notwithstanding the previous arrangement, if he chose to exercise the rigid power of a master; for I readily concede that in this commonwealth no contract between a master and slave is binding, and the latter can acquire no property of which the former may not deprive him. But this, I think,

results from the power which the master may exert over the slave, and the denial to the latter of all remedy to recover back the money so taken, rather than from any acknowledged principles of right and justice. If the master does not choose to exercise the power over the extra earnings of the

478 slave, and to commit a manifest injustice, I do not perceive \*that we are bound to allow his creditors to urge a want of consideration, when no fraud upon their rights was contemplated, and none can be practised, if an actual equivalent has been received, although that equivalent consists of something upon which the master, against conscience, might have seized. Besides, the case is stronger, where (as here) a part of the consideration was beyond the power of the master. About 125 dollars of the earnings of the slave whilst the property of Dirting, had not been collected at the date of the conveyance, but was afterwards collected and paid as a part of the 200 dollars. Dirting could not have recovered this money from the employers of Ben, because he had permitted his slave, in violation of the law, to trade and act as a freeman, and that law would not have assisted him in recovering from others under a contract thus made with the slave. The money was, however, paid to Ben whilst he belonged to Barr, and was applied (by the latter, I presume,) in discharging the consideration money mentioned in the deed. This 125 dollars was more than the amount of the debt due to the testator of the plaintiff in error; and being received by Dirting afterwards under such circumstances, prevents us, as I think, from considering the conveyance a purely voluntary one. Whether the price stipulated, or this portion of it, was adequate or not, might be a material circumstance in determining the question of fraudulent intent; but as that is settled by the proofs before the judge, it can have no influence on the question now under consideration.

The cases cited are those wherein a fraud was meditated upon existing creditors; or where the conveyance was made with a view to future indebtedness; or where a conveyance of property, although accompanied by possession, has been set aside in equity for the want of a valuable consideration. The case at bar does not belong to

either of the two first classes; nor 479 to the last, \*unless we are prepared to decide that the master cannot bestow upon the slave the privilege of acquiring any property, which may serve as a foundation (if the master's will and conscience so determine) for a consideration moving, mediately or immediately, from the slave to the master, for the inestimable grant of freedom. In this anomalous case, where there is no authority to bind us. I conceive we may obey the dictates of humanity and justice.

I am therefore for affirming the order of the judge discharging the petitioner from the custody of the sheriff of Shenandoah; leaving the plaintiff in error to seek his remedy in equity, if he has any.

STANARD, J., expressed a strong doubt as to the propriety of the remedy resorted to. But being overruled on that point by a majority of the court, he stated that he concurred in the opinion of Parker, J., on the merits.

TUCKER, P. Concurring entirely with my brother Parker in opinion that the habeas corpus was the appropriate remedy for the defendant in error, I yet think that the judgment below was erroneous and should be reversed. I am satisfied that the conveyance by Dirting to Barr must be taken to be void as to his then subsisting creditors. He became insolvent within a year afterwards, and was considerably indebted at the time, having regard to his property and resources and his condition of life. It is moreover clear from the evidence, that the deed was altogether voluntary. It is not pretended that Barr paid, or contracted to pay, one cent. The pretended consideration was paid and to be paid out of the earnings of Ben, accruing whilst he remained the slave of Dirting. These earnings already belonged to Dirting, and could form no consideration for the sale to Barr. The uncollected portion of them ought to have been surrendered

480 in Dirting's schedule, \*for his creditors had a right to it. The law recognizes no power in a slave to acquire property. What he acquires becomes, *eodem flatu*, his master's. The right to himself includes an absolute right to all that he acquires. Of this opinion Blackstone clearly was, when, in discussing the question of slavery, he said that if a man could sell himself, the price given for him by his master would instantly belong again to the master. Our law, certainly, recognizes no such power in the slave to acquire property; and as the introduction of such a principle into our jurisprudence might lead to consequences not easily foreseen, it is better that the subject should be left to legislative provision, by which the necessary safeguards against mischief may be supplied. If I am right, there was then no consideration for the deed to Barr. Without therefore considering the other questions discussed, it is sufficient to say, that the deed being void as to the plaintiff in error, his execution was properly levied upon the property: and moreover the act of emancipation by the donee cannot bar or impair his rights. If indeed the debt be discharged, then the deed will be good between the parties, and the deed of emancipation will have effect. But while the debt is unsatisfied, the superior right of the creditor must ride over both. The consequence would be the reversal of the judgment, and an order that the defendant in error be remanded to the custody of the sheriff, to be proceeded with under the execution, unless such proceeding be restrained hereafter by any other process of law. But my brethren being of opinion that there was no error in the order of the judge discharging the said defendant, that order should be affirmed.

Order affirmed.

# 481 \*Pindall's Ex'x & c. v. The Bank of Marietta.

July, 1830, Lewisburg.

(Absent BROOKE, J.)

**Debtor and Creditor—Payments—Application to Principal—Interest on Interest.**—A debtor owing a debt consisting of principal and interest, it is agreed between him and his creditor, that he shall in the first place pay off the principal, and that the interest may for a time remain unpaid. The creditor, having received money from the debtor, applies it in satisfaction of the principal. Afterwards many years elapse without payment of the interest. **Held**, the creditor is only entitled to the interest due at the time the principal was paid, and not to interest on that interest; there having been no agreement to pay interest on interest.

In the case of *The Bank of Marietta v. Pindall &c.*, 2 Rand. 415, this court considered that the plaintiffs should recover against the defendant 2500 dollars, with legal interest thereon from the 29th of August 1815 till payment, and their costs in the superior court of law expended.

On the 11th of December 1824, an agreement was made between James Pindall and John J. Allen attorney of the bank of Marietta, which, after reciting the judgment, proceeded as follows:

"And whereas the said Pindall hath this day, under this agreement with the bank, paid 1500 dollars (as per receipt given) applicable to so much of said principal sum of 2500 dollars, and not applicable to the interest or costs, the residue of the principal shall continue on interest till paid. The said James hath a suit depending in chancery against Benjamin Wilson junior, to obtain from him an indemnity against said judgment, or to reimburse himself for the payment thereof, and hath

**\*Debtor and Creditor—Payments—Application to Principal.**—The rule laid down in the principal case that "a debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal in exclusion of the interest, and the creditor, if he receives it, is bound to apply it accordingly," is approved and acted on in *Miller v. Trevilian*, 2 Rob. 1, 2, 27. In this case, it was further held that the case was not taken out of the influence of this rule by the circumstance that the party who agreed to such an application of the partial payment was a fiduciary.

**+Same—Interest on Interest.**—The general rule of law is that interest shall not bear interest. *Stuart v. Hurt*, 88 Va. 345, 18 S. E. Rep. 438; *Genin v. Ingersoll*, 11 W. Va. 557, both citing the principal case.

But it is definitely settled in Virginia and West Virginia, that an agreement to pay interest upon interest is valid if made after the interest which is to bear interest has become due. *Craig v. McCulloch*, 20 W. Va. 154; *Stansbury v. Stansbury*, 24 W. Va. 638. As authority for this proposition, these cases cite *Pindall v. Bank of Marietta*, 10 Leigh 481, *Childers v. Deane*, 4 Rand. 406, *Fultz v. Davis*, 26 Gratt. 903-911, and *Genin v. Ingersoll*, 11 W. Va. 549.

For further authority, see *Barbour v. Tompkins*, 31 W. Va. 410, 7 S. E. Rep. 1; monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541.



this day assigned, and hereby doth assign, to said bank so much of the first money to be recovered in said suit as shall be sufficient for the payment of said interest and costs. The said bank agrees to wait for said interest and costs till the final determination and event of said cause; but if, by such determination, the said James Pindall should not recover, or not recover enough to pay said interest or costs, or if, after obtaining a decision in his favour, the same cannot be collected, either by reason of the insolvency of said Wilson or otherwise, then the aforesaid assignment shall not be taken or considered as a payment of said interest and costs, or only a payment of so much as shall be obtained and received by the bank in said cause. The bank or their attorney shall, whenever they request (being such assignees) be entitled to control so much of said suit as relates to their interest therein, but will not, without consent of said James, throw any obstacle in the way of the prosecution of said cause. The said judgment is to remain as a security for the fulfilment of this agreement on the part of said James; and after the event of said chancery cause can be known, if, under this agreement, the said James becomes liable for said interest and costs, an execution may issue without any *scire facias*."

Besides the sum of 1500 dollars paid under the agreement on the day of making the same, and for which a receipt was given as therein mentioned, Pindall, on the 18th of June 1825, paid the further sum of 516 dollars 79 cents, and subsequently paid as much more as was equal to the balance of the principal, with interest on the 1000 dollars not paid at the date of the agreement, from the time of that agreement.

The suit against Wilson was proceeded in, after his death, against his administratrix; and by the decree rendered in that suit the 30th of May 1832, it was ascertained that the whole of Wilson's estate would be exhausted in paying preferable claims, and that Pindall would neither be reimbursed for the payments he had made, nor obtain any money from the suit, to satisfy the interest and costs remaining due.

483 \*Afterwards the bank of Marietta filed a bill in chancery in the circuit court of Harrison, against Pindall's executrix, devisees and legatees, to recover from his estate the balance due upon the judgment.

In this suit, the commissioner to whom the accounts were referred, stated the balance due upon the judgment in three ways: 1. Shewing that the interest on the original principal from the 29th of August 1815 to the 11th of December 1824 amounted to 1392 dollars 50 cents, and that the costs to be added thereto amounted to 57 dollars 56 cents, making together 1450 dollars 6 cents. 2. Deducting from the 2500 dollars paid as of the 11th of December 1824, 1450 dollars 6 cents for the amount of interest and costs, and then deducting the balance of 1049 dollars 94 cents from the original principal, whereby there was stated to be due of prin-

cipal money 1450 dollars 6 cents, on which interest was calculated from the 11th of December 1824. 3. Treating the principal as paid, as in fact it was, and on 1392 dollars 50 cents, the interest to the 11th of December 1824, calculating interest from the 30th of May 1832 (the time of the decree in the suit against Wilson), and then adding the costs, whereby a sum was made due, on the 10th of May 1838, of 1946 dollars 72 cents.

On the 25th of May 1838, the circuit court declared its opinion to be, that on the interest and costs, the plaintiffs were not entitled to interest from the date of the agreement, but that they were entitled to interest from the time at which they had a right, under the agreement, to resort to Pindall, viz. from the date of the decree in the suit against Wilson; and therefore the court, approving the third way in which the account was stated, pronounced a decree in favour of the plaintiffs for 1946 dollars 72 cents, with interest on 1392 dollars 50 cents from the 10th of May 1838.

From this decree an appeal was allowed on the petition of Pindall's representatives.

484 \*William A. Harrison for the appellants. As a general rule, interest is not allowed on interest. It is only allowed by virtue of a special written agreement. It is the agreement to pay interest upon interest, and not the law, nor the delay of payment, that will turn interest into principal. *State of Connecticut v. Jackson*, 1 Johns. Ch. Rep. 13; *Van Benschooten v. Lawson*, 6 Johns. Ch. Rep. 315; *Childers v. Deane &c.*, 4 Rand. 406. In this case, there is nothing in the agreement between the bank and Pindall to authorize the compounding of interest.

G. D. Camden for the appellees. When interest has accrued, the parties may by contract, express or implied, convert it into principal. By the agreement in this case, the bank was to wait for the interest and costs until the determination of the suit against Wilson, and should that prove unproductive, Pindall was then to discharge the interest and costs. It was intended that Pindall should not be subject to interest while the suit was pending. But when that was determined, the bank had the right to demand payment of the interest and costs, and if there was a failure to pay, a debt then existed upon which interest might run.

CABELL, J. A debtor owing a debt consisting of principal and interest, and making a partial payment, has a right to direct its application to so much of the principal, in exclusion of the interest; and the creditor, if he receives it, is bound to apply it accordingly. And it is the general rule of law that interest shall not bear interest. This rule of law will, however, yield to the agreement of the parties, express or implied. If therefore a debtor, in consideration of forbearance, agrees with the creditor that he will pay interest on interest heretofore accrued, that agreement will be enforced. So also, I apprehend, if

a debtor, in consideration of forbearance, agrees that he will, on a future  
 485 \*day, pay the interest heretofore accrued, and fails to pay it on the day, a jury or a court of chancery will give interest on the amount of that interest, after the expiration of the day. This, however, is on the ground that the contract of the parties has converted the interest into a debt. But the circumstances of this case negative the idea of any such contract. There is no agreement on the part of Pindall to pay the interest, not even that which had previously accrued. The stipulation is that the bank shall be at liberty to pursue its legal remedy by execution on the original judgment, without suing out a scire facias; a proceeding which would not allow the recovery of interest upon interest.

I am therefore of opinion that the court of chancery erred in giving interest on the interest. The decree must be reversed, and one entered up for 1450 dollars 6 cents, with the costs in the court of chancery.

The other judges concurring, decree reversed accordingly.

#### 486 \*M'Alexander v. Hairston's Ex'or.

July, 1830, Lewisburg.

(Absent BROOKE, J.)

##### Continuances—Sickness of Defendant\*—Case at Bar.—

An action of slander is commenced on the 21st of July, in a circuit court; but the judge of that court being related to one of the parties, an order is entered on the 27th of September, by consent of the parties, sending the case to the county court. On the 20th of November, a motion is made to the county court for a continuance, on the ground that the defendant had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend to the case in person and prepare himself for trial; and it is admitted by the plaintiff's counsel that such had been and still is the situation of the defendant. But a trial being nevertheless urged, the court is divided on the motion for a continuance, and the same being overruled, a verdict and judgment are rendered against the defendant. *Held*, the county court erred in so ruling the defendant to trial, at the term next after the cause had been

transferred to that court, and at which it was docketed in that court for the first time.

**Jurisdiction—Cause Docketed by Consent.**—Parties may, by consent, make up the pleadings and issue in a case, and have it docketed in any court having jurisdiction to try such a case; and on the parties appearing before the court in which a case may be so docketed, and making no objection to the regularity of the docketing of it, that court may exercise jurisdiction over the case; and an objection to the jurisdiction of the court, made for the first time after the trial of the case and judgment therein, cannot be sustained. *Per STANARD, J.*

On the 21st of July 1834, Samuel M'Alexander sued out of the office of the circuit court of Floyd county a writ of *capias* ad respondendum against Samuel Hairston senior; and at August rules 1834, the plaintiff filed his declaration. It was an action for slander. The general issue was pleaded in court on the 27th of September 1834, and after the entry thereof, the record proceeds as follows: "But the judge being delicately situated in his relationship to the  
 487 parties, by consent of \*the parties the trial of the issue is sent to the county court of Floyd."

In the county court, on the 20th of November 1834, a motion was made for a continuance, on the ground that the defendant, who resided in the county of Franklin at a distance of 20 miles from the courthouse of Floyd, had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend to the case in person and prepare himself for trial. The plaintiff's counsel admitted that such had been and still was the situation of the defendant, but urged a trial. The court being divided on the motion, the same was overruled; and the defendant excepted to the opinion.

Whereupon the cause being tried, a verdict was found for the plaintiff for 250 dollars damages, and judgment rendered for the same.

Soon after the judgment, Hairston died, and Joab Early qualified as his executor. Early, in his character of executor, petitioned the judge of the circuit court of Floyd for a *supersedeas* to the judgment; and it was allowed.

In the circuit court of Floyd, at April term 1835, the following entry was made: "The service of the writ of *supersedeas* being confessed, and the judge of this court being delicately situated by reason of his relationship to one of the parties, by consent of the parties by their attorneys, this cause is removed to the circuit superior court of law and chancery for the county of Montgomery."

vented by severe illness from making preparation for the trial."

See further, monographic note on "Continuances" appended to Harman v. Howe, 27 Gratt. 676.

**†Jurisdiction—Cause Docketed by Consent.**—The principal case was cited with approval and followed in Bell v. Farmville, etc., R. Co., 91 Va. 104, 20 S. E. Rep. 942; Hunter v. Stewart, 23 W. Va. 557.

See further, monographic note on "Jurisdiction" appended to Phippen v. Durham, 8 Gratt. 457.

**\*Continuances—Absence of Party.**—In Logie v. Black, 24 W. Va. 23, it is said: "The presence of a party to a suit to aid and assist his counsel in the trial is not ordinarily considered essential; and very many cases are tried in the absence of the parties. And the absence of the party not as a witness but simply as a party to aid his counsel in the trial of a case would but rarely be regarded as a ground for a continuance, especially when there had already been one or more continuances. Certainly it would not in any case be regarded as good ground for a continuance, though he was necessarily absent, unless there was satisfactory evidence, that in that particular case it was a matter of great importance to his interest, that the case should not be tried in his absence. The case of *M'Alexander v. Hairston's Ex'or*, 10 Leigh 486, shows only that when there are strong reasons why a case should be continued, some weight would be attached to the fact, that the party asking a continuance had been pre-

On the 27th of May 1835, the circuit court of Montgomery reversed with costs the judgment of the county court of Floyd, and ordered that the cause be remanded to that court, to be dismissed, upon the ground that the said county court had no jurisdiction to hear and determine the cause.

To this judgment, on M'Alexander's petition, a supersedeas was awarded.

488 \*Preston for plaintiff in error.

Taliaferro for defendant in error.

STANARD, J. Without deciding or even considering the question whether the order of the superior court, made by consent of parties, remitting this case to the county court for trial, would proprio vigore place the case, in its then condition, in the county court for trial, notwithstanding an objection of one of the parties to the docketing of the case in the county court and to the jurisdiction of that court over it, I am of opinion that parties may, by consent, make up the pleadings and issue in a case, and have it docketed in any court having jurisdiction for the trial of such a case; that over a case so docketed, on the parties appearing before the court in which it may be so docketed, and making no objection to the regularity of the docketing of it, that court may exercise jurisdiction; and that the objection to the jurisdiction of the court, coming for the first time after the trial and judgment in the case, cannot be sustained.

I am further of opinion that it was too rigorous, under the facts disclosed by the exception, shewing the disability of the defendant, from the visitation of God, to attend to the defence of the case, to rule him in the court below to trial in the absence of his witnesses, at the first term of that court after the order remitting the case had been made; especially as it does not appear, that under the order remitting the case to the county court, it had been docketed in that court at any time previous to the term at which it was tried, so as to enable the defendant, even if severe illness had not prevented him from making preparations for trial, to take out process to summon his witnesses.

My opinion therefore is, that the judgment of the county court, and that of the circuit superior court reversing it and remanding the case to the county court to be dismissed for want of jurisdiction, 489 are both of \*them erroneous, and ought to be reversed, with costs to the plaintiff in error in prosecuting his suit in this court. I am further of opinion that the superior court ought to have reversed the judgment of the county court; and as the original action did not survive, and the defendant therein was dead at the time the judgment was rendered in the superior court, and the action could not, on the remanding of the case to the county court, be revived, the reversing judgment of the superior court should have remanded the case to the county court with directions to enter an abatement by reason of the death of the original defendant Hairston.

The judgment of the court of appeals was entered in the following terms:

The court (without deciding the question of jurisdiction arising in this case) is of opinion that the county court of Floyd erred in ruling the defendant to trial, at the term next after the cause had been transferred by the said circuit superior court to the said county court, and at which it was docketed for the first time; especially when it was proved and admitted that the defendant had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend said court and prepare himself for trial. Therefore it is considered by the court, that the judgment of the circuit superior court of Montgomery, reversing the said judgment of the county court of Floyd, be affirmed, and that the defendant recover against the plaintiff his costs by him about his defence in this behalf expended. And the said Samuel Hairston senior having departed this life, and the court being of opinion that the action does not survive against his executor or administrator, it is ordered that this suit be abated.

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\*Spencer v. Pilcher.

July, 1839, Lewisburg.

(Absent BROOKE, J.)

**Forthcoming Bonds—Construction—Time for Delivery of Property.**—A forthcoming bond dated the 1st day of November 1834, being conditioned for the delivery of the property "on the third monday of November next," it is contended that there could be no breach of the condition until the third monday in November 1835: HELD by the court of appeals (construing the instrument according to the subject matter and the evident meaning of the parties) that the day for the delivery of the property was the third monday of November 1834.

**Same—Supersedeas to Original Judgment—Effect.**—A forthcoming bond being forfeited, notice is given that a motion will be made on it. After the notice, and before the term to which it is given, a supersedeas is awarded to the original judgment, and it is perfected by giving bond and security. The motion is then continued from term to term, until there is a decision affirming the original judgment. After that decision, but before a copy of it is received by the court in which the motion is pending, the motion is heard, and judgment entered against the obligors. It is objected that the court proceeded on its own unofficial information that the original judgment had been affirmed. But the only evidence in the record, to shew that a supersedeas had been awarded, is the supersedeas bond.

HELD, 1. the right to move on a forthcoming bond is not suspended by a supersedeas to the original judgment; and 2. whether this be so or not, the writ of supersedeas not having been given in evidence in the court below, there is no sufficient foundation for the objection to the proceedings of that court upon the motion.

On the first day of November 1834, William Spencer and John F. Snodgrass en-

\*See monographic note on "Statutory Bonds" appended to Goolsby v. Strother, 21 Gratt. 107.

The principal case is cited in Hudgins v. Marchant & Co., 28 Gratt. 183.

tered into a bond to Alexander H. Pilcher in the penalty of 700 dollars, with a condition whereby—after reciting that two negro men named Williamson and Caesar, the property of Spencer, were then in the custody of Jonas Beeson high sheriff of Wood county, by virtue of a *feri facias* issued from the office of the circuit court of Wood, at the suit of Alexander

491 \*H. Pilcher, against the goods and chattels of Spencer, for 317 dollars which Pilcher had recovered in that court for certain damages, and also 29 dollars 30 cents which by the same court were adjudged for his costs, amounting in the whole to 362 dollars 85 cents, including sheriff's commission and fee for the bond—it was provided that if Spencer should deliver to the sheriff the aforesaid property at the courthouse of Wood county on the third monday of November next, it being the time and place appointed for the sale of the aforesaid property, then the said obligation was to be void.

In the circuit court of Wood on the 2d of April 1835, there was a motion by Pilcher against Spencer and Snodgrass on this bond. Legal notice of the motion was proved by the oath of John R. Murdoch, a deputy sheriff, and the defendants were called but came not. Whereupon the motion was continued until the next term. Other continuances were entered from term to term, until September term 1837.

At that term, the defendants resisted the award of execution on the bond, on the ground that the notice proved was given on the 12th day of January 1835 for April term 1835, and that in fact the bond was not forfeited at the time the notice was given. But the court overruled the objection, and decided that the bond was forfeited on the 3d monday of November 1834; being of opinion that the true construction of the condition of the bond required the property to be delivered to the sheriff on the first 3d monday in November after its date. The defendants then stated to the court that the judgment on which the execution issued, and on which the bond was taken, had been superseded by the award of a writ of supersedeas by the court of appeals, and shewed to the court, by the supersedeas bond, that the supersedeas had been perfected by giving bond and security on the 17th of January 1835. There was no certificate of any kind from the clerk of the court of

492 \*appeals to the circuit court, shewing that the supersedeas had been tried or in any manner disposed of; but the court, though satisfied that this bond was taken under the judgment which had been superseded, overruled the last objection, because the judge knew, unofficially, that the supersedeas had been tried and the judgment affirmed. To all which opinions and decisions of the court, the defendants excepted.

Judgment was thereupon entered for the penalty of the bond and costs, to be discharged by the sum mentioned in the condition, with interest and costs. On Spencer's petition, a supersedeas was awarded to that judgment.

At the end of the record, the clerk copied the writ of *feri facias* returned with the bond and remaining filed therewith. The writ bore date the 3d of October 1834, and was returnable the first monday in December following.

H. J. Fisher for plaintiff in error.

William A. Harrison for defendant in error.

PARKER, J. The forthcoming bond in this case was dated the 1st day of November 1834, conditioned for the delivery of the property on the 3d monday of November next; and a question is made, whether the bond was forfeited by nondelivery of the property before the 3d monday in November 1835. If the instrument is to be construed secundum subjectam materiam and the evident meaning of the parties, (see Bac. Abr. Conditions, P.) there can be no difficulty on this point. The *fi. fa.* on which the property was taken, issued the 3d of October 1834, returnable to the 1st monday in December following. It was the duty of the sheriff to levy the execution and publish notice of the day of sale at the courthouse door of his county, and to make sale of the

property unless the owner entered  
493 into a bond to \*have the goods and chattels forthcoming on the day of sale. This day of sale must be taken to have been anterior to the return day of the execution; for the sheriff is directed, if a forthcoming bond is given, to return it to the office from which the execution issued, on the return day thereof; and in this case it seems to have been actually so returned. He had no authority, under the law, to postpone the day of sale for more than 12 months after the levy, and for nearly 12 months after the return day of the execution; and it would be preposterous to suppose that such was the meaning of the parties taking or giving a bond under the act of assembly respecting executions. As the property was to be delivered on the day appointed for the sale, and as that day was doubtless before the 1st monday in December 1834, "the 3d monday in November next" must have meant the first or next 3d monday in November after the date of the bond. That similar words have received the same construction, in cases where the subject matter afforded no guide, and which were in other respects less strong than this, will be satisfactorily shewn by the president in the opinion he is about to deliver.

If the bond was forfeited the 3d monday in November 1834, a supersedeas obtained to the original judgment afterwards, would not preclude the party from his right to have execution awarded on the forthcoming bond, which is a bar to all proceedings on the former judgment, and has itself the force of a judgment; for if it did, the plaintiff would lose his damages on the aggregate amount of the forthcoming bond, which he is certainly entitled to on affirmation. The court of appeals has impliedly sanctioned the right of the plaintiff to have judgment entered on the forthcoming bond after a supersedeas to the first judgment, by awarding a second writ to the last judg-

ment, instead of quashing it, or regarding it as a contempt of the order allowing  
494 \*the supersedeas—as in the case of *Monroe v. Webb's ex'ors*, 4 Munf. 73, and by extending the supersedeas first awarded, to the judgment subsequently obtained on the forthcoming bond, as in *Bell v. Bugg*, 4 Munf. 260.

But there is a further difficulty here. No writ of supersedeas was given in evidence in the court below. The supersedeas bond was produced, but that was not the best evidence of the fact to be proved. Nor will the implied admission of the judge that there was a supersedeas to the judgment, derived from his unofficial knowledge that the supersedeas had been tried and the judgment affirmed, serve to satisfy us of a fact which, if insisted on, ought to be established by legal evidence.

For these reasons, I am for affirming the judgment.

**TUCKER, P.** I am of opinion that the judgment in this case should be affirmed. The first error assigned is, that the motion was made while a supersedeas was depending in the court of appeals upon the original judgment, and that the court undertook to proceed upon its own unofficial information that the judgment had been affirmed. This objection involves two questions: 1. Is it true that the plaintiff cannot move for judgment on a delivery bond which was forfeited before the award of a supersedeas? 2. Was there any legal evidence of the existence of the supersedeas? Both questions must be answered in the negative. As to the first, the opinion of my brother Parker sufficiently disposes of it, and shews most clearly that the right to move on a forfeited forthcoming bond is not suspended by the pendency of a supersedeas.

As to the second question, there is no legal evidence in the record that there had been a supersedeas to the original judgment. Had the matter been pleaded, the defendant must have verified his plea by the record shewing the emanation of the supersedeas. The supersedeas bond would not have sufficed. Now, though  
495 pleading \*was not required on this motion, the same proof was necessary as if the matter had been pleaded. It was not enough, according to the pretensions of the plaintiff in error himself, that the court had unofficial knowledge of the fact that there had been an award of a supersedeas. This court then cannot know of its existence, and must decide the case as if there were none. If so, there was no error in proceeding to act upon the motion.

As to the second error assigned: it is alleged, that the bond being dated November 1, 1834, and the condition being for the delivery of the property "on the third monday in November next," the time of delivery was in November 1835, and so the bond had not been forfeited at the date of the notice, which was given to April term 1835. This depends upon the construction of the bond: and happily we are relieved from any difficulty as to this sheer technicality by the decided cases. In *Bac. Abr.*

*Conditions*, P. there are several cases. They have been all cited by the counsel of the plaintiff in error. In the first, the condition of an obligation was to deliver corn on the 29th of February next following the date. The following February had but 28 days, and it was decided that the obligor was not bound to deliver till leap year. *Leonard* 101. I should hesitate much before I should follow this judgment, even if it bore upon this case. The next case, from *Cro. Jac.* 646, is in point. The obligation was dated May 1, and the condition was to pay the 15th of May next ensuing: this, it was said, shall have relation to the day and not to the month, so as to be payable the 15th day of the same month, and not of "May next come twelvemonth." So where the bond bore date the 17th of November, and the condition was to pay £5. the 21st of November following, and £5. the 20th of December next after, it was held that the words referred to the day and not to the month, and so the first £5. was payable 4 days after \*date, instead of 12 months and 4 days. These cases would seem to be decisive. But two others have been cited, one from *Cro. Jac.* 677, and the other by the name of *Kettle v. Jones*, cited *Bac. Abr. ubi supra*. Both are identical, and the statement of one will therefore suffice. The condition of a bond dated 12th of May was to pay £10. on the 13th of May next following. These words were said to have relation to the month and not the day, and so the bond was not payable till May twelvemonth. The court say, these contracts are to be construed secundum subjectam materiam and the meaning of the parties. And they probably considered this but as a form adopted for giving credit for a twelvemonth and a day. Be this as it may, if the rule that the meaning of the parties must govern be applied to our case, there can be no question. A sheriff levying an execution on the 1st of November, and taking a delivery bond, fixes the day of sale for "the third monday in November next." Who can believe that the meaning of the parties was, that the sale was not to take place for 12 months? Who can doubt that the real intention was to fix the day of sale for the third monday of that month in which the bond was dated, and that the error has arisen either from haste or from the clumsy style of some deputy sheriff? I cannot: and I am therefore of opinion that there is no error in the judgment.

The other judges concurred in affirming the judgment.

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\**Bryan v. Cole &c.*

November, 1839, Richmond.

(Absent PARKER and CABELL, J.)

**Deed of Trust Conveying Personalty—Removal of Property—Registry.**—A deed of trust conveying personal chattels is recorded in the court of the county in which the property is at the time of making the deed. Afterwards the grantor, who has the property in possession, is permitted to

remove with the same out of that county, and there is a failure, for more than twelve months after such removal, to cause the deed to be delivered to the clerk of the court of the county into which the grantor has so removed. Whereupon an action is brought against the grantor by one of his creditors. The deed is then delivered to the clerk of the court of the county into which the grantor has removed, and is there recorded, before an execution against the grantor's chattels is delivered to the sheriff, and indeed before the grantor's creditor obtains judgment. HELD, the deed is valid against the creditor.

By a deed made the 21st of May 1821, between George W. Banks of the county of Essex of the one part, and Lawrence Muse of the same county of the other part, the former conveyed to the latter certain real property and personal chattels, in trust that Muse should hold the same to the use of the said George W. Banks and Charlotte his wife during their lives, without being subjected to any debt or contract theretofore made by the said George, or which he might thereafter make or enter into; and at the death of the said George and Charlotte, then in trust that the said Muse should convey the same to such children as the said Charlotte might have by the said George.

The parties residing in Essex county at the time the deed was made, it was, on the day of its date, acknowledged by them in the court of that county, and admitted to record.

In November 1821, Banks removed from Essex to the county of York, and carried with him, by permission \*of the trustee, the personal chattels conveyed, of which he retained possession in York from the time of his removal into the county until the property was levied on under an execution at the suit of Cole & Sheldon.

The debt from Banks to Cole & Sheldon arose on the first of July 1823, and was put in suit on the 5th of August 1826.

At a court held for York county the 15th of January 1827, the deed from Banks to Muse was produced in court, and, together with the certificate of its acknowledgment by the parties in the county court of Essex, ordered to be recorded.

In the suit of Cole & Sheldon against Banks, the plaintiffs obtained judgment the 4th of May 1827, and issued their execution the 17th of that month, which came to the hands of the sheriff of York the 23d of the same month, and was levied on most of the personal chattels embraced in the deed.

On the 16th of July 1827, Cole & Sheldon entered into an indemnifying bond, with sureties, to John F. Bryan the sheriff of York, and the property levied on was sold by Bryan's deputy.

Thereupon, an action was brought on the indemnifying bond, in the name of Bryan the sheriff of York, for the benefit of Muse as trustee, against Cole & Sheldon and their sureties, in which action the defendants pleaded conditions performed.

At the trial before the circuit court of York on the 9th of October 1833, after evidence had been given shewing the case to be as before stated, the defendants moved the court

to instruct the jury, that if they believed, from the evidence, that the debt of Banks to Cole & Sheldon arose after 12 months had elapsed from the time of Banks's removal in November 1821 with the property, and before the 15th of January 1827 when the deed was recorded in York, then the property embraced in the deed was liable to the debt of Cole & Sheldon, and the recording the same on the 15th of January 1827 where the property then was, did not protect the property against a debt which had been so contracted. This instruction the court gave; and the plaintiff excepted.

A verdict being found for the defendants, and judgment rendered thereupon, on the petition of the plaintiff a supersedeas was awarded.

Leigh, for the plaintiff in error, said, that the question in the case depended on the construction and effect of the statute 1 Rev. Code, ch. 99, § 11, p. 364.\* He insisted, that until Cole & Sheldon recovered judgment against Banks, and indeed until their fieri facias was delivered to the sheriff, they were, with respect to any personal property of their debtor Banks, creditors at large, having no rights whatsoever that attached upon any chattels in his possession. It was well settled, he said, that the phrase "all creditors," in all these statutes, means not creditors at large but creditors whose rights have attached on the subject. This deed was recorded in York before any rights of the creditors Cole & Sheldon attached upon the trust subject. \*It was duly recorded within the meaning and intent of the statute, as against those creditors.

There was no counsel for defendants in error.

BROOKE, J. The judge who decided this case seems to have supposed that as the deed was not recorded within twelve months after the removal of the property into York county, it was void as to all the creditors of the grantor, whether creditors at large or creditors whose rights had attached on the property. All these acts regulating conveyances have received a different construction. It was never supposed that if a deed under

\*The section referred to is in these words: "Every deed respecting the title of personal chattels, hereafter executed, which by law ought to be recorded, shall be recorded in the court of that county or corporation in which such property shall remain: and if afterwards the person claiming title under such deed shall permit any other person, in whose possession such property may be, to remove with the same, or any part thereof, out of the county or corporation in which such deed shall be recorded, and shall not, within twelve months after such removal, cause the deed aforesaid to be certified to the court of that county or corporation into which such other person shall so have removed, and to be delivered to the clerk to be there recorded, such deed, for so long as it shall not be recorded in such lastmentioned county or corporation court, and for so much of the property aforesaid as shall have been so removed, shall be void in law as to all purchasers thereof for valuable consideration, without notice, and as to all creditors."

one of the former acts was not recorded within eight months, as required by that act, it was void as to creditors at large, whose rights had not attached on the property before the deed was recorded after the expiration of the eight months. But independently of that construction of the former acts, the words in the act under consideration, "such deed, for so long as it shall not be recorded &c. shall be void &c." ought to put that question at rest. These express words were intended to give validity to the deed, though not recorded within the twelve months from the removal of the property into another county, as soon as it should afterwards be recorded in such county: and the judgment not having been rendered, and the fieri facias placed in the hands of the sheriff, before it was recorded according to the provisions of the act, Cole & Sheldon were still creditors at large, their rights having never attached on the property conveyed by the deed. I think, therefore, that the judgment in this case must be reversed, and the cause sent back to the circuit court.

TUCKER, P. I concur entirely in the interpretation given by the appellant's counsel, of the act of assembly, 1 Rev. Code, ch. 99, § 11. If, during the interval  
501 \*between the removal of Banks in November 1821, and the recording of the deed in January 1827, a judgment had been obtained and a fi. fa. delivered to the sheriff, the deed of trust would have offered no obstacle to its levy. But the recording here having taken place anterior to the judgment, Cole & Sheldon had no rights which had attached upon the chattels, until the deed of trust had been reususcitated in all its force by the recording in York county in January 1827. To give to the law any other interpretation, would be in effect to give a lien to the creditors at large, where no such lien had been contracted for. If there had been no deed of trust when the debt was contracted, Banks would have been at liberty, notwithstanding its contraction, to sell or incumber his property to any other person: and certainly the case before us is not less strong than it would be, if, instead of recording the old deed of trust, Banks had executed a new one. Had he done so, it would have withdrawn the chattels from the reach of Cole & Sheldon; and *pari ratione* the revivification of the original deed must have that effect. The effect of the act of assembly was indeed, as to transactions occurring in the interval between the removal and recording, merely to give to the deed the operation of a new deed, as of the date of its record in the county to which the property may have been removed. The instruction was therefore wrong. The judgment must be reversed, and a new trial directed, in which the instruction given on the former trial must not be repeated.

STANARD, J., concurring, judgment reversed, verdict set aside, and cause remanded for a new trial, in which the instruction given on the former trial is not to be repeated.

## 502 \*Skipwith &c. v. Mutual Assurance Society.

November, 1839, Richmond.

(Absent PARKER and CABELL, J.)

**Mutual Assurance Society\*—Motion against Assured—Record—Misjoinder of Defendants.**—The mutual assurance society move for judgment against two defendants, on a notice which is made part of the record, and shews that the motion is for quotas due the society per declarations numbered 1044, 778 and 1946. The defendants acknowledge legal notice of the motion, and the same is continued until the next term. At a subsequent term the plaintiffs obtain a judgment; the defendants "now failing to appear." The declarations of assurance referred to in the notice are filed by the plaintiffs, and copied by the clerk as part of the record for the appellate court. They shew that by the judgment, quotas which accrued after the property was insured by two persons, are recovered jointly against one of those persons and a former owner of the property. **Held.** 1. that the declarations of assurance constitute part of the record; and 2. that the judgment is thereby ascertained to be erroneous.

At a superior court of law for Cumberland county held on the 4th of October 1826, the mutual assurance society against fire on buildings of the state of Virginia, by their attorney, moved the court for judgment and award of execution against William Skipwith and John Trent, on a notice in the following words:

"To William Skipwith and John Trent.

Take notice, that on the first day of the next superior court of law to be holden for the county of Cumberland, the mutual assurance society against fire on buildings of the state of Virginia will, by their attorney, move the said court for judgment and award of execution against you for the sum of 378 dollars and 58 cents, that being the amount of the quota of the year 1816, the balance on quota of 1817, the quotas of 1819, 1820, 1821 and 1822, and quota of deficiency, on a merchantmill and storehouse in Cumberland county, due to said society per declarations duly signed, sealed and  
503 \*delivered, numbered 1044, 778 and 1946, and filed in the general office of assurance, and for interest on 20 dollars 1 cent part thereof from the 1st April 1816, on 57 cents another part thereof from 1st of April 1817, on 71 dollars 60 cents other parts thereof from the first day of April 1819, 1820, 1821 and 1822, and on 71 dollars 60 cents the balance thereof from the first day of October 1822, until payment, with costs, damages and expenses according to law and the rules and regulations of the said society.

James Rawlings, principal agent of the mutual assurance society against fire on buildings of the state of Virginia.

Office of the Mutual Assurance Society, Richmond, 2 Septem'r 1826."

\*On the subject of fire insurance, see monographic note on "Insurance, Fire and Marine" appended to Mutual, etc., Soc. v. Holt, 29 Gratt. 612.

The defendants by their attorney acknowledged legal notice of the motion, and the same was continued until the first day of the next term.

Afterwards it was continued on the 4th of May 1827 till the next term, and likewise on the 5th of October 1827 till the next term.

The next entry is on the 5th of May 1829. It states that the plaintiffs came by their attorney, "and the defendants having heretofore acknowledged legal notice of this motion, and now failing to appear, therefore it is considered by the court that the plaintiffs recover against the said defendants the sum of 378 dollars and 58 cents, with six per centum per annum interest on 20 dollars and 1 cent part thereof from the first day of April 1816, on 57 cents other part thereof from the first day of April 1817, on 71 dollars and 60 cents another part thereof from the first day of April 1820, on 71 dollars and 60 cents another part thereof from the first day of April 1821, on 71 dollars and 60 cents another part thereof from the first day of April 1822, and on 71 dollars and 60 cents another part thereof from the first day \*of October 1822, until paid, also seven and a half per cent. damages upon the said principal and interest according to law, and also their costs by them about their motion in this behalf expended."

The declarations referred to in the notice, and numbered 1044, 778 and 1946, were filed by the plaintiffs. No. 778 was a declaration by William Skipwith, made the 14th of January 1806. No. 1044 was a declaration by Henry Skipwith, made the 12th of June 1806. And No. 1946 was a revaluation of the buildings declared for assurance by declarations Nos. 778 and 1044, and a new declaration for assurance of the same buildings by James B. Woodson and John Trent, acting under the firm of James B. Woodson & Co. This revaluation and new declaration of assurance were made the 3d of March 1816.

A supersedeas was awarded to the judgment, on the petition of Skipwith and Trent, assigning the following errors:

1. The motion is stated to have been continued from term to term for several terms, without its appearing that the petitioners consented to such continuances, or were called, or otherwise notified therefore.

2. In October 1827, the motion is stated to have been continued until the ensuing term; and the next proceedings that appear were at the May term 1829. This chasm in the proceedings created a discontinuance.

3. At the May term 1829, judgment was rendered against the petitioners, without its appearing that they were called, or were present in court.

4. The judgment being by default, the record should shew sufficient grounds to warrant the recovery. If the declarations are not to be regarded as a part of the record, then there is no foundation for the judgment. If on the other hand, being referred to in the notice, they make a part of the case and a proper part of the

No. 778, executed by William Skipwith, cannot make him responsible for quotas falling due upon the property after it was declared for insurance by Woodson and Trent in March 1816, yet judgment is given against him for quotas and interest subsequent to that time: 2. because Trent, who declared for insurance with Woodson in 1816, was not liable separately, or in conjunction with Skipwith, but only in conjunction with his copartner; neither was Skipwith liable jointly with Trent.

Robertson for plaintiffs in error.

Macfarland for defendants in error.

TUCKER, P. I do not think that the objections made to the proceedings in this case in relation to the continuances have any validity. The party having appeared and acknowledged the notice, the case must have been regularly placed upon the docket, and then stood in court precisely upon the footing of other causes which are continued from term to term but not to any particular day, and which, under the general law of continuances, if not tried during the term, stand continued, without any order, until the next term. And after the defendant has once appeared, it is his duty to attend to his cause at every term until it has been decided or discontinued.

On the merits, however, the case is, I think, clearly against the appellees. The defendants not having appeared at the trial, as the record ascertains, there should appear upon it sufficient to warrant the judgment. From the manner in which this record is made up, I take it that the notice was spread upon it, and is therefore part of it. This was not the case in *Ayres v. Lewellen*, 3 Leigh 609. The notice here demands certain quotas, due

506 "as per declarations signed, sealed \*&c." These declarations being thus referred to, and being filed by the plaintiffs, make part of their case, and are, properly speaking, part of the record. In a summary motion on a forthcoming bond, the bond is considered a part of the record without being spread upon it by exception; for it is the foundation of the plaintiff's claim: and the bond certified by the clerk is taken to be that on which judgment was given. *Beale v. Wilson and others*, 4 Munf. 380. *Pari ratione* the declaration, in a case of the mutual assurance society, being the foundation of the demand, must be taken to be part of the case, even without an exception. If this be so, then is this judgment erroneous, since it makes the appellant Skipwith responsible for quotas subsequent to the revaluation and insurance of the same property by Woodson and Trent, and moreover enters a joint judgment against parties not jointly bound, while it severs the joint contract of Woodson and Trent, by pursuing Trent without Woodson. The judgment must therefore be reversed, and judgment entered that the plaintiffs take nothing by their motion; without prejudice to any other motion which may be hereafter made by the society against the proper parties for any quotas in arrear.



STANARD, J., and BROOKE, J., gave no opinion on the question of discontinuance, but concurred with the president on the merits.

Judgment reversed.

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**\*Platt v. Howland.**

December, 1839, Richmond.

(Absent PARKER and CABELL, J.)

**Chancery Practice—Decree against Absent Defendant—**

**How Redress Obtained.**—In a suit in equity against an absent defendant alleged to be indebted to the plaintiff, and a home defendant having effects in his hands, the plaintiff should prove himself in a legal manner to be a creditor of the absent defendant; but if a decree be rendered without such proof, the absent defendant cannot obtain redress by appealing from the decree; he must seek it in the mode prescribed by the statute, that is, he must appear in the court which pronounced the decree, and petition to have the cause reheard.

**Same—Same—Same.**—Upon the absent defendant's giving security for payment of costs, he will be admitted to answer the bill; but the court will not set aside the decree so soon as the answer is filed. After issue is joined, the parties on both sides will have an opportunity of examining their witnesses, the cause will be matured for rehearing, and, upon a rehearing, such decree will be made as may be just and right.

On the second of July 1834, Gideon Howland sued out of the office of the circuit court of Henrico a subpoena in chancery against Daniel Platt and Jonathan W. Beers, with an indorsement thereon, stating that it was "to attach the estate, moneys, debts, goods and effects of the defendant Daniel Platt in the hands of the other defendant, so that he be restrained from paying away, conveying or secreting the debts by him owing to, or

**\*Chancery Practice—Decree against Absent Defendant—How Redress Obtained.**—An absent defendant, against whom a decree has been made, cannot appeal from the decree. His only remedy is that provided by statute. The mode of relief provided by statute is for the defendant to appear in the court which pronounced the decree and petition to have the error complained of corrected. *Barbee v. Pannill*, 6 Gratt. 443, and *foot-note*; *Lenows v. Lenow*, 8 Gratt. 349, 353, and *foot-note*; *James River, etc., Co. v. Littlejohn*, 18 Gratt. 71; *Higginbotham v. Hazelden & Rohbrough*, 3 W. Va. 19; *Griñnan v. Edwards*, 5 W. Va. 114; *Vance v. Snyder*, 6 W. Va. 33; *Newman v. Mollohan*, 10 W. Va. 505; all citing the principal case as authority on the subject.

But, though the absent defendant has no right by reason of the statute to appeal, not having sought his rehearing in the court below, yet a codefendant, who has appeared, can nevertheless appeal before such rehearing has been sought, from a joint decree against him and the nonresident defendant, who has not been served with process or appeared; and such appeal necessarily brings under review the propriety of the whole decree, and devolves upon the court the duty of correcting and reversing it, if erroneous, in favor of both the nonresident defendant who has not appeared, and the defendant who has. *Lenows v. Lenow*, 8 Gratt. 352.

See further, monographic *note* on "Appeals."

the moneys, goods and effects in his hands belonging to the defendant Daniel Platt, until the further order of the court."

At the rule day to which the process was returnable, the plaintiff filed his bill, alleging that Platt was justly indebted to him in the sum of 433 dollars and 40 cents, with interest thereon from the eleventh day of December

1833, as appeared by his account there-  
508 with filed; \*that Platt resided out of the commonwealth; and that Beers had effects in his possession to a large amount, belonging to Platt.

Beers answered, saying that he has no personal knowledge of the plaintiff's demand, except from admissions of Platt, from which he believes Platt to be indebted to the plaintiff; that he has in his hands, as the property of Platt consigned by him for sale, two barouches and one sulky, which he supposes to be worth 500 dollars or thereabouts, which he is ready to surrender to the order of the court; that he has not had a final settlement of accounts with Platt, and cannot say, therefore, whether he owes Platt any money; but he will settle the account at any moment, and account at once for the balance, if any.

Against Platt, the plaintiff proceeded in the mode prescribed by law against absent defendants; and he failing to appear and answer, on the motion of the plaintiff, his bill was taken for confessed as to that defendant. And the cause coming on to be heard, the court, on the 23d of January 1836, decreed that the sheriff of Henrico county sell the two barouches and sulky by public auction, to the highest bidder, in the manner prescribed by law for the sale of perishable property, and out of the proceeds of sale pay to the plaintiff the sum of 433 dollars, with interest from the 11th of December 1833 till paid, and the costs, and deposit the residue (if any) in the bank of Virginia, to the credit of the cause. In case there should not be a sum sufficient, after deducting the charges of sale, to satisfy the sum aforesaid with interest and costs, then, unless Beers should admit a fund in his hands sufficient to make up the deficiency, he was directed to render before a commissioner an account of the property, goods and moneys of Platt which had come to his hands prior to the service of the subpoena. The decree provided that the plaintiff was not to

509 have the benefit \*thereof, until he, or some person for him, should enter into bond with security, in the clerk's office, in a penalty equal to double the money to be received by him under the decree, payable to Platt, and conditioned as prescribed by law in the case of absent defendants.

Bond with security was given accordingly. On the 4th of July 1836, Platt presented a petition to a judge of this court for an appeal from the decree, assigning as error, that it was rendered without any proof to support the claim. The judge allowed the appeal on the usual terms; but afterwards on the 20th of February 1837, this court, being of opinion that it was improvidently allowed, ordered that it be dismissed with costs.

A copy of the order of this court dismissing the appeal being transmitted to the court

below, the plaintiff and the defendant Platt were heard in that court, by counsel, on the 10th of April 1837, upon the motion of the said defendant for leave to file his answer.

The court, having considered the motion, made an order on the 19th of June 1837, allowing the answer to be filed, upon security being given for the payment of such costs as might be awarded to the plaintiff, and also for the fees which would become due from the said defendant to the officers of the court. The security was accordingly given, and the defendant filed his answer, to which the plaintiff replied generally. Immediately thereupon, the defendant moved the court to set aside the interlocutory decree pronounced on the 23d of January 1836; which motion was opposed by the plaintiff. The parties being fully heard, the motion was overruled.

Whereupon, on the petition of Platt, an appeal was again allowed him by a judge of this court.

Mayo for the appellant.

Lyons for the appellee.

510 \*TUCKER, P. There is no error in these proceedings of which the defendant Platt can avail himself. Having submitted to a decree against him as an absent defendant, the statute leaves him but one remedy. That remedy is the right to appear and file his answer, and proceed to have the cause reheard, and the decree rescinded, if, after hearing, it shall prove to be erroneous. The appellant, then, having instituted his proceeding according to the statute for rescinding the original decree, cannot, at the same time, arraign it by proceeding by appeal in this court. The correctness of the original decree is thus out of the case, and the only question which the appellant can raise is whether, before the cause is prepared for a rehearing, the absent defendant has a right to demand that the decree already made should be set aside. I think not. Upon his petition to rehear the cause, he may, on giving security for costs only, file his answer, to which the plaintiff may reply; and issue may be joined, witnesses examined, and other proceedings, decree and execution had, as may be just and right in the cause. To rescind the former decree before the cause is matured for rehearing, would be to adjudge first and hear afterwards. The practice would moreover be most mischievous in many respects. Whether the attached effects, or the effects in the hands of the garnishee, would or would not be discharged, it may not be necessary to decide. But if the decree be set aside upon filing the answer, then it would seem to follow that all the proceedings under it must be set aside also; and thus the sale of the attached effects, the payment by the garnishee, and the receipt of his demand by the plaintiff, may be vacated at any time within seven years after the decree, although, upon the rehearing, it may turn out that the first decree is unassailable. This would not only be without the sanction of the statute, but in conflict with the general principles as to bills of

511 \*review and petitions for rehearing, that such bill or petition does not prevent the execution of a decree, and money

decreed must be paid before the bill is filed, though it may afterwards be ordered to be refunded. Mitford's Plead. 79, 80; Hinde 58, 59. In this regard, there is no difference between reviewing and rehearing, though in both a discretion may be exercised in suspending such parts of a decree as if once performed would place the defendant beyond the relief of the court. Ibid. The court therefore very properly declined, at this stage of the cause, to set aside the first decree; that being to be done after a rehearing only. The appeal is therefore again premature, and the order of the circuit must accordingly be affirmed.

The other judges concurring, order affirmed.

## 512 \*Armistead v. Armisteads.

December, 1839, Richmond.

(Absent PARKER\* and CABELL, J.)

**English Case Disapproved.**—The decision of the house of lords in *Rowe v. Young*, 2 Brod. & Bing. 165, 6 Eng. Com. Law Rep. 53, 2 Bligh 391, examined and disapproved.

**Promissory Note—Action against Makers—Neither Averment Nor Proof of Presentment and Demand Necessary.**—In debt against the makers of a promissory note (made in Virginia) negotiable and payable at the United States branch bank at Washington City, the first count of the declaration, after describing the note, averred that the same was duly presented at the bank, and payment there required. At the trial, there being no proof of a demand of payment at the bank, the circuit court instructed the jury that the plaintiff could not recover on this count. The

\*He decided the cause in the court below.

**+Promissory Note—Action against Makers—Neither Averment Nor Proof of Presentment and Demand Necessary.**—In *Hall v. Bank of Virginia*, 14 W. Va. 633, it is said: "It has been decided in Virginia, that if a note be payable at a branch of a bank at a particular specified time. It is not necessary to aver and prove due presentation of the note and demand of payment at the bank, in order to entitle the plaintiff to recover of the maker of the note. See *Watkins v. Crouch*, 5 Leigh 522; *Armistead v. Armisteads*, 10 Leigh 512. From these decisions it appears to have been doubtful, whether if the note was payable at a branch bank on demand instead of at a specified time, it would or would not be necessary to aver and prove presentment and demand at such branch bank before suit. To settle this question, and to put bills of exchange accepted or notes payable at a specified place on demand on the same footing as bills accepted or notes payable at a specified place and time, was, it seems to me, one of the objects of the passage of the 1st section of chapter 144 of the Code of 1860, page 628."

In *Peabody Ins. Co. v. Wilson*, 29 W. Va. 543, 2 S. E. Rep. 896, a promissory note was payable at a specified time and at a specified place. On the authority of the principal case and *Watkins v. Crouch*, 5 Leigh 522, the court said that the makers of the note were liable for the amount of it without presentment, demand, protest, or notice thereof.

See further on this subject, monographic note on "Bills, Notes and Checks" appended to *Archer v. Ward*, 9 Gratt. 622.

second count of the same declaration merely set forth the note, without any averment of presentment at the place; and the defendants having demurred thereto, the circuit court sustained the demurrer. **Held**, the circuit court erred in sustaining the demurrer, and also in its instruction to the jury.

**Same—Payable on Demand—No Default of Maker until Demand Made.**—This decision does not embrace the case of a note of obligation payable, in terms, on demand at a particular place, without specification of time, or payable, in terms, on demand at a particular place after the lapse of a specified time. In such cases, it would probably be held that there is no default of the maker or acceptor until such demand be made, and consequently that no action would accrue to the payee until such demand should be made. Per **STANARD, J.**

John B. Armistead declared against John C. Armistead and Robert L. Armistead, in debt. After a demurrer by the defendants, the plaintiff filed an amended declaration, containing five counts. The first count set forth, that the defendants, on the 24th of October 1823, at the county of Fauquier, made and signed their certain note in writing, by which they jointly and severally promised to pay to the plaintiff or order, on the 25th day of December 1824, the sum of 250 dollars, negotiable and payable at the United States branch bank at Washington City, for value received; and averred that afterwards, to wit, on the 25th day of December 1824, at the United States branch bank at Washington City, to wit, at the county aforesaid, the said note was duly presented at the said bank for payment, and payment of the said sum of money therein specified was then and there duly required of the cashier thereof, but that neither the cashier of the said bank, nor the defendants, nor any other person or persons on behalf of the said defendants, did or would, at the said time when the said note was so presented and shewn for payment thereof as aforesaid, or at any time before or afterwards, pay the said sum of money therein specified, or any part thereof, but wholly neglected and refused so to do: by reason whereof an action accrued to the plaintiff to demand and have of and from the defendants the said sum of 250 dollars, parcel of the sum demanded.

The second count merely set forth the note, and then concluded that by reason thereof, action accrued to the plaintiff to demand and have of and from the defendants the further sum of 250 dollars, parcel of the sum demanded.

The third count was for money lent; the fourth, for money had and received; and the fifth, on an insimul computassent.

To the second count of this amended declaration the defendants demurred generally, and the plaintiff joined in the demurrer.

The superior court of Fauquier, on the 9th of March 1830, sustained the demurrer to the second count. The defendant then pleaded nil debet, and a jury was impanelled to try the issue joined on the plea.

A bill of exceptions was filed, stating, that

at the trial of the cause, which was brought (as appeared by an indorsement on the writ) for the benefit of Enos Wildman, the said Wildman's counsel proved that the defendants had executed the note set forth in 514 the first and \*second counts, but failing to prove any demand for payment at the United States branch bank at Washington City, the court instructed the jury that he could not recover on the first count. The plaintiff's counsel thereupon insisted that he was entitled to recover on that evidence, under the count for money had and received to his the nominal plaintiff's use; but the court was of a different opinion, and so instructed the jury. The beneficiary plaintiff then proved by a witness, that when the note in the first and second counts mentioned was executed by the defendants to John B. Armistead their father, he the witness was present, and the parties said it was for the prospective rent of the farm they were living on; and the said plaintiff insisted that under this evidence he was entitled to recover on the insimul computassent count: but the court, on the motion of the defendants, instructed the jury that the evidence aforesaid did not entitle the plaintiff to recover on that count. To all which instructions and opinions the beneficiary plaintiff by his counsel, in the name of the plaintiff on the record, excepted.

A verdict being found for the defendants, and judgment rendered thereupon, a superseas was awarded.

The cause was argued in this court by Robertson for the plaintiff, and Carter and Harrison for the defendants.

Robertson insisted, that the law of Virginia, *lex loci contractus*, was to be regarded by the court as that which governed the contract. Such was the general rule, and this case formed no exception. There was nothing in the pleadings to shew that there was indeed any difference between the law of Virginia and that of the district of Columbia; and the court could not judicially take notice what the law of the district was, unless pleaded, or proved at the trial below. Assuming the law of Virginia as that which governed the case, there could be no doubt that the demurrer to the second

515 \*count was improperly sustained. The statute 3 and 4 Anne, putting promissory notes on the footing of bills of exchange, was never in force in Virginia: and our own statutes placed no other notes on that footing, than such as were payable and negotiable at one or other of our state banks. The promissory note in this case was therefore a common law paper, not governed by the law merchant. On such a paper an action might be maintained without averring or proving a demand at the time or place, however particularly designated in the body of the instrument. For this he referred the court to the cases cited and commented upon by Richardson, J., in delivering his opinion in *Rowe v. Young*, 2 Bligh 426-9. These cases, and the authority of 1 Wms. Saund. 33a, and note 2, proved, he said, that in actions on such papers at common law, no special demand was required to be averred or proved,

where there was an antecedent debt or duty; the licet sæpius requisitus, and the institution of the suit, being a sufficient averment and demand, unless in cases where there was a collateral undertaking, or where the demand or request was specially required as a precedent condition. The case of *Sander-son v. Bowes*, 14 East 500, was itself an authority on these points. In all such cases at common law, the objection, if it could be taken at all, was matter of defence by plea, and that plea must aver that the defendant was ready at the place &c. and still is ready &c. But admitting the law of the district of Columbia to govern the case, and that law to place the note on the footing of bills of exchange, still no special demand need be averred or proved. The case of *Rowe v. Young* is supposed to decide otherwise. The manifest injustice of that decision, the character of the tribunal which made it, and the decided reprobation of the ablest judges

both in England and the United States, 516 as well as that of the \*whole commercial world, are sufficient to overturn its authority. The house of lords could not be considered here as a body likely to be well versed in intricate questions of law. The weight of authority was manifestly against them in that particular case. They had referred the question to the twelve judges, and the result was that eight out of the twelve, possessing the most decided superiority in point of judicial ability, gave their opinions that as against the acceptor of a bill of exchange, on an acceptance payable at a particular place, there was no necessity to aver or prove a demand prior to the action. The acceptor was regarded *prima facie* as the debtor: it was upon this ground they proceeded: and it applies a *fortiori* to cases where the payee sues the maker,—in other words, where the creditor sues his debtor. Conceding, for the sake of argument, that the note was brought within the influence of the decision in *Rowe v. Young*, yet the action, he insisted, was maintainable on the money counts. The note itself was *prima facie* evidence of money lent or advanced, and a recovery might on that ground be had on the count for money had and received. This doctrine was familiar to the court. *Meredith v. Chute*, 2 *Ld. Raym.* 760; *Grant v. Vaughan*, 3 *Burr.* 1516; *Tatlock v. Harris*, 3 *T. R.* 174; *Vere v. Lewis*, *Id.* 182; *Minet v. Gibson*, *Id.* 481. But the court below instructed the jury that such recovery could not be had on that count, or on the count for money lent. The plaintiff was moreover entitled to recover on the *insimul computassent* count, on evidence proving the note to have been given on a valuable consideration. It is true, there was only a single item of account, but it had been settled that an accounting or settlement between parties, though relating to but one item, might be given in evidence on the *insimul computassent* count. *Knowles and others v. Michel &c.*, 13 *East* 249; 1 *Chit. Pl.* 345.

517 \*Carter, for the defendants, after remarking that the note appeared not to be payable in Virginia, but "negotiable

and payable at the United States branch bank at Washington City," referred to the rule that where a contract is to be performed in any other place than that in which it is made, it is governed, as to its validity, nature, obligation and interpretation, by the law of the place of performance. *Story's Conflict of Laws*, § 232, 3, 4, 5, and § 248, 252, 272; *Robinson v. Bland*, 2 *Burr.* 1077; *Chitty on Bills* 191, 193; *Bank of Washington v. Triplett &c.*, 1 *Peters* 34. He said that by the act of congress of February 1801 in relation to the district of Columbia, that part of the district ceded to the federal government by Virginia was put under the laws of Virginia as they then existed, and that part ceded by Maryland was put under the then laws of Maryland. 3 *Story's Laws U. S.* 2089. The enquiry then is, what were the laws of Maryland upon this subject? In *Lindo v. Gardner*, 1 *Cranch* 343, 4, (decided in February 1803) it is distinctly stated that the statute of 3 and 4 *Anne*, ch. 9, is in Maryland the law of the land, "and that the courts of Maryland, in the construction of that statute, have always respected the adjudications of the english courts." It being ascertained that this instrument would be held in the district to be negotiable, this court, in passing upon it here, will also treat it as negotiable; and it being ascertained that the courts of Maryland would apply to this paper the decisions of the english courts under the statute of *Anne*, this court will be governed by the same decisions, even if they were opposed (which they are not) by any decisions in Virginia. What then are the english decisions under the statute of *Anne*, applicable to the question here? They will be found stated in a note of the reporter to *Head &c. v. Sewell*, 1 *Holt* 363; 3 *Eng. Com. Law Rep.* 130, 31. It is true that in *Rowe v. Young*, 2 *Bligh* 391, some of the english

518 \*judges doubted whether the rule of that case should be applied to acceptors of bills of a particular kind. But there was very little if any doubt as to makers of notes payable, in the body of them, at a particular place. Opinion of lord Eldon, p. 400, and of Dallas, J., p. 501. Certain it is, that since the decision of the house of lords, it is considered as settled in England, that where a promissory note is made payable, or bill of exchange is accepted payable, at a particular place, it is necessary, in an action against the maker or acceptor, to aver and prove a presentment at the place. So it is stated by judge Carr, in *Barrett v. Wills*, 4 *Leigh* 116. If, then, there were any decisions the other way in Virginia, the court should nevertheless, in this case, follow the decision of the house of lords in *Rowe v. Young*. But there are no such decisions in Virginia. In *Barrett v. Wills* the point is merely adverted to, without any opinion being given upon it. And in *Watkins v. Crouch & Co.*, 5 *Leigh* 522, though some of the judges gave opinions upon the question, it was very properly left open. All then that the court has to do here, is to decide according to the law of the district of Columbia; the law of Virginia not having been settled otherwise. If, he said, the note was not sufficient by

itself to sustain the first count, it was equally insufficient to sustain any other count. The instruction that the note, being given for prospective rent, was not sufficient under the insimul computassent count, was clearly right. For as that count can only be sustained upon a settlement of mutual accounts, and an acknowledgment on such settlement of a subsisting balance, the balance must be due at the time of the settlement, which could not be if the rent was prospective.

Harrison, on the same side, strenuously insisted that even though the court should not consider the law of the district of Columbia as governing the case, still it  
519 \*should follow the decision of the house of lords in *Rowe v. Young*, sustained as it was by the two lord chancellors, and by the opinions of other able judges.

Robertson, in reply, argued very fully the question whether the law of Virginia, or that of the district, should govern the case. He insisted that the law of Virginia should govern, but regarded the question as not important, unless it appeared that the law of the district differed from that of Virginia, which he said had not been shewn. The case of *Lindo v. Gardner*, 1 Cranch 343, he considered too vague to authorize the conclusion which it was cited to sustain. He went into a full examination of the case of *Rowe v. Young*, the reasons on which it was founded, and the comparative weight of conflicting authority. It was the usage, he said, both here and in England, to institute such comparisons. Information is looked for from men in proportion to their capacity to give it. *Cuilibet in arte sua credendum est*. Viewed in this aspect, the opinions of the lords on questions of law were absolutely entitled to no consideration. They themselves, sensible of this, had usually acknowledged their ignorance by appealing to the judges learned in the laws. They had done so in this case, and afterwards rashly overruled the opinions of the great majority of the ablest of those judges—eight out of the twelve—the minority being almost exclusively judges of the common pleas, of inferior ability. It was said, much weight was to be attached to the opinions of the two chancellors, Eldon and Redesdale. This would perhaps be true if it were a question of equity. But on a question at common law, we habitually resort to the king's bench as the ablest expounder of its principles. Chancellors are often more rigorous in their exposition of all laws than common law judges. If an interpretation be wanted according to the equity of the case, apply to a common law judge: if *stricti juris*, to a chancellor. The counsel for the ap-  
520 pellees, \*founding themselves on lord Eldon's observations, had endeavoured to discriminate between bills of exchange and promissory notes, holding it as a settled rule that whatever might be thought of *Rowe v. Young*, relating as it did to an action against the acceptor of a bill of exchange, demand &c. must be proved in an action on a promissory note payable at a particular place. In answer to this, he referred to the remarks of Richardson, J., in *Rowe v. Young*,

2 Bligh 429, and still more particularly to the masterly judgment pronounced by Bayley, J., (p. 472,) whose authority on questions of mercantile law he considered superior to that of all the judges of the common pleas and all the lords put together. There was no distinction in England, he said, between bills of exchange and promissory notes, as regarded this question. But he especially asked the attention of the court to the cases themselves in which the doctrine relative to promissory notes is thought to be settled—*Sanderson v. Bowes*, 14 East 500; *Dickinson v. Bowes*, 16 East 110; *Howe v. Bowes*, Id. 112, and the cases in the common pleas. They were all on a banker's cash notes payable on demand at his banking house. The demand, therefore, was essential to fix responsibility or give action. They were cases where the demand was expressly made a precedent condition: and lord Ellenborough, in *Sanderson v. Bowes*, distinguishes such cases from cases where the note was payable at a certain time, and he and Bayley and the other judges put their judgments expressly on that ground. So that these cases are by no means similar to that at bar; and the principal is one that no court will ever be disposed to extend to a new class of cases. *Dickinson v. Bowes* was decided without argument, and followed by *Howe v. Bowes*, in which the rigorous doctrine was qualified by holding demand excused where the plaintiff averred that the door of the banking house was closed. This question had under-  
gone a full examination in our own

521 \*country, and the principle established by the case of *Rowe v. Young* had been discountenanced by our courts. In New York, the most commercial state in the union, it had been repeatedly overruled. *Wolcott v. Van Santvoord*, 17 Johns. 248; *Caldwell v. Cassidy*, 8 Cow. 271. These were decisions on promissory notes. They established that no demand was necessary prior to action. The same doctrine was held in Massachusetts. And in *Watkins v. Crouch & Co.* in this court, the president and judge Cabell expressed decided disapprobation of the judgment in *Rowe v. Young*.

The day after the argument, Robertson mentioned, that he had been informed the court of appeals of Maryland had disapproved the decision in *Rowe v. Young*, and decided in the manner now contended for by him. Their decision was in the case of *Bowie v. Duvall*, 1 Gill & Johnson 175.

STANARD, J. The counsel of the defendants in error have, to support the judgment of the circuit court in this case, endeavoured to maintain three propositions: 1st, That the note on which the suit is brought being made payable in Washington, the laws of that part of the district of Columbia govern the construction and effect of the contract. 2dly, That the laws of Maryland are those of that part of the district; that the statute of 3 and 4 Anne forms a part of those laws; and consequently the note in question is a commercial negotiable security, the obligation and effect of which are to be ascertained by the *lex mercatoria*. 3dly, That such being the nature of the note, no action can be

maintained on it, unless it be alleged and proved that it was presented by the payee or holder, for payment, at the time and place specified on the face of the note.

Conceding, for the purposes of this case, that the first and second of the foregoing propositions are correct, \*the defendants in error would perhaps find an insuperable difficulty in availing themselves in this case of the second; because the laws of Maryland are not found as matters of fact, and non constat what those laws are, unless the court can take judicial notice of them: and if it could, then, according to the decision of the supreme court of that state, the third proposition is not sustainable, but on the contrary that decision ascertains, that to the maintenance of an action on the note in question, it is not necessary to allege or prove the presentment of the note by the payee or holder, at the time and place specified on the face of it.

The question, however, involved in the third proposition is one of general importance in relation to commercial securities that are undeniably such according to our laws, and I deem it fit that the public should not be left in uncertainty as to the judgment of this court on that question: and as it has been very fully and ably discussed, and I have formed a distinct and decided opinion on it, I think it proper to express it on this occasion.

My opinion is, that it is not necessary, to sustain an action against the acceptor of a bill of exchange or maker of a promissory note payable at a time and place specified in the acceptance or note, to aver or prove a presentment and demand at the time and place so specified. This opinion is sustained by eight of the twelve common law judges of England, in the case of *Rowe v. Young*, 2 Brod. & Bing. 165; 6 Eng. Com. Law Rep. 53,—by the decision of the supreme courts of all the states in which it has been (as far as I am informed) adjudicated, as is shewn by the cases of *Foden & Slater v. Sharp*, 8 Johns. 183; *Wolcott v. Van Santvoorden*, 17 Johns. 248; *Caldwell v. Cassidy*, 8 Cowen 271; *Weed v. Houten*, 4 Halst. 189; *Bowie v. Duvall*, 1 Gill & Johns. 175; *Ruggles v. Patten*, 8 Mass.

Rep. 480; *M'Nairy v. Bell*, 1 Yerger 523 502; *Mulhovin v. Hannum*, \*2 Yerger 81, and by the unanimous decision of the supreme court in the case of *Wallace v. M'Connell*, 13 Peters 136.

The full discussion that the question received in some of those cases supersedes the necessity of entering upon that discussion here. The cases furnish a firm foundation of authority for the opinion I have expressed; and the arguments of the judges in some of them furnish a full exposition of the principles of law, reason and justice by which it is sustained. It is perhaps a needless caution to say that this opinion does not embrace the case of a note or acceptance payable, in terms, on demand at a particular place, without specification of time, or payable, in terms, on demand at a particular place, after the lapse of a specified time. In such cases it would probably be held that there is no default of the maker or acceptor until such demand be made: and

consequently that no action would accrue to the payee until such demand should be made.

*BROOKE, J.* I was surprised, not at the ability (for of that we have had other examples) but by the earnestness with which this case was argued by the counsel of the appellees. Relying on the decision in the house of lords in the case of *Rowe v. Young*, 2 Brod. & Bing. 165, they overlooked the cases decided in this country. In the case in the supreme court of *Wallace v. M'Connell*, 13 Peters 136, they would have seen in the opinion of justice Thompson, who delivered the judgment of the court, the whole doctrine on the point before that court thoroughly examined, and all the cases in England and this country cited. The difference between the king's bench and common pleas on this point is very remarkable; the first holding that it was unnecessary to aver presentment of a bill of exchange at the time and place specified in the

acceptance of the bill, to sustain the action by the holder; and the other, \*that without such averment and proof, the plaintiff could not maintain the action. So also on a note in which the time and place are specified on its face. In the case before cited of *Wallace v. M'Connell*, a very proper notice is taken of the able discussion by the president of this court in the case of *Watkins v. Crouch & Co.*, 5 Leigh 540. Though I differed with the court in that case, it was not on the question now before us, or the principle which ought to govern its decision. I differed with the president in thinking that question as regarded the indorser (for there was no question as to the drawer of the note) was not the question of indemnity by the deed of trust, but a question of notice to the indorser that the note would be dishonoured when due, and that he would be looked to for payment. I thought (as will be seen by reference to my opinion) that the circumstances therein enumerated were full proof of notice, nor could I see that full indemnity by the deed of trust was material. I could not see that to the indorser, having full notice that the note would not be paid, the presentment of it at the time and place specified in it was of the smallest importance. I thought it of no more importance to him than the drawer, and that substance was sacrificed to technicality in holding a different opinion.

I concur entirely in the opinion delivered by judge Stanard in this case, and in the entry agreed upon.

*TUCKER, P.* The principal question which has been discussed in this case is, whether it is necessary, in a declaration on a promissory note against the maker, to aver a presentment and demand at the time and place specified on the face of the note for its payment? This question was so fully examined by me in the case of *Watkins v. Crouch & Co.*, 5 Leigh 522, that I have only found it necessary to look again very narrowly into the grounds of the opinion there given, and to weigh the \*additional considerations which have been presented to the court in the able argument of this case. I have done so, and still adhere to my former opinion, that in an action against the maker of a promissory

note, the plaintiff is under no obligation to aver in his declaration a presentment and demand at the place and on the day specified in the note for payment. The only consequence of his neglect to present is that the maker, if he was ready at the time and place to make the payment, may plead that matter in bar of damages and costs; but he must at the same time bring the money into court, which the plaintiff will be entitled to receive. A further consequence indeed might follow, if any loss had been sustained by occasion of his failure to present; but this must be set up as matter of defence. These principles are so ably sustained by a majority of the judges in the case of *Rowe v. Young*, 2 Brod. & Bingham 165, as to render unnecessary any farther attempt to fortify and support them. That case was indeed against the acceptor of a bill of exchange; but the decision as to him was founded upon the theory of bills of exchange, that he is the real debtor: which is undeniably the case with the maker of the note. In that case too, as in this, the declaration omitted the averment of demand at the time and place, and upon a demurrer for that cause, a majority of the judges were of opinion that the declaration was good.

Much argument was used to prove that by the law of Maryland this note would stand upon the footing of bills of exchange, and that, as it was payable in that part of the district which is governed by the laws of Maryland, it must be so considered here. Besides, however, the defect in the case in not finding what the law of Maryland is (which we apprehend to be necessary if this cause is to be decided under it), it turns out upon examination, unpropitiously for the argument, that the court of appeals have solemnly decided the question in 526 \*that state against the necessity of averring a presentment of the note at the time and place appointed for the payment, although it is conceded that promissory notes are there considered as standing upon the footing of bills of exchange. *Bowie v. Duvall*, 1 Gill & John. 175. If then the law of the place of payment governs the case, it must be decided against the defendant; and if the *lex loci contractus* prevails, the note is not commercial paper, and must be governed by those common law rules which regard the presentment at the time and place of payment not as a condition precedent to be performed by the creditor, but as a mere matter of arrangement, which, if not complied with by him, will enable the defendant to save the damages and costs, if he is punctual to the engagement on his part: but he must bring the money into court; for that is necessary in the yet stronger case of a tender of the money by the debtor, and a refusal to receive it by the creditor. 6 Bac. Abr. 464, 465.

According to my view of this case, then, the instruction given was erroneous; the demurrer to the second count should have been overruled, and judgment entered for the plaintiff on that count. I should therefore be of opinion to reverse the judgment, set aside the verdict, and (entering such judgment as the court below ought to have

rendered) to overrule the demurrer, and enter judgment for the plaintiff on the second count, with an award of a writ of enquiry of damages, granting leave to the defendants to plead any other plea to the said count if they please. The cause should then go back for a new trial upon the other issues and the writ of enquiry on the second count. My brethren, however, prefer a somewhat different entry, which will accordingly be made.

The entry in the court of appeals was in the following terms:

527 \*The court is of opinion that the superior court erred in sustaining the demurrer to the second count of the declaration, and also in its instruction to the jury, that the plaintiff was not entitled to recover on the first count, because he had not proved presentment and demand of the note, at its maturity, at the office of discount and deposit of the bank of the United States in Washington; and that the said judgment is erroneous." Therefore judgment reversed, demurrer to second count overruled, verdict on the issue to the country set aside, and cause remanded to circuit court for a new trial of the issue to be had in conformity with the foregoing judgment.

#### Adams's Adm'r v. Adams's Adm'r.

December, 1839, Richmond.

(Absent PARKER and CABELL, J.)

**Legacies—Annuities—Interest on Arrears—Liability of Administrator d. b. n.\*—Case at Bar.**—A testator directs his executors to set apart so much of his property, not specially bequeathed, as they may think sufficient to produce a clear annual income, by rent or interest, of 2000 dollars, which amount he desires them to pay in manner following, viz. the sum of 500 dollars annually to his sisters and niece, to be paid to each of them for and during her life. The executors fail to set apart property as directed, and die largely indebted to the estate, and wholly insolvent. In a suit by one of the annuitants against the administrator *de bonis non*, she claims not only the principal which the executors failed to pay her, but interest thereon. HELD, to decree for such interest against the administrator *de bonis non*, and thereby diminish the estate of the residuary devisees and legatees, is erroneous.

The will of Richard Adams contained the following clause: "It is my wish and desire that my executors, \*hereinafter to be appointed, will set apart as much of my property, not herein specially bequeathed, as they may think sufficient to produce a clear annual income, by rent or interest, of 2000 dollars, which amount I wish then to pay, and I hereby give, in manner following: the sum of 500 dollars annually to my sisters Tabitha, Elizabeth Griffin and Ann Carrington, and to my niece Sally Bland Adams, to be paid to each of them for and during her life." The will bore date the 3d of August 1815, and was admitted to record

\*See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

the 13th of January 1817. John Adams and Samuel G. Adams qualified as executors. The will directed that no security should be required of them, other than their own joint bond; and none other was given.

After the death of Samuel G. Adams, to wit, on the 24th of July 1824, a bill was filed in the name of Sally Bland Adams, a person of unsound mind, by Edmund Christian her next friend and committee, setting forth, that she had never received her annuity of 500 dollars, or any part thereof, and praying that the arrearages thereof due the complainant may be paid to her, and a fund set apart for the payment thereof in future, out of the estate, real or personal, of the said testator. The defendants to this bill were John Adams the surviving executor of Richard Adams, and Tabitha Adams, Elizabeth Griffin Adams and Ann Carrington, who were jointly interested with the complainant in the fund to be provided for the annuities.

Pending the cause, all the parties died. It was revived in the name of Richard Adams as administrator of Sally Bland Adams, against William D. Wren as sergeant of Richmond and administrator of John Adams, George M. Carrington administrator de bonis non with the will annexed of Richard Adams, the same George M. Carrington as administrator of Ann Carrington and Tabitha Adams, and Richard A. Carrington as executor of Elizabeth G. Adams.

529 \*George M. Carrington answered, stating, that he does not know whether any fund, real or personal, was ever set apart by the executors of Richard Adams, or the survivor of them, for the payment of the annuities; that payments have been made by the executors on account of the annuities, the amount of which payments will appear by their accounts; and that he has not the funds out of which the arrearages of the said annuities can be paid.

An amended bill was filed in the name of Edmund Christian and of Richard Adams the administrator of Sally B. Adams, stating, that owing to the nature of the dispute in which the most valuable part of the estate of Richard Adams has been involved, it would have been injudicious to raise money by a sale thereof, but alleging that by a recent compromise with the parties who contested the title, there is now an abundant source from which the annuity and all the interest accruing thereon may be readily satisfied. Adverting to the fact that interest was not in terms specially claimed in the original bill, the complainants say they are advised that it is incidentally involved in the claim of the principal, and that it is justly due; and they pray that it may be decreed, and paid over to the complainant Richard Adams the administrator of Sally B. Adams.

George M. and Richard A. Carrington answered, correcting the statement in the first answer, that payments had been made on account of the annuity to Sally B. Adams, and admitting that no payments had ever been made by the executors of Richard Adams,

or either of them, on that account. On the subject of interest, the answer proceeds as follows: "These respondents are advised that the recovery of interest on an annuity in arrear is not a matter of course in all cases, and the plaintiff, or his counsel who drew the original bill, did not consider the said

Sally B. Adams entitled to interest 530 \*on her annuity in arrear, and therefore, it is presumed, it was not claimed in that bill. At the death of Richard Adams, it is admitted he was possessed of real property, the title to which was clear, and which was not specifically devised by his will, sufficient to have produced the annuity of 2000 dollars bequeathed to the testator's niece Sally B. Adams and to the testator's sisters Tabitha Adams, Elizabeth G. Adams and Ann Carrington; but these annuitants, who were all sui juris except Sally B. Adams, and the complainant Edmund Christian who was her committee, forbore, the said Tabitha, Elizabeth G. and Ann during their lives, and the committee of the said Sally B. until sometime in the year 1824, to exhibit her bill for her annuity. The executors of Richard Adams (very honestly, no doubt, but most imprudently) so proceeded in managing their testator's estate, that they became indebted thereto in the sum of 158000 dollars, which they left unpaid at their deaths, and which must forever remain unpaid, as they both died utterly insolvent: and now the complainant Edmund Christian as late committee of the said Sally B. Adams, and Richard Adams her administrator, are demanding the principal of her said annuity, with interest thereon, although the complainant Christian was the agent and clerk of the executors of Richard Adams in 1818, 1819 and 1820, and at the same time the committee of the said Sally B. Adams, and knew perfectly well how the executors were proceeding. If the right of the said Sally B. Adams and the other annuitants, to have the sums then due to them paid, and property set apart to secure the annuity of 2000 dollars annually thereafter, had been asserted in 1818 or 1819, it might have been done, and without loss to the other legatees under Richard Adams's will: but the executors were not required to pay the arrearages of the annuity, nor to set apart property sufficient to raise annually the amount

thereof, which might have been done 531 without loss to the general \*legatees, most of whom were infants; and after the executors had wasted the enormous amount aforesaid, the claim to the arrearages of Sally B. Adams's annuity was made in 1824, when there was no money in the hands of Richard Adams's executor to pay the arrearages of the annuity, nor any property which could have been sold to raise the amount; and now in the year 1833, for the first time, a claim to interest thereon is asserted by her administrator. These respondents are advised that under the circumstances of this case, if the balance of the principal of the annuity of 2000 dollars can be recovered by the representatives of the deceased annuitants, they should not be allowed interest thereon.



The counsel for the plaintiffs agreed that the indebtedness of the executors of Richard Adams, their insolvency, and the fact that Christian was the committee of Sally B. Adams and the clerk of the executors, might be regarded as fully proved.

And it was admitted by the defendant George M. Carrington, the administrator de bonis non with the will annexed of Richard Adams, that by a recent compromise entered into between the real and personal representatives of the said Richards Adams deceased, the real and personal representatives of William Byrd deceased, and the corporation of Richmond, there is now real property belonging to the estate of the said Richard Adams deceased, which may be set apart for that purpose, sufficient to raise the balance of principal and interest due upon the annuities, without prejudice to the claims of creditors of Richard Adams deceased, or the rights of any of the legatees or devisees under the will of the said Richard Adams, except the residuary legatees and devisees under the same.

On the 17th of February 1834, the circuit court declared its opinion that the personal representatives of the annuitants are entitled to interest on the annuities and arrears thereof, from the time the same became \*due and payable; the first payment commencing at the expiration of twelve months from the death of the said Richard Adams.

From this decree, an appeal was allowed. Taylor for the appellant.

Robertson for the appellees.

STANARD, J. The only question that the counsel for the appellant has propounded for the consideration and decision of this court, is whether the decree appealed from, so far as it establishes the title of the appellee to interest on the arrearages of the annuity antecedent to the time of the decree, be correct. The adequacy of the estate to pay the principal of those arrearages, or its liability therefor, is not here questioned. To the decision of this question so propounded, I deem it unnecessary to pursue the elaborate and able investigation made in the argument, of the cases adjudicating the claim to interest on the arrears of annuities of various classes, or to ascertain the nice shades of distinction which have determined the allowance or disallowance of interest on the arrears; being of opinion that no adjudication, even that most favourable to the claim to interest, would justify its allowance in this case.

The annuity here was payable out of the rents of real, or interest or profits of personal estate, that the testator directed should be set apart by the executors to raise, in rents or interest, a sum adequate to pay it. The case ascertains that the rents and profits of the whole estate, during the greater part of the time, were received and wasted by the executors, who wasted also a large amount of the principal of the real and personal estate; that such rents and interest have not come to the hands of the defendant, on whom the claim is now made for the principal and interest of the annuity; and that the

satisfied by charging it on the rents of real and interest of personal estate, accruing long since the death of the annuitant.

That such claim cannot be sustained, is made manifest by adverting to the position it would occupy, on the hypothesis that the executors had, as the will directed, set apart the rents of real estate adequate to raise the annuity, and disposed of the residue of the estate by partition thereof among the devisees. Had this been done, it would have been the duty of the executors to receive the rents and pay them over to the annuitants. If the executors were in default in paying them over, they might have been responsible for interest; but that responsibility could in no wise have been made a charge on the principal of the estate yielding the rent,—much less on the profits of the estate in the hands of the devisees, and still less on the principal of that estate. On this hypothesis, the devisees, and the rents and profits or principal of the estate devised to them, would not have been liable to this claim, though they received the profits of the residue of the estate. Can that liability exist, when such rents have not been received by them, but have been wasted by irresponsible executors?

BROOKE, J. The general rule is that annuities do not bear interest, but there are many exceptions, which, however, it is not necessary to state, as I think the case before us cannot come within any of them. It would be to go beyond the terms of the will, to charge the estate with more than the sum specified to be raised by the executors, namely, 500 dollars annually to each of the annuitants. The claim in the bill being against the estate of Richard Adams, I think the decree ought to be reversed as to the interest.

TUCKER, P. If this were a demand against the executors of Richard Adams deceased, there could be no \*question about their liability to interest on the annuities. The estate was abundant, and the requisite fund should have been at once set apart. The annuities should have been paid at the end of each year, and on failure of payment, the executors should have been charged with interest—payable, however, out of their own pockets, and not out of the estate; for that could not be charged with it. For where an executor who is fullhanded fails to pay creditors, so that interest accumulates, the payment of such interest is a devastavit, and it can therefore never form a proper charge against the estate. Toller on Executors, p. 426; 2 Levinz 40. The case of interest paid to legatees, where the situation of the estate was not the cause of the delay of payment, stands upon the like reason and must be governed by a like rule.

Here, however, the executors are insolvent, and the attempt is to charge the interest upon the residuary estate. In deciding this question, it is not necessary to settle a principle about which lord Eldon seems to have had great difficulty in *Ex parte Chadwin*, 3 Swanst. 380, and which he seems to have considered yet open; 2 Williams on Ex'ors, 838. In that case there was a question between general and residuary legatees,

whether, in the case of the executor's waste of the estate, and his hopeless insolvency, the general legacies should abate. The general legatees had received interest from the executor, and this dealing with him, his lordship held, was sufficient to charge them with their proportion of the loss. *Dyose v. Dyose*, 1 P. Wms. 306 (questioned in 1 Brown's C. R. 472, and 2 Cox's C. R. 184,) was cited. Perhaps the true rule in such cases is, that as no one can have a right to expect another to attend to his interest, the residuary legatee cannot complain of the general legatee's delay, since all that is incumbent on him is to see that enough is left in the executor's hands to pay himself, without looking beyond to the interest of the residuary. The residuaries here, however, are not contesting the payment of the annuities \*themselves, but only of the interest; and this question, I think, may be decided upon the case itself, without reference to authority.

The testator, by his will, carved out of the residuum of his estate a limited capital, sufficient to produce a certain and limited sum for a certain and limited time. This court has no power to enlarge the capital, the sum to be raised, or the time. Now, as the sum to be raised annually was only 500 dollars for each, and the time for which it was to be raised was limited to the lives of the annuitants, no more than that sum, for as many years as she should live, can be raised for either annuitant. But that sum will only pay the principal, and not a cent of interest. The interest, therefore, cannot be allowed; for in allowing it, we should exceed the limits which the testator has imposed.

This opinion may perhaps be more clearly illustrated, by supposing that all the annuitants were now in full life, and all were claiming the principal and interest of their annuities since the year 1818. To give them this, the court would find it necessary to set apart a much larger capital than would be sufficient to produce 2000 dollars per annum for each year since the death of the testator. There must be a farther capital set apart to raise an average of 1440 dollars per annum for the twenty years that have elapsed, that being the average interest each year for the whole time. This would be very greatly to extend the limits which the testator had set to this charge upon the residuum. It could not therefore be countenanced, and probably would not be insisted on. But the plaintiff's demand is the same in principle, although inferior in amount. It ought therefore to be rejected, and the decree which allowed it should be reversed.

Decree reversed, for so much as allows interest on the annuity, and for the residue thereof affirmed.

### 536 \*Haxall's Ex'ors v. Shippen and Wife and Others.

December, 1830, Richmond.

[84 Am. Dec. 745.]

(Absent PARKER, J.)

**Fire Insurance—Case at Bar.**—Testator, having insured his dwelling house against loss by fire, by a

covenant of assurance to himself, his heirs and assigns, devises the same tenement and the farm on which he lived, to his wife for life, remainder to his two daughters in fee; the house is burnt down during the life of the wife: she receives the insurance money, and, without the concurrence of the devisees in remainder, expends it in the building of a new house on the premises; and then dies, leaving the new house standing, which devolves with the farm to the devisees in remainder, who are then both *femes covert*, and they and their husbands both survive the tenant for life: **Held,**

**Same—Same—Application of Insurance Money to Reinstating Premises.**—That neither the covenant of insurance, though to the assured, his heirs and assigns, nor the testator's will, worked any special destination of the insurance money to the purpose of reinstating the premises.

**Same—Same—Rights of Life Tenant and Remaindermen in Insurance Money.**—That the tenant for life had a right to receive the insurance money; but when received, it was mere personal estate, of which she had a right to the use for life, and her daughters to the remainder; and upon the marriage of the daughters, the marital rights of their husbands attached to it, as to any other personality to which their wives were entitled in remainder.

**Same—Same—Same.**—That the tenant for life had no right to convert the insurance money into real estate, by applying it to the building of a new house without the consent of the remaindermen.

**Same—Same—Same.**—That, therefore, at the death of the tenant for life, the husbands of the devisees in remainder had a right to call for the whole in-

**\*Fire Insurance—Rights of Life Tenant and Remaindermen in Insurance Money.**—In *Brough v. Higgins*, 2 Gratt. 410, it was held that, where a building insured, in which one person is entitled to a life estate and another to the reversion, sustains a partial injury from fire, for which indemnity is due from the insurers, both the life tenant and the reversioner are entitled to have the insurance money applied to the repair of the building. The court draws a distinction between the case where there is a total destruction of the property and the case where the property sustains only a partial injury. In speaking of the principal case, the court said: "In the case of *Haxall's Ex'ors v. Shippen*, 10 Leigh 536, the court decided, and that decision is, in my opinion, a governing authority, that where the title in an insured building is in a tenant for life and a reversioner, and the building is entirely destroyed, the property is in effect converted to personality, and the parties have the like interest in the insurance money that they had in the building: that is, the tenant for life is entitled to the use of it for life, and the reversioner to the principal at the death of the tenant for life. And that the tenant for life cannot, by applying the money to the rebuilding of the house, defeat the reversioner's title to have the money on the termination of the life estate: nor has the reversioner a right to require the tenant for life to apply the money to the rebuilding of the house. This decision has been applied by the court below to the case now in judgment; and if the cases be not distinguishable, the decree of the court below must be affirmed. To my perception, the distinction between the cases is not only visible, but broad and well defined." See generally, monographic note on "Insurance, Fire and Marine" appended to *Mutual*, etc., Soc. v. Holt, 20 Gratt. 612.

surance money, without any deduction for the value of the new house put on the premises by the tenant for life and left standing at her death.

Thomas Shore died in the year 1800, and by his will devised the tenement and plantation on which he lived, called Violet Bank farm, in Chesterfield, to his wife Jane Shore for life, remainder to his three daughters Jane, Elizabeth and Louisa, or such of them as should be living at his wife's death. On the premises so devised, 537 \*there had been erected by the testator in his lifetime, a valuable wooden dwelling house, on which he had effected a policy of insurance with the Mutual Assurance Society, as early as the year 1797, by a covenant insuring the house to the covenantee, his heirs and assigns. Mrs. Shore took possession of the premises so devised to her for life and so insured, and continued to occupy the house for her dwelling, until she married a second husband Henry Haxall, and thenceforth her second husband and she continued to occupy the same till the house was burned down by accidental fire in October 1810. The quotas or premiums for insurance for the years 1809 and 1810 were then in arrear; all due for the previous years appeared to have been regularly paid. The net amount of loss for which the Mutual Assurance Society was responsible, was 7833 dollars. The society refused to pay the principal to Haxall and wife, the tenants for life, but made an order directing the payment of the interest to them during the continuance of the life estate.

In January 1814, Haxall and wife exhibited a bill in the superior court of chancery of Richmond, against Elizabeth and Louisa Shore, the devisees in remainder (the other devisee Jane being dead), and the Mutual Assurance Society; setting forth the will of Thomas Shore, the insurance of the house, the destruction thereof by fire, and the refusal of the society to pay them the principal money due for the loss; and that they were desirous of applying the principal to the building of another house for their dwelling during the life of Mrs. Haxall, and to leave the same at her death for the use and benefit of the devisees in remainder; and praying a decree, that the money should be paid to them by the society for that purpose. The devisees in remainder, then infants, by guardian ad litem, answered and submitted their rights to the court. And the Mutual

Assurance Society having also answered, the court on the \*22d June 1814, 538 declaring, that by the will of the testator Thomas Shore, Mrs. Haxall was entitled to the use of the money due from the society for the loss by fire of the dwelling house insured, in like manner as she would have been entitled to the use of the house itself if the loss had not happened,—decreed, that the society should pay to Haxall and wife the principal sum of 7833 dollars, upon their entering into bond with surety to be approved by a commissioner, in the penalty of 15000 dollars, payable to the two infant devisees in remainder, with condition to pay them, or their representatives, the said principal sum of money, immediately after the death of

Mrs. Haxall. The bond was accordingly executed, in February 1816, by Henry Haxall and Mrs. Haxall, and by William Haxall and Philip Haxall as their sureties; the condition of which was in these words—“That whereas the above bound Henry Haxall and Jane his wife have recovered by a decree of the superior court of Richmond pronounced on the 22d June 1814, from the Mutual Assurance Society &c. the sum of 7833 dollars, the amount to which the said Elizabeth Shore and Louisa Shore are entitled after the death of the said Jane Haxall; now, if the said Henry Haxall and Jane his wife, William Haxall and Philip Haxall, do and shall well and truly pay, or cause to be paid, unto the said Elizabeth and Louisa Shore, the aforesaid sum of 7833 dollars, immediately after the death of the said Jane Haxall, then the above obligation to be void.”

This bond being returned by the commissioner to the court, the money due from the Mutual Assurance Society was paid to Henry Haxall, who proceeded to build another dwelling house on the land called Violet Bank; in the building of which the whole of this money, and more, was expended. At the time the new building was commenced, Elizabeth and Louisa Shore, the devisees in remainder, were both infants; Elizabeth was unmarried; Louisa had married William Shippen.

539 \*Mrs. Haxall survived her second husband, and died in May 1831, upon which the land called Violet Bank, with the new house thereon, devolved to the devisees in remainder, Louisa the wife of William Shippen, and Elizabeth who was now the wife of John Gilliam.

Shippen and wife and Gilliam and wife brought an action on the above mentioned bond, against William Haxall, the only surviving obligor, to recover the 7833 dollars mentioned in the condition, with interest from the date of Mrs. Haxall's death.

Upon the institution of that suit, and before judgment had been recovered therein, William Haxall exhibited his bill in chancery in the circuit superior court of Petersburg, against Shippen and wife and Gilliam and wife, exhibiting copies of the record of the suit of Haxall and wife against the devisees in remainder and the Mutual Assurance Society, and of the bond executed in pursuance of the decree; alleging, that Henry Haxall had applied the whole of the insurance money by him received, and more, to the building of another dwelling house on the land called Violet Bank, that the same was standing there at the death of Mrs. Haxall, and that the devisees in remainder had thus received the full benefit of the insurance money; and praying, therefore, that the bond should be delivered up to be cancelled, or such other relief as the case entitled him to. And after judgment had been recovered upon the bond at law, he filed an amended bill praying an injunction to further proceedings upon it; which was awarded.

The defendants Shippen and wife and Gilliam and wife put in their answer, wherein, not denying or admitting that the whole of

the insurance money had been expended in building another dwelling house on the premises, nor denying that the new dwelling house devolved to them on the death of Mrs. Haxall, they insisted, that whether such was the case or not, they were entitled to

540 \*the whole amount of the insurance money, secured to them by the bond taken in pursuance of the decree of the court of chancery of June 1814, which decree they relied upon as conclusive of their right to it.

There was evidence proving very clearly, that the whole of the insurance money received on account of the loss of the old house, and about 500 dollars more, had been expended in the building of the new house.

The cause was transferred to the circuit superior court of Surry. The plaintiff William Haxall died pending the proceedings, and they were revived in the name of his executors. And then, on the motion of the defendants, the court dissolved the injunction.

Haxall's executors applied by petition to this court for an appeal from the order of dissolution; which was allowed.

Leigh, for the appellants, argued, 1. That the court of chancery of Richmond, in its decree of June 1814, under which Henry Haxall received the insurance money due for the loss of the old house, did not decide, or intend to decide, the points now presented; did not intend to decide, that the insurance money should not be applied to the rebuilding of another house, or if it should be so applied, and the new house left for the devisees in remainder, they nevertheless should have the insurance money also. The Mutual Assurance Society, acting upon its own rules, refused to pay the principal to the tenants for life, and ordered, that the interest only should be paid them during the continuance of the life estate. They insisted in their bill, that they were entitled to receive the principal, to be applied to the building of a new house in place of the old one that had been destroyed, for Mrs. Haxall's dwelling during her life, to be left, instead of the old one, for the devisees in remainder at her death; and

541 prayed the court to decree that the principal of the insurance money should be paid them for that purpose. The Chancellor declared, that by the will of the testator Thomas Shore, Mrs. Haxall was entitled to the use of the money due from the society for the loss of the dwelling house insured, in the same manner as she would have been entitled to the use of the house itself if it had not been burnt. Now, she was entitled by the will of her husband to the use of the house for her dwelling, and she could no otherwise enjoy the use of the insurance money in the same manner, but by building another house in place of the old one for her dwelling. If the court had thought her entitled to the use of the insurance money, as money only, there would have been no necessity to alter the resolution of the Mutual Assurance Society on the subject; her enjoyment of the interest would have been the full enjoyment of the use of the money. It was because the Chancellor thought her entitled to the use of it in another manner,

namely, in providing herself a dwelling, that he decreed the payment of the principle to her. It was true the decree directed the payment of the principal to Haxall and wife, upon their giving bond with surety to the devisees in remainder, with condition to return the principal to them upon the death of Mrs. Haxall: but the only purpose of requiring that bond was, that though the money might be applied to the building of a new dwelling house, yet as it was to be paid into the hands of the second husband, and as the building of the new house was prospective, and the money might not be applied to that purpose, such a bond was necessary to secure the rights of the devisees in remainder; and however general the terms of the condition of the bond required by the decree, it ought to be restricted to the purpose the bond was intended to answer. While, therefore, he admitted that the decree of June 1814 could not now be reversed or altered, yet, he said, the court must

542 now ascertain the construction \*and purpose of it; that if the decree intended not to authorize, in express terms, the application of the insurance money to the building of a new house in place of the old one, for the dwelling of the devisee for life, it at least intended to leave the question of the proper application of it open; and that, supposing the decree ambiguous, the court should put such a construction upon it as would best comport with the rights of the devisee for life as well as of the devisees in remainder. And then he contended, 2. That, according to just construction and effect of the will of Mr. Shore, the insurance money which should become due in case of the destruction of the dwelling house he left at Violet Bank, ought, upon the happening of the loss, to have been applied to the building of a new house in place of the old one, in order to carry into effect the bounty he intended for his wife, to whom he devised the house during her life, and the bounty he intended for his daughters, to whom he devised it in remainder. Owning this house, which he had used as a dwelling for himself and his family; having insured it against loss by fire by a covenant of the assurers to himself and his heirs; intending to provide a comfortable dwelling for his wife as long as she should live; a dwelling too for his daughters, then in early infancy, who were, of course, till their marriage or full age, to live with their mother; he devised the house, thus insured, to his wife for life, remainder to his daughters. He had provided the insurance as a muniment and protection for the dwelling house; as the means, in case that should be destroyed, of building another in its place. He intended to give his wife real estate, not money: to provide a dwelling house for her at Violet Bank, not to give her interest on insurance money with which she might rent a dwelling house elsewhere; and the Violet Bank farm would be reduced in value to her, if she should not reside upon it. He intended too, to 543 devise \*real estate to his daughters, not to bequeath them money; real estate, which in case of their marriage would be

unalienable without their consent, and in case of their death would descend to their heirs; not money, which upon their marriage would belong to their husbands, and at their death devolve to their next of kin who might be strangers to the testator's blood. The court ought, therefore, to regard the insurance money as a fund destined to restore the dwelling house in case it should be destroyed by fire; and it followed, that the money had been laid out on the estate for the very purpose to which it was originally destined. And to sustain him in this view of the case, he cited *Norris v. Harrison*, 2 Madd. Ch. Rep. 268. It was true, that, in the subsequent case of *Noble v. Cass*, 2 Sim. 343, 2 Condens. Eng. Ch. Rep. 447, (which case, however, presented a very different question), it was remarked upon the decision of *Norris v. Harrison*, that it "turned on the acts of the party and the expressions in the will of the testator, and not on any abstract rule of equity that money paid on a policy of insurance effected by a tenant for life, was to be considered as belonging to the inheritance." Neither did he contend for any such abstract rule of equity here; his proposition was, that the testator having in his lifetime insured his dwelling house by a covenant to himself and his heirs, and then devised the house to his wife for life, manifestly for the purpose of providing her a dwelling, with remainder to his daughters, the insurance money, in this case, belonged to the inheritance; that it was destined by the testator to restore the house in case it should be destroyed by fire during the life of his wife; and that the precise bounty which he intended for his wife certainly, and (he thought) for his daughters too, could only be effectuated by the application of the insurance money to the rebuilding of a dwelling house on the same estate. But 3. if he

544 was mistaken on the questions "touching the construction and effect of the decree of June 1814, and the rights of the parties under the will of their common deviser, yet, he said, the money expended on the new house ought to be considered as a satisfaction of the money due on the bond which was taken in pursuance of that decree. For that was a debt contracted by Henry Haxall and Mrs. Haxall, to Mrs. Shippen and Mrs. Gilliam, the daughters of the one and stepdaughters of the other. The decree required both Haxall and his wife to join in the bond, and she did join in it. And he endeavored to liken the case to that class of cases, in which a parent being indebted to a child, and giving the child property of equal value to the debt, though not ejusdem generis, the gift of the property had been held a satisfaction of the debt. *Kelly v. Kelly's ex'ors*, 6 Rand. 176. Or, 4. at the least, the value of the new house, in the state it was at the time of Mrs. Haxall's death, when it devolved to the devisees in remainder, ought to be ascertained, and so much ought to be discounted from the principal due on the bond. He admitted, that if the old house had remained unimpaired, and the devisee for life had built a new one, she would have had no claim against the dev-

isees in remainder, for the value of the improvement thus voluntarily put upon the estate, however judicious or valuable. But he said, the present case was altogether peculiar. The house devised to her for her dwelling was destroyed by fire: the money due for the loss upon a policy of insurance effected by the deviser, was applied to the building of a new house on the same place: the new building was not an improvement of the life estate only, but of the inheritance also, was so intended by the tenant for life, and in fact so enured. The devisees in remainder, getting the benefit of the improvement, could not, in equity, claim also the whole fund expended in making it. Their husbands, indeed, were now entitled 545 to their "rights in the money due by the bond, whatever those rights were; but if there was an equity against the wives affecting those rights, that equity ought to be enforced against the husbands. Besides, no objection was ever made by or on behalf of the devisees in remainder, to the application of the insurance money to the new building: Shippen had married one of them before the new building was commenced, and he made no objection.

Rhodes and Macfarland, for the appellees, maintained, 1. That the chancellor's decree of June 1814 determined the very questions now again controverted, touching the relative rights of the devisee for life, and of the devisees in remainder, in the insurance money; and as that decree could not now be reviewed, it was a conclusive bar to the relief which the appellants now sought. The chancellor's declaration, that Mrs. Haxall was entitled to the use of the insurance money in like manner as she would have been entitled to the use of the house itself if the loss had not happened, merely denied the right of the Mutual Assurance Society to hold the principal, paying her only the interest; and affirmed her right to have the principal paid her, to be managed, invested or improved, in any manner she thought most advantageous and convenient to her. Haxall and wife, in their bill, asked a decree for the principal of the insurance money, for the purpose of applying it to the building of another house, for the benefit of the tenant for life, and of the remaindermen; and the chancellor decreed, that the principal should be paid to them; but so far from authorizing the application of it to the building of a new house, to be substituted for the money to the devisees in remainder, he held that the remaindermen were entitled to the remainder of the fund in money; for the terms on which he decreed the money to Haxall and wife, were that they should give bond with 546 surety to pay the principal to the dev-

isees in remainder, "immediately after Mrs. Haxall's death. If he had intended to authorize the application of the money to the building of a new house, and the substitution of the house for the money to the devisees in remainder, he would have required a bond from Haxall and wife, with condition, in the alternative, either that the money should be expended in rebuilding, or paid over to the remaindermen at Mrs. Hax-

all's death. In requiring that the money should be paid to the remaindermen, in all events, immediately after Mrs. Haxall's death, he denied the right of the tenant for life, so far as the remaindermen were concerned, to apply it to the building of a new house, and thus give them a house in place of the money. And they said it was plain, that Haxall and wife so understood the decree; for they hesitated for near two years to accept the money upon the terms of the decree; and then they gave a bond, the condition of which recited, that Elizabeth and Louisa Shore were entitled to the money after the death of Mrs. Haxall. This bond was, in effect, the execution of the decree by them according to their own interpretation of it; and this interpretation of the decree was correct: but if it was not, the obligors were nevertheless bound by the bond. The decree and the bond certainly left Haxall and wife free to apply the money to the building of a new house, or to any other purpose they thought proper; but the application they made, or any application they might have made of it, could not affect the right of the devisees in remainder to call for the money at Mrs. Haxall's death. 2. Supposing, however, that the decree and bond left the question open, they maintained, that the devisees in remainder became entitled to call for the money, and the whole of the money, after the expiration of Mrs. Haxall's life estate. The will of the testator Thomas Shore, far from indicating any destination of the money which might accrue upon the policy of insurance in case of loss, to the purpose of rebuilding, \*made no mention of it or allusion to it. And this distinguished the present case from that of *Norris v. Harrison*; certainly, according to the vicechancellor's exposition of that case in *Noble v. Cass*. If the covenant of insurance to the assured, his heirs and assigns, ran with the land, so as to give the heirs and devisees of the land, each *pro interesse suo*, a right to recover compensation for loss; yet it gave them a title only to recover compensation in damages. The policy of insurance, and the rights of the covenantee, his heirs and assigns, under it, were personal property: the damages when recovered by the devisee of the covenantee, were merely personal. Nor was there any principle of law or equity which required the application of the money recovered to the purpose of rebuilding, so as to make it quasi real. They referred to *Platt on Covenants* p. 183, 197-203; *Ellis on Insurance* 81-87, where all the cases are collected. They relied chiefly on *Leeds v. Cheetham*, 1 Sim. 146; *Noble v. Cass*, 2 Sim. 343; 2 Condens. Eng. Ch. Rep. 74, 447. In the case of *Parry v. Ashley*, 3 Sim. 97, 5 Condens. Eng. Ch. Rep. 31, it was held, that the insurance money due for the loss of a house on which an annuity was charged, stood in the place of the house as a security to the annuitant; but the court impounded the money, and would not permit it to be paid to the owner of the fee, though she asked it with a declared purpose to apply it to rebuild the house. They said, a testator

holding a policy of insurance of a house might by his will annex it to the land, and appropriate the insurance money in case of loss to the purpose of rebuilding; or the money might be destined to reinstate the property, by the express contract of the parties to the policy of assurance; and by the statute 14 Geo. 3, ch. 78, the insurance money due on policies of insurance in London, must be applied to rebuilding: but independently of express appropriation by will or contract or statute, there was no general  
548 \*rule of equity that required the insurance money to be appropriated to rebuilding, for the benefit of lessee or landlord, tenant for life or remainderman. To hold that Haxall and wife had a right to apply the insurance money to the building of a new house, and by so expending it, to exempt themselves from accountability to the devisees in remainder for the money, would be, in effect, to recognize a right in a tenant for life of personal property, to convert the remainder expectant on the life estate into real property without the concurrence of the remainderman; and, in the present instance, to work a material change in the rights of the parties; since if the fund remained unconverted, the husbands of the devisees in remainder, upon their marriage, acquired marital rights in so much personal property of their wives, whereas if converted, they could only acquire marital rights in their real property. 3. Taking the subject to be personal property, when the devisees of the remainder married, their husbands respectively acquired inchoate rights in it, which would become absolute, in the event that they and their wives survived the tenant for life, and then reduced it into possession, in which case the husbands would be entitled to it *jure mariti*, or in the event of the husbands surviving the wives, in which case they would be entitled to recover it as administrators of their wives, and then to hold it as their own property. Therefore, the debt due from Haxall and wife for the money in question was not, in the event which has actually occurred, a debt due to Mrs. Shippen and Mrs. Gilliam, but a debt due to their husbands. Then, surely, no gift of real estate made by the stepfather and the mother to the wives could be a satisfaction of the claims of the husbands. And 4. it was only necessary to advert to the true state of the rights of the parties in the subject, to ascertain, that the claim to have the actual value of the new house as it stood at Mrs. Haxall's death discounted  
549 \*from the debt, was untenable. The state of the case as to this point, was simply this: Haxall and his wife put valuable improvements on land of which she was tenant for life, and those improvements devolved, along with the land, at her death, to her daughters, who were entitled to the remainder in fee, and who, at the time the remainder fell in, were married women. Their husbands could not, on any principle, be held to make compensation, out of their own money, for improvements voluntarily put on the real estate of their wives. Now, the money in question was the money, the

absolute property, of the husbands, though they acquired it by their marriage. The devisees in remainder were nowise bound to give warning to Haxall and wife, that if they expended the insurance money in rebuilding, the money would nevertheless be demanded after Mrs. Haxall's death: the decree of June 1814 gave them full warning. The remaindermen had no right to object to the application which was made of the money, or to any other application that might have been made of it; the payment of the money to them when their right should accrue was secured, and that was all they had a right to ask.

TUCKER, P. Upon mature consideration of this case, and of the very able argument on both sides, I regret to be compelled to give my judgment in favour of the appellees: I regret it because it is certainly a case of some hardship on the appellants, and those for whom their testator was the surety, since the appellees, by this decision, will get both the newly erected building and the whole of the insurance money which was paid for that which was consumed.

At the very first step in this investigation, we are met by the decree of June 1814. That decree I consider as conclusive of the rights of the parties to it, and, whether right or

550 wrong, decisive of the questions \*now again brought before the court. The bill filed by Haxall and wife sets forth the burning of the mansion house, their purpose to rebuild it with the insurance money, and the refusal of the Mutual Assurance Society to pay it to them, and prays a decree that the money should be paid to them for that purpose. The decree simply orders a payment of the whole insurance money to the plaintiffs, declaring Mrs. Haxall's right "to the use of the money in like manner as she would have been entitled to the use of the house itself;" that is, to the uncontrolled use of it (the money) during her life, but to be paid over to those in remainder at her death. It gave no authority to rebuild at the charge of the daughters, nor did it limit the life owner in the manner of using the fund. She had the absolute use of it during her life, and was not bound or required to use it in rebuilding. It might have been employed in trade or speculation, and the parties in remainder could not, after that decree, have arrested such an employment of the capital. All their right was to have it returned at the expiration of the life estate. Such was obviously the effect of the decree; and, accordingly, the plaintiffs were required to give bond, before they should have the benefit of it, to the two daughters for the payment of the principal money immediately upon the death of the mother. The plaintiffs seem to have hesitated. The court had disapproved the idea of the assurers, which confined Mrs. Haxall to the interest, since in that mode she did not enjoy the money as she was entitled to enjoy the house. The use of the money was not necessarily measured by the interest, and, therefore, the money itself was decreed to her and her husband for her life, the repayment being secured by bond; and thus she would truly

enjoy the money as she would have enjoyed the use of the house. Yet for nearly two years the plaintiffs delayed giving the bond. At length, they did

551 give it, conformably to the decree, \*which after such a lapse of time must have been well understood, and by entering into the obligation under it, they assented to, ratified and confirmed it, and made themselves absolutely debtors to the devisees in remainder for the whole insurance money at the mother's death. Had the chancellor designed to sanction the rebuilding at the children's expense, the decree and the bond would have been in the alternative, either to rebuild, or, on failure to do so, then to refund. But the decree is absolute, that they shall have the use of the money for life, and that the daughters shall have the money at the mother's death. This decree is unassailable. The plaintiffs, having acquiesced in it, and indeed acted under it, cannot gainsay it, or vacate, or modify, the bond given under it. To say that the daughters shall not have the money, but shall have the buildings in satisfaction of it, is to contradict the bond. To contradict the bond, which follows the decree, is to controvert the decree; and this cannot now be done even by appeal, and much less when thus assailed collaterally only. That decree, therefore, I conceive, is conclusive upon the question of the plaintiffs' claim to have the money for the purpose of rebuilding at the joint charge of the life owner and those in remainder.

I am, however, clearly of opinion, that that decree was right. Conceding that the covenant of assurance, being with the covenantee, his heirs and assigns, enured to the benefit of all who had any title in the premises, in proportion to their respective interests; conceding that the tenant for life is not chargeable for waste and for the value of the building, according to the doctrines anterior to the statute 6 Ann. ch. 31, 1 Wms. Saund. 323b, 7 Bac. Abr. Waste. C. p. 256, and waiving the question how their respective proportions are to be ascertained; still it is obvious, that the tenant for life could have no superior right over those in

552 remainder, to the disposition of the insurance money. Unless \*there was an equity, as is contended, that the money paid for the building that was burned should go to rebuild it, as that was the purpose for which it was destined (a question to be presently examined), it seems undeniable, that Mrs. Haxall could have no right to insist, that a fund in which her daughters were equally interested, should be invested in any manner without their assent or against their wishes. Being entitled to its use for life, indeed, she might have used it during life as she pleased, but she could have no right so to use it as to affect or impair their right to the use of the money itself after her death. Unless all therefore concurred in this conversion of personality into realty, neither could so convert it. There was, then, no power in Haxall and wife to make the conversion without the assent of the daughters. But they were in-



fants and could not assent. Moreover, Shippen's marriage, at least, was prior to the rebuilding. Immediately upon his marriage, his marital rights to a moiety of this fund as money attached. It was, indeed, but a chose in action; but still it would become his, upon his reducing it into possession, and it has now become absolutely his by the judgment upon the bond, which he may enforce in his own right and not as administrator of his wife. What right, then, had the tenant for life, without his assent, to convert this money, which would belong to him as personalty, into real estate to which he would have no title whatever, unless he had a child, and then only the title of a tenant by the curtesy? The law recognizes no such power in one person, to dispose of and change and annihilate the rights of others. And here, if the fund continues money, Shippen is entitled to four or five thousand dollars; but if the conversion of the money into land is recognized, he may not have title to any thing; for non constat that he would be even tenant by the curtesy.

553 \*That I have not assumed too much in asserting the husband's right to the insurance money, may be safely affirmed. Though it be a covenant real for upholding the estate, yet if the insurers refuse payment, the action against them is for damages, and damages only can be recovered. It is truly said by vicechancellor Leach in *Noble v. Cass*, that with respect to injuries to land for which damages are to be recovered in a personal action, the person who brings the action is entitled to the damages; and, accordingly, he held, that the damages recovered for a breach of a covenant running with the land belonged to the person who recovered them, and are not to be considered as a part of the inheritance. Now on this covenant of insurance, the wife could not sue alone. Her husband must join even in actions relating to her real property; 1 *Bac. Abr. Baron and Feme. K. p. 499*; 1 *Chitt. Plead. 17*, and if he recovers damages, they at once become his absolutely; he puts them in his own pocket without accountability to any. This occurs in various instances, seemingly of the greatest hardship. It happens even in those cases where the damages which thus become his, are retribution for realty which never could have become his, and where the apparent relation between the damages and the reparation of the estate would seem plain and palpable. Thus, if he sues upon a covenant of seisin, in which the value of the estate may be the measure of damages, those damages are not applied to purchase a new estate for the wife, but they become his own. The wife loses her real estate, and the husband pockets its value. So, in an action on a covenant for quiet enjoyment, or of warranty, or for renewal of a lease, the wife's retribution for her real estate goes into her husband's hands. So in action on a covenant to repair or to rebuild, the damages assessed must be adequate

554 to repairing or rebuilding \*the premises, *Shortridge v. Lamplugh, Ld. Raym. 798*, yet these damages the husband

recovers, and there is no equity to compel him to lay out the money in repairing or rebuilding his wife's houses. "A court of equity" (says the vicechancellor, in *Noble v. Cass*), "never holds that damages are any thing but the personal estate of the person who recovers them, and I should be introducing a new equity if I were to hold the damages recovered for breach of covenant running with the land, to be a part of the inheritance."

Upon these principles then, this court must consider the money due by the insurance society, for which the decree was rendered in June 1814, as a chose in action, which Shippen became entitled to on his marriage, and which upon the death of the widow he would have been entitled to demand by suit, if its payment had not been secured by bond. Upon these principles too, the court in 1814 was right in considering this money as personal estate of the infants, and to be secured to them as such. The bond by which it was secured became, as to a moiety, the property of Shippen, as soon as he married, and he has since made it absolutely his own by recovering a judgment upon it. The other moiety, in like manner, belonged to Gilliam.

In this view of the case, it is manifest that the tenant for life could not lawfully deprive the appellee Shippen of his marital right to sue for this money to which, when recovered, he would have absolute right) by converting it into realty, to which he would have no title. And this furnishes a sufficient answer to the idea, that the case resembles the payment of a debt by a gift or legacy: for, in those cases, the gift or legacy may not only be rejected by the party, but it goes to him who is in fact the creditor. But here, the supposed gift of the buildings is to the owners of the realty, instead of the husbands who are entitled to the money. The gift, therefore, does not enure to the owners of the debt.

555 \*Unless, therefore, it can be shewn that the insurance money ought to be applied to the purpose for which it is said to be destined, there would seem to be little foundation for the pretensions of the appellees. Let us then enquire how stands the law in this regard. The position seems to me to be a misapprehension of the law of insurances against fire. In the case of *Vivian v. Champion*, 1 *Salk. 141*, 2 *Ld. Raym. 1125*, lord Holt indeed observed, in relation to damages recovered from a tenant for 99 years on a covenant to repair, that the damages should be sufficient to put the premises in repair, and the plaintiff ought in justice to apply them to that purpose. How he was to be compelled to do so, and whether the obligation was to be held to be perfect or imperfect, does not appear. But admitting it to be perfect, there are strong reasons for compelling such an application of the money in the case of a tenant who is bound for rent to his landlord, and who seems therefore equitably entitled to have the benefit of the damages to put the property in the stipulated state of repair. But as to policies of insurance, they are considered as distinct, independent contracts between the insurers and



the insured. If the covenant does not name the heirs, the executors of the insured, and not the heirs, will be entitled to the proceeds of the policy, and those proceeds will go to pay debts, instead of being applied to rebuild houses; Ellis on Insurance, 84, 5. "As a general rule," says Mr. Hovenden in his note on *Mildmay v. Folgham*, 1 Hovend. Supp. 305, "policies of insurance are not attached to the realty, nor do they in any manner go with the same as incident thereto, by any conveyance or assignment;" citing *Lynch v. Dalzell*, 4 Bro. P. C. 431. Accordingly, in the case of *Mildmay v. Folgham*, 3 Ves. 471, where the policy was made payable to the insured, her executors, administrators and assigns, the lord chancellor refused to make the executor a trustee for the heir.

556 Where however, as in "our insurances, the policy binds the insurers to pay to the insured, his heirs &c. the policy must be considered, I conceive, as a covenant real, of which the heir, and not the executor, must have the benefit. Still it does not follow, that when the money is paid to the heir, he is bound to lay it out in rebuilding: and if, as usually happens, there are several heirs, it is not perceived that either has a right to insist that the others shall unite with him in rebuilding the premises. The insurance is a compensation for a loss, and when that compensation is paid, it is money in the hands of the assured, of which they may dispose at pleasure. The law of contribution has no application to the case. That law has strict application, indeed, where property held in common needs repair: for there, it is in existence, and each has a right to keep it in existence, and to make all essential repairs at the joint expense of all. But where the buildings on an estate are destroyed, the question is one, not of repair of what exists and is held in common, but of building out and out. And as one tenant in common cannot compel another to build on their vacant lot, however it may be to their advantage, so one heir cannot compel the others to rebuild a house that has been destroyed. Still less can the tenant for life; for between him and the remainderman there is no community of interest. On the contrary, their interests are conflicting; for if the remainderman is compelled to spend his money in rebuilding, peradventure the life owner may live till it falls into decay and becomes useless; or it may again be consumed by fire, and then he will have no retribution. Accordingly, as between tenant and landlord, the landlord who receives insurance money cannot be compelled to rebuild, nor indeed is he even compellable to repair, but that duty, to a certain extent, rests upon the tenant. See Ellis on Ins. 82; *Leeds v. Cheetham*, 1 Sim. 146. In the case at bar, it must be

557 \*buildings might have become, the tenant for life could have demanded no aid for repairs, but would have been bound at her own expense to keep the property in repair. By what right, then, could she demand that the devisees in remainder should expend their funds in rebuilding the premises out and out? And a fortiori, by

what right could she demand, after the marital rights attached, that the husband should expend what had become his funds, in rebuilding a house which never might become his?

Much reliance was placed on the case of *Norris v. Harrison*, 2 Madd. Ch. Rep. 268. The various reasons for that decision are so thrown together by vicechancellor Plumer, that it is difficult to extract any distinct principle applicable to this case from his opinion. There are some expressions which seem to indicate the idea, that the insurance money ought of right to be employed in rebuilding, and the court repelled the claim of the remainderman to that portion of it which had been so employed, since it had been "laid out on the estate for the very purpose to which it was originally destined." Yet, in deciding upon the right to the unexpended balance of the insurance fund, he rests so strongly on the intention of the testator W. Bell's will, as to induce the belief that upon that intention depended the character of the fund, as real or personal. I think, however, upon the whole, that there is sufficient evidence that the vicechancellor did look upon the fund as one properly devoted to rebuilding the premises, or to the erection of some other equivalent building on the estate. But in the subsequent case of *Noble v. Cass*, vicechancellor Leach did not consider his predecessor as settling any such general principle, but as deciding the case upon the acts of the party and the particular expressions in the will. If the case of *Norris v. Harrison* does determine that the insurance money must be applied to rebuilding the premises,

558 \*then I can only say that I cannot acquiesce in any such opinion. The covenant does indeed run with the land, and enure to the benefit of all who have title to the estate, according to their respective interests. But the damages (or insurance money) when recovered, are not to be considered as part of the inheritance. They are a sum in gross, belonging to the parties according to their respective interests. There is no authority for the principle, that an equity attaches to the damages recovered at law, to give them the particular destination of rebuilding the premises for the loss of which they were recovered. Such a doctrine would be unreasonable and difficult of execution; unreasonable, because it might well be to the interest of the reversioner that the houses should not be rebuilt, either because of the depreciation of the property or for other causes; difficult of execution, because one party might oppose a rebuilding according to the former fashion, and the other insist upon it, and, in case of difference, the court must interfere to settle and adjust these vexatious disputes, involving petty details, embarrassing and unworthy of the tribunals of justice.

The notion, indeed, of an equity attaching to the insurance money, is wholly without foundation. There is no covenant even of the society to rebuild: it has no right to rebuild: it must pay the amount of the policy: and when so paid to the insured himself, he may do as he pleases with the money.

There is nothing to bind him to rebuild. And if he gives the property to A. for life, remainder to B. he does not give to either any right to demand the concurrence of the other in rebuilding the premises. As assignees, each has a right to benefit in the covenant proportioned to his interest, and each has his distinct action at law. *Attersoll v. Stevens*, 1 Taunt. 183. Perhaps there is no method better adapted to effect the ends of justice, than, through a court of equity, to decree the whole money \*to the tenant for life for his use during life, taking care to secure repayment to the remainderman upon the tenant's death. This is the course which the chancellor pursued in 1814, and which, upon the whole, I think is to be approved.

It remains but to say, that I think the tenants for life cannot be sustained in their gratuitous act, by the allegation that the parties stood by and did not warn them against proceeding. It has been well said, that the decree itself was a warning; the bond was a warning; and non constat, that notice was ever given to those in remainder, that an attempt would be made to charge them. They had no right or reason to suppose, after that decree, and while they held the absolute bond for repayment, that the tenants for life were building at their charge. They had therefore no reason for interfering with the proceeding; for if the tenants chose to rebuild at their own expense, there was no one who could gainsay it.

BROOKE and CABELL, J., concurred.

STANARD, J., said, he entirely concurred with the president, in the general principles stated in his opinion, but he doubted, whether, considering the circumstances of the particular case, the actual value of the new house put on the premises, as it stood at the time of Mrs. Haxall's death, ought not to be allowed to the appellants, and set off against the debt. He inclined to the opinion, that, to this extent, the appellants were entitled to relief.

Decree affirmed.

560 \*Watkins and Wife v. Carlton.

January, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

**Issue Out of Chancery—Certificate of Verdict—What Constitutes.\***—Upon a trial at law of issues out of chancery, exceptions are filed to opinions of the court, and made part of the record; the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions: **Held**, all the proceedings upon the trial of the

**\*Issue Out of Chancery—Certificate of Verdict—What Constitutes.**—In *Lamberts v. Cooper*, 29 Gratt. 64, the court, in speaking of the principal case, said: "That case does not, however, decide that a bill of exceptions is not necessary upon the trial of an issue out of chancery. It merely decides that when exceptions are filed to opinions of the court and made a part of the record, and the court of law certifies the verdict, although it does not expressly certify the exceptions, yet all the proceedings upon the trial of the issues spread upon the record thereof, constitute part of the certificate of the ver-

issues, spread upon the record thereof, constitute part of the certificate of the verdict, and with it become part of the chancery record.

**Same—Improperly Ordered—Appellate Practice.**—A court of chancery directs issues of fact to be tried at law, without evidence regularly taken before the court, touching the facts to which the issues relate; but there was evidence, which, if regular, would have rendered the order for the issues proper: **Held**, that if the appellate court should set aside the issues, for being, in the actual state of the case, improperly ordered, it should, under such circumstances, remand the cause to the court of chancery, where the evidence may be regularly taken, and thereupon the issues ordered anew.

**Infants—Legitimacy—Evidence.**†—J. C. and S. his wife being both white persons, a child is born of the wife during their wedlock and cohabitation; upon the trial of an issue, whether this child is the legitimate child of the husband, evidence that the child is a mulatto, and that in the course of nature a white man and white woman cannot procreate a mulatto, is admissible and proper.

John Carlton late of the county of King & Queen, some three or four years before his death, made and published his last will and testament, whereby he devised and bequeathed his whole estate, real and personal, to his two children Mary and Thomas Carlton. For his wife, Sarah Carlton, he made no provision whatever; nor did he make any provision for, or any mention of, a child of which his wife was then enseint, born about six months after the making of his will, and while the husband and wife were cohabiting, who was called William; this after-

dict, and with it becomes part of the chancery record."

And, to the point that, upon all trials at law of issues out of chancery, all the proceedings upon the trial of the issues as spread upon the record thereof, constitute part of the certificate of the verdict, and with it becomes part of the chancery record, the principal case was cited in *Henry v. Davis*, 7 W. Va. 716. See further, monographic note on "Issue Out of Chancery" appended to *Lavell v. Gold*, 25 Gratt. 473.

**Same—New Trial—Rule Governing.**—Although errors may have been committed by the law court in the trial of an issue out of chancery, in admitting or rejecting evidence, or in giving or refusing instructions, yet if the chancellor is of opinion that the verdict was unaffected by such errors, or is satisfied upon a consideration on the whole case that the result ought not to have been different, had there been no error in the trial of the issue, he may refuse to order a new trial and enter a decree in accordance with the finding of the jury. *Repass v. Richmond*, 99 Va. 516, 39 S. E. Rep. 160, citing the principal case; *Brockenbrough v. Spindle*, 17 Gratt. 28; *Powell v. Manson*, 22 Gratt. 192, and *Miller v. Wills*, 95 Va. 337, 28 S. E. Rep. 337.

A motion for a new trial of an issue out of chancery must be made to the court of chancery. *Reed v. Axtell*, 84 Va. 236, 4 S. E. Rep. 587, citing the principal case, *Brockenbrough v. Spindle*, 17 Gratt. 21, and *Watt v. Starke*, 101 U. S. 247, 25 Law Ed. 826.

†**Infants—Legitimacy—Evidence.**—See monographic note on "Parent and Child" appended to *Armstrong v. Stone*, 9 Gratt. 102.

561 born child was pretermitted \*in the will. The testator afterwards became a lunatic, and died in that state.

After his death, dower of his land was assigned to the widow, and one third of his slaves to hold for her life, under an order of the county court of King & Queen. And, afterwards, by a decree of the same county court in chancery, the testator's land, including that assigned to the widow for dower, was divided into three parts, and one third part, subject to the widow's dower, was assigned to his daughter Mary, who was now the wife of William Watkins, and another third part, likewise subject to the dower, to his son Thomas Carlton; and the testator's slaves, except those assigned to the widow for life, were likewise divided into three parts, and one third assigned to his daughter Mary, and another third to his son Thomas. The county court ordered the other third part of the land and slaves to be rented and hired out; and this third part was the subject of the present controversy.

In 1829, William Watkins and Mary his wife exhibited their bill in the superior court of chancery of Richmond, against Harris Carlton administrator with the will annexed of the testator John Carlton, Sarah Carlton his widow, Thomas Carlton his son, and the child William born of his wife after the making of his will (Thomas and William being then both infants); wherein, after setting forth the facts above stated, and exhibiting the proceedings of the county court of King & Queen for the division of the testator's estate, they alleged, that the afterborn child William was in fact a mulatto; that the testator John Carlton and his wife were both white persons, and, in the course of nature, the husband could not be the father of the mulatto child; that, therefore, that child, though born in wedlock and while the husband and wife were cohabiting, was illegitimate, and consequently was not entitled to any part of the testator's

562 estate. And the bill prayed, \*that the child William should be declared illegitimate, and that the third part of the testator's land and slaves, which had been reserved by the decree of the county court as before mentioned, should be decreed to, and divided between, the defendant Mary and her brother Thomas.

A guardian ad litem was appointed for the infant defendants Thomas and William, who put in answers for them. The answer of Thomas merely insisted on his legal rights, and submitted them to the judgment of the court. The answer put in for William, stated, that as, according to the plaintiffs' own shewing in their bill, he was born in lawful wedlock of John Carlton and Sarah his wife, he was therefore, in presumption of law, the legitimate child of the said John, and he submitted to the court whether he could now be declared illegitimate, and prayed the court to protect his rights. The defendant Harris Carlton answered, that one third part of his testator John Carlton's estate had been reserved by the county court of King & Queen for the defendant William,

or until it should be judicially decided whether he was entitled thereto or not; and that the complexion of the defendant William was such as to cast a cloud of suspicion on his legitimacy. As to the defendant Sarah Carlton, the bill was taken pro confesso.

Several depositions were taken and filed, upon the question of fact, whether the child William appeared by his features, hair and complexion, to be a mulatto; but these depositions were taken without notice to his guardian ad litem. There was, however, no exception taken to them for want of notice, and they were read at the hearing.

The chancellor, upon the hearing, ordered that issues be made up and tried at the bar of the circuit court of King & Queen, to try and ascertain, by the verdict of a jury,

whether John Carlton deceased was 563 \*or was not a white man? whether the infant defendant William was the child of a black or of a white father? and whether the said William was in fact the lawfully begotten child of the said John Carlton deceased, who was in his lifetime the husband of Sarah Carlton, the mother of the said infant defendant? And that the verdict thereupon be certified to the court of chancery. The chancellor added, that he confided to the circuit court, to assign counsel for the infant defendant William, and cause him to be produced before the jury, if to that court it should seem proper, and, in general, to take care that his rights should be defended and protected.

The cause was subsequently transferred to the circuit superior court of King & Queen, on the law side of which, under the order of the chancellor, the issues to be tried were pending.

In the sequel of the proceedings, there were several depositions regularly taken and filed, on both sides, touching the question whether the defendant William Carlton was of mixed race or not.

The circuit superior court of King & Queen appointed another guardian ad litem to defend him; and, upon his motion, made an order "to change the venue in the cause to the circuit superior court of Essex;" but this order did not appear in the record of the proceedings in the former court, but only in that of the proceedings in the latter. For, through some inadvertence, or mistake (as it seemed) of the import of the order "to change the venue," instead of sending the issues only to the circuit superior court of Essex, to be tried on the law side thereof, the cause itself was transferred to that court, and thenceforth proceeded in there, on its chancery side. And the proceedings in the two courts of King & Queen and of Essex, and after the transfer of the cause to the court of Essex, the proceedings on the law side in

the trial of the issue, and the proceed- 564 ings \*on the chancery side, were irregularly blended and confused.

Upon the trial of the issues, the plaintiffs filed two bills of exception to opinions of the court. I. The first stated, that evidence was introduced on the part of the defendant William, to prove the marriage of John and

Sarah Carlton, and that he was born of Sarah during the lawful wedlock of John and Sarah, and at a time when by the laws of nature the husband might have been his father; and then, the plaintiffs offered evidence to prove the defendant William's illegitimacy, by proving that he was a mulatto, and that his mother Sarah and her husband John Carlton were both white persons: whereupon, the counsel for the defendant William objected, and moved the court to exclude such evidence to prove his illegitimacy, unless the plaintiffs should first adduce evidence to prove, either that John Carlton was physically incompetent to beget a child, or that he had no sexual intercourse with his wife, at any time when by the laws of nature he might have been the father of the defendant; and further moved the court to instruct the jury, that if they should find from the whole evidence, that the defendant was born of Sarah the wife, during the lawful wedlock of her husband John and her, at a time when by the laws of nature he might have been the father of the defendant, and that the husband and wife had not been separated by sentence of divorce, but cohabited and had opportunities of sexual intercourse, the jury ought to presume that the defendant was their legitimate son, and find accordingly, unless they should also find from the evidence, that no sexual intercourse did in fact take place between the husband and wife, at any time when, by such intercourse, the husband could by the laws of nature be the father of the defendant. The court sustained the objection to the introduction of the evidence offered by the plaintiffs, and gave the instruction

565 to the jury asked for the defendant.

The plaintiffs excepted. II. The plaintiffs then offered to prove, by the testimony of a physician of eminence in his profession, that there was no time at which such sexual intercourse could take place between a white man and a white woman, that the white man could, according to the laws of nature, be the father of a mulatto child born of the white woman. The defendant's counsel moved the court to exclude this evidence; the court excluded it; and the plaintiffs excepted.

The jury found a verdict in these words: "We of the jury find, that John Carlton of King & Queen, and Sarah Carlton his wife, in the issues mentioned, were white persons; that the defendant William Carlton was born during wedlock of the said John and Sarah; and that, according to law and the evidence introduced, the defendant William Carlton is the legitimate child of the said John Carlton and Sarah his wife." And the court ordered the verdict (not the whole proceedings on the trial of the issues on its law side) to be certified to the circuit superior court of Essex on its chancery side.

The verdict being certified accordingly, the proceedings were resumed on the chancery side of the court. The plaintiffs moved the court to set aside the verdict, and to direct a new trial of the issues; because the verdict was not responsive to the issues directed to be tried, nor did the finding of the jury, under the instructions of the court of law, in any manner serve to enlighten

the conscience of the court of chancery, on the question of fact directed to be enquired into upon the issues; and because of misdirection of the court of law to the jury at the trial of the issues. The court overruled the motion; and then proceeded to order the proper accounts, and, finally, to decree to the defendant William Carlton, an equal third part of the testator John Carlton's estate.

566 \*This court, on the petition of plaintiffs Watkins and wife, allowed them an appeal from the decree.

Leigh, for the appellants, remarked that the proceedings were wholly irregular. It did not appear by the record of the proceedings in the circuit superior court of King & Queen, that the cause had been transferred to that of Essex, or even that the venue for the trial of the issues had been changed to the latter court. The change of the venue only appeared by the record of the proceedings in Essex; from which it also appeared, that the order for the change of the venue had been acted upon, not only as an order for that purpose, but as an order for the removal of the cause itself from one court to the other. Strictly speaking, all the proceedings in Essex were coram non iudice. But he waived all objections to these irregularities; and asked the court to decide at once the questions that arose upon the merits. He said, the verdict of the jury did not respond to the second question propounded in the order for the issues; namely, whether the defendant William was the child of a black or of a white father? which, as the husband of his mother, and his mother, were both white persons, was the material point on which the question of his legitimacy depended. And the verdict evaded the third question put in issue: it did not find that he was in fact legitimate, but that, according to law and the evidence introduced, he was the legitimate child of John Carlton and Sarah his wife. The jury took the law as the court expounded it, and heard only the evidence which the Court admitted, having excluded the most material. Taking the two bills of exception together, the circuit court was of opinion, 1st, that a white husband cohabiting with a white wife, and having access to her, might, in the course of nature, procreate a mulatto child upon her body, and therefore, if a white husband cohabited with a

567 white \*wife, and had access to her, a mulatto child born of the wife during wedlock and cohabitation, was in presumption of law legitimate; and 2ndly, that this presumption was so strong, that the law would not admit evidence to prove, that white parents could not, in the course of nature, procreate a mulatto child. Now, he said, that as there never had been an instance known, in countries where there was only one race, either white or negro, of a white man and woman, or a negro man and woman, procreating a child that exhibited the distinct marks peculiar to the mixed race, it might be affirmed, with certainty, that, in the course of nature, neither a white man and white woman, nor a negro man and negro woman,

could produce such a child; and that in countries in which both races existed, if the white wife of a white man brought forth a mulatto child, that child was begotten by a negro man in illicit intercourse with her. There could be no question but one of fact, whether the child was a mulatto or not. The white and the negro races were distinguished by natural marks not to be mistaken. And the mulatto bore on his face distinct and certain indications of his mixed parentage: the hair, the complexion, the features, all betrayed the truth. He admitted the general presumption of the law, that children born in wedlock were legitimate; but he said, this presumption, however strong, yielded to clear proof of the impotency of the husband, or that he had no access, no possibility of access, to the wife, at the time the child born of her must have been procreated. *The king v. Luffe*, 8 East 193; *Stegall v. Stegall*, 2 Brock. Rep. 256. Proof of impotency of the husband, or of nonaccess to the wife, were sufficient to bastardize the issue, because such facts shewed the natural impossibility that the husband should be the father; and any other matter which proved the same impossibility, was equally sufficient to bastardize the issue. A husband who had no access

568 \*to his wife, could not possibly procreate a child on her body: a white man who had access to a white wife, nay continual intercourse with her, could not possibly beget a mulatto child of her.

R. T. Daniel, for the appellee, insisted, 1. that the chancellor ought not to have directed the issues. There was no legal evidence whatever before him to raise even a suspicion, that the unfortunate child, whose legitimacy was questioned, was a mulatto; for the depositions on the subject had been taken without notice to his guardian. 2. He contended, that the questions presented by the bills of exceptions to the opinions of the judge at the trial of the issues, could not now be examined by this court. The circuit superior court of Essex, having tried the issues on its law side, ordered the verdict only to be certified to the court on its chancery side. It did not certify the bills of exceptions, or any other part of the proceedings on the trial of the issues at law; nor was any application made to the court to certify them. Nothing but the verdict was before the court of chancery, and nothing else could be brought before this court, by this appeal from the decree of the court of chancery. 3. Supposing the bills of exceptions regularly before the court, he said the question was, whether the judge was right in holding, that the legal presumption of legitimacy arising from the birth of the child in wedlock, born and begotten during actual cohabitation of the husband and wife, could not be rebutted by evidence that the child was a mulatto? Nothing could be more vague and uncertain than such evidence. There was great variety in the hair, complexion and features, of persons of unmixed race, and yet greater variety in persons of mixed race, according as one or the other parent predominated in the procreation, and according to the proportions of white and of negro blood of their parents.

The statute of Virginia declared, that "every person other than a negro, of

569 \*whose grandfathers or grandmothers any one is or shall have been a negro, although all his other progenitors except that descending from the negro shall have been white persons, shall be deemed a mulatto; and so every such person who shall have one fourth part or more of negro blood shall in like manner be deemed a mulatto." 1 Rev. Code, ch. 111, § 11, p. 423. Now, he said, it would be very difficult, hardly possible, to distinguish with certainty a mulatto having only one fourth part of negro blood from a white person. The difficulty, the uncertainty, attending the proof of a person being white or mulatto, were strongly exemplified in the present case; it was always matter of opinion, founded on inspection; and it appeared from the dispositions in this cause, that while some of the witnesses thought the defendant William a mulatto, others thought him a white person. The court, then, ought not to suffer any person to be bastardized, deprived of his status and of his inheritance, or put in jeopardy of losing both, by the admission of evidence in its own nature so uncertain. As to the physical impossibility of a white man and white woman procreating a mulatto child; if by mulatto was meant a person whose parents were undoubtedly of different races, the impossibility must be admitted; indeed, it was a truism: but the true question was, whether a white man and woman could, in the course of nature, procreate a child which had the appearance of a mulatto? And whatever opinions philosophers, speculating on the natural history of the human race, might entertain, it was the general opinion of mankind, that impressions made on the mother at the time of conception, or during pregnancy, often produced effects on the physical constitution, and much more on the appearance, of her offspring. And the effect of such impressions might be that a child procreated by white parents might have the appearance of a mulatto. He urged, very strenuously, that the policy of

570 the law required \*the court to cut off all such enquiries as those which the plaintiffs sought to introduce upon the trial of the issues in this case. And for this proposition, he quoted and relied upon the language of judge Roane, delivering the opinion of this court in *Bowles v. Bingham*: "With respect to procreations during marriage, the presumption is, that all persons born during marriage are legitimate. This presumption can be destroyed only by contrary proof, demonstrating that the child is not the child of the husband; which, again, can only be by shewing that, from his continued absence from his wife, or about the time of procreation, or from the impotency of his body, it is impossible that he should be the father."—"It is not, therefore, a mere circumstance of probability that will operate to bastardize the issue. Such issue will be held to be legitimate, unless it be conclusively shewn that a person other than the husband must necessarily and unavoidably have been the father."—"Our law wisely throws a veil over

acts of incontinency in such cases, and certainly will not, without necessity, and in a spirit of departure from the wise rule of public economy before mentioned, inundate our court with indecent enquiries, whether this or that man, whether the husband or another, committed any given act of immorality or fornication."—"It is even better, that a particular grievance should exist, than a scene of this sort be opened, without necessity, in a country in which public decorum is a part of the law, to contaminate and destroy the morals and peace of our country." 3 Munf. 601, 2, 3. This reasoning, he insisted, was peculiarly applicable to the case now before the court; and it was, without doubt, the ground of the opinions given by the judge of the circuit superior court at the trial of the issues.

Leigh replied, 1. That if there had been no parol evidence at all before the chancellor, to warrant the belief that the defendant William was a mulatto, there was enough to shew the propriety, and indeed the necessity, \*of directing the issues, and that even for the defendant's own sake.

For, the county court of King & Queen had forborne to give him a share of the testator John Carlton's estate, and held it in reserve till the doubt as to his legitimacy should be decided. Besides, if upon the state of the evidence at the time the chancellor directed the issues, there might have been a doubt as to the propriety of directing such issues to be tried, the evidence taken with perfect regularity and filed in the sequel of the proceedings, shewed that the issues ought now to be directed; and if the court should set aside the former issues, it would only direct new ones to the same purpose. 2. He said, all the proceedings upon the trial of issues out of chancery, were part of the proceedings of the suit in chancery; and, in our practice, the court of law before which the issues were tried, only certified the verdict to the court of chancery; and that carried with it all the proceedings belonging to the verdict; the docketing of the issues, the impaneling of the jury, the points ruled by the court at the trial, in short, every thing regularly made part of the record thereof, as well as the verdict itself. 3. He said, the question on the merits was not whether the evidence offered might or might not be sufficient to establish the facts it was offered to prove? (which was a question for the jury) but whether any evidence, however clear, certain and conclusive, that the person in question was a mulatto, and that white parents could not in the course of nature procreate a mulatto child, was admissible? Whether, in short, the court below did right in cutting off all enquiry into the facts which the jury was sworn to try?

TUCKER, P. Preliminary to any enquiry into the merits of this case, it is necessary to ascertain what is to be considered as constituting the record. And upon this point, I shall observe, that I take the whole proceedings \*in the court of law, upon an issue directed out of chancery for the purpose of ascertaining a particular fact, to be part and parcel of the chancery cause.

The court of law is but ancillary to the court of chancery: it has no jurisdiction in such case, except that which is derived from the chancellor's order: it must pursue his directions, admitting papers to be read which he orders to be read; and, if required, it must certify any instructions which are given to the jury, that the chancellor may decide whether they were rightly given or not: finally, it can give no judgment upon the verdict, but must certify it to the court of chancery to avail there as it may. Such being the case, the chancellor has a right to see the whole proceedings, and though to save costs the verdict only is certified, yet, in strictness, the whole record should be so. But were it otherwise, still the order to certify the verdict, necessarily implies, that every thing should be certified which was spread upon the record as part of the proceedings at the trial. The exceptions, therefore, ought to have been so certified; and, doubtless, they were so, since a motion was expressly made and entertained for a new trial of the issues, on the ground of misdirection set forth in those exceptions. In this case, indeed, unless we look to the law record, the whole proceeding appears irregular. The bill was filed in the court of chancery of Richmond, and the issue was directed by it, to be tried in the circuit court of King & Queen. Afterwards, the whole cause was removed to King & Queen. There it depended for several years, when, all at once, the case makes its appearance in Essex, without any order appearing by which it was sent thither, unless we look into the law record. There, indeed, we see the order sending it to Essex for the trial of the issue; but in the chancery record, no warrant for the action of that court appears. If the law record were rejected, the court of Essex 573 \*would be found trying an issue without authority, and pronouncing a final decree upon it without jurisdiction. I do not, however, rest upon this necessity which the appellee is under to admit the law record. I go upon the broad ground, that upon the trial of an issue out of chancery to enlighten the conscience of the chancellor, the whole of the proceedings at the trial, so far as they are spread upon the record, properly constitute a part of the certificate of the verdict, and of course become a part of the chancery record.

It is next necessary to consider, whether, as the depositions of the witnesses taken before the issue was directed, were taken without due notice to a guardian of William Carlton, the chancellor was justified in directing the issue, and if not, what will be the consequence here. The depositions in question were proper evidence as to the other parties, and they were certainly read upon the hearing as to them. Suppose them to have been irregular as to William; ought the chancellor to have dismissed the bill? or to have suppressed the depositions as to him, and given reasonable time to retake them? The latter, assuredly. But the court did not suppress them: it read them: it treated them as good, either because there was no exception to them at that time, or because the

exception was deemed invalid. It recognized the proof as sufficient; and this court sees, that there was evidence, however irregular, that was all important. We ought, then, at most, to do what the court below should have done; suppress the depositions, and send the cause back, to give the parties an opportunity of retaking them. This is in the spirit of the cases of *Duff v. Duff's ex'ors*, 3 Leigh 523; *Cropper v. Burtons*, 5 Leigh 426; *Miller v. Argyle's ex'or*, Id. 460; *Sittingtons v. Brown & al.*, 7 Leigh 271. In this case, however, it will only be necessary to send the cause back for a new trial, as the record is now replete with evidence of the necessity of an issue.

574 \*The only proper question in the case is, whether there should be a new trial of the issues? I think there ought to be, both because they are not in all things responded to by the verdict, and because they were found under a misdirection of the judge.

In the first place, there were three enquiries directed: 1. Whether John Carlton was a white man? 2. Whether William was the child of a black or a white father? 3. Whether he was the lawfully begotten son of John Carlton? To the second of these enquiries, there is no response. The jury answer only the first, distinctly; the second they answer not at all; the third they evade. They find, that William was born in wedlock, and that, according to law and the evidence introduced, he was the legitimate child of John and Sarah Carlton. But it does not follow, that he was the lawfully begotten son of John Carlton; since, if born in wedlock without impossibility of being so begotten, he would "according to law" be held to be his legitimate child, though he may have been actually begotten by another. The verdict, then, not being responsive to the issues, should have been set aside; and the rather, as the most important enquiry is not answered by the verdict, namely, whether he was the child of a black or white father?

2dly, The instructions of the court were, I conceive, manifestly erroneous. The court refused to admit evidence to prove that the defendant William was a mulatto, and that his mother and her husband John Carlton were both white; and refused also to admit the evidence of a scientific physician to prove, that there was no time at which sexual intercourse could take place between a white man and a white woman, that the white man could, according to the laws of nature, be the father of a mulatto child born of the white woman. In these opinions, it is implied, that the procreation of a mulatto child by a white man upon the body of a

575 \*white woman, is either not impossible, or at least not such an impossibility as the law will recognize as fixing the stamp of illegitimacy. To such opinions I cannot accede. If it fell within my province, I should say at once it was impossible. But perhaps it belongs to the jury to decide that matter upon the evidence of experts. This, however, was refused, evidently upon the ground, that even if impossible, it was not, such an impossibility as would prove the

child a bastard, provided he was born in wedlock. I do not so understand the law. It is not this or that particular impossibility that bastardizes the child. The essence of the rule is, that if it be impossible that the husband can be the father, the child is a bastard. The cases of the husband being beyond sea, imprisoned, impotent, and the like, are but instances of the application of the rule. Even nonaccess, if proved, though the parties are in the same kingdom, will suffice. How, then, if the impossibility rests upon the laws of nature itself? Shall it be less regarded? Shall the white child of a white couple be bastardized, upon questionable proof that the husband was rendered impotent by disease; and shall we legitimate a negro because he was born in wedlock? The learned judges give no countenance to such opinions. In the case of *The king v. Luffe*, lord Ellenborough said, "Circumstances which shew a natural impossibility that the husband could be the father of the child of which the wife is delivered, whether arising from his being under the age of puberty, or from his labouring under disability occasioned by natural infirmity, or from the length of time elapsed since his death, are grounds on which the illegitimacy of the child may be founded." He does not say they are the only grounds. The principle is that if the procreation by the husband be impossible, the child is illegitimate. Accordingly, in the case of *Bowles v. Bingham*, judge Roane observes, "that the issue born during wedlock will be held to be legit-

576 imate, \*unless it be conclusively shewn that a person other than the husband must necessarily and unavoidably have been the father." Now, to my mind, this is conclusively shewn, when the married couple are white and the child mulatto. But admit, that this is a physiological question, most proper for the jury upon the evidence of professional and scientific men, still the court of law erred in rejecting all testimony on that important point.\*

\*Note by the president. I rest my opinions on this matter on grounds that seem to me to be altogether impregnable. 1. I take it, that what is against the uniform course of nature is impossible. It cannot be denied, indeed, that there are sometimes anomalies in nature, which it is beyond our ken to account for. Thus, until the birth of the siamese twins, no physiologist would probably have admitted the possibility of such a *lusus naturæ*. But where the fact in question can be accounted for without supposing a deviation of nature from her ordinary laws, philosophy dictates the rejection of a theory in conflict with universal experience. Thus a white couple cannot (according to the common course of things, at least) have a black child. If, therefore, the wife, resident where a black man may have access to her, has a mulatto child, it would be more philosophical to suppose it to be the child of the black, than to imagine such a deviation from the general law of nature, that a white couple cannot procreate a child of the black race. The first supposition has nothing highly improbable about it; while the last, if it be possible at all, is so remotely possible, that it could only be true upon the notion that the child was a *lusus naturæ*. 2. I take it that



577 \*I am of opinion to reverse the decree, and direct a new trial of the issues; upon which, evidence that William Carlton is a mulatto, and evidence also of professional men that, according to the course of nature, a mulatto child cannot be the offspring of two white persons, shall be admitted, if offered. And on such trial, the instructions given on the former trial are not to be repeated.

CABELL and STANARD, J., concurred. Decree reversed, and cause remanded, with directions to order a new trial of the issues &c.

578 \*Couch v. Fretwell's Adm'r.

February, 1840, Richmond.

(Absent BROOKS and PARKER, J.)

**Declaration—Leave to Amend—Proceeding Afterwards.\***

—When an order of court has been entered, grant-

what is (as far as human observation goes) the uniform course of nature, we must call a law of nature. Man can only know the laws of nature by experience; by the uniform course of natural events. It is by this means he knows, that the progeny of the horse will be a horse, if the female be of the same species, and the offspring of man will be a human being. Nec imbellem feroces progeniant aquilæ columbam. If then the progeny of the white race be uniformly distinct from that of the black, it may be said to be a law of nature, that a white couple cannot produce a negro or mulatto child. For no experience is more universal than that a white couple always produces white offspring, and never black or mulatto. Among the hundred millions of whites in Europe, there is no authenticated instance of the produce of the white race being other than white, where there was no possibility of access between a black and white. It is only in a country where there are blacks, that this fancied *lusus naturæ* is found; and it is, therefore, more reasonable to believe that a mulatto child is the offspring of a meretricious connexion, than to suppose the existence of a miraculous conception and birth, of which the natural history of our species affords no well authenticated instance. Accordingly, we find that intelligent and scientific men have considered it impossible that a black or mulatto child, born of a white mother, should be the child of a white man. 1 Beck's Med. Jurispr. 307, citing 1 Edinb. Med. & Surg. Journal 335, and citing also the case of Alexander Whistelo, decided against the opinions of Dr. Mitchell, whose learning and extensive research, however, did not avail him to discover, in the history of our species, a single incontestable instance of such a monstrous birth as a black child from parents that were white. Science and philosophy, busied from the time of Aristotle and Pliny to the present day, in recording whatever is curious and remarkable in natural history, have handed down to us, it is believed, not a single case of the kind. On the contrary, it is the settled and established understanding among the intelligent, wherever the black and white races are found together, that the mulatto is the product of the sexual intercourse of the two races. This understanding is the result of general and uniform experience; and from that uniformity, we deduce, as a law of nature and of our species, that a male and female of one of the races never can produce an offspring of the other.

\*See monographic note on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

ing the plaintiff leave to amend his declaration, and remanding the cause to rules, the case, after the amended declaration is filed, ought to be regularly proceeded in at the rules to an issue or office judgment, unless by consent an issue be made up in court; and if, without such proceedings at the rules, judgment be entered up in court against a defendant because he has not appeared and pleaded to the amended declaration, such judgment will be erroneous.

On the 21st of December 1828, James B. Fretwell, administrator of Alexander Fretwell deceased, sued out of the superior court of law for Buckingham county a writ of *capias ad respondendum* against Anderson & Woodson and John Couch. The return of the sheriff was as follows: "Executed on Geo. Woodson and John Couch, and Curtis C. Nunnally their bail. Anderson is not an inhabitant of this county."

At the rule day to which the writ was returnable, the suit was abated as to Anderson, and the plaintiff having filed his declaration, a conditional judgment was entered against Woodson and Couch, which was confirmed at the succeeding rule day.

At the next term, the judgment obtained in the office against the defendants Woodson and Couch was set aside, upon their filing a plea in writing to the following effect: "that the said George Woodson, in the declaration mentioned, had no lawful power and authority to seal and deliver the alleged bond in the declaration mentioned, as the act and deed of the said Edmund Anderson, and the said writing is not the act and deed of the said Anderson; and so the defendants say that the said alleged writing in the declaration is not the act and deed of the defendants."

579 \*During the same term, leave was given the plaintiff to amend his declaration, and the cause was remanded to the rules.

At June rules 1829, the plaintiff filed his amended declaration. It was in the name of James B. Fretwell (sometimes called administrator of Alexander Fretwell deceased) against George B. Woodson (who sometimes styles himself Anderson & Woodson) and John Couch, and set forth, that the said George B. Woodson and John Couch, on the 19th March 1827, by their certain writing obligatory, sealed with the seal of the said John Couch and the seal of the said George B. Woodson, (which said seal or scroll of the said George B. Woodson is affixed to the name of Anderson & Woodson, but in truth and in fact is the signature and seal of the said George B. Woodson,) promised to pay said plaintiff, on or before the first of January next after the date of the said writing obligatory, the sum of 90 dollars, for the payment of which they bound themselves in the penal sum of 180 dollars.

No rule was given the defendants to plead, nor any other proceeding had at the rules, after this amended declaration was filed. But final judgment was entered as of the succeeding term: the entry stating that "the defendants not appearing and pleading



to the amended declaration, on the motion of the plaintiff by his attorney, it is considered" &c.

A superadeas was awarded on the petition of Couch, assigning as error, that the writ is against Anderson & Woodson and John Couch, and the declaration against George B. Woodson and John Couch.

Robertson for plaintiff in error.

TUCKER, P. The judgment in this case is altogether irregular. The cause having been remanded to the rules, to enable the plaintiff to amend his declaration, 580 \*ought to have been there regularly proceeded in, upon the filing of the declaration, by rule to plead &c. to an office judgment or an issue. Parties indeed may amend their pleadings in court, where they are willing and consent to make up an issue there; but there can be no judgment by default for want of a plea, except at the rules. This judgment is not then a judgment by default, but it is altogether an irregular judgment, taken against the defendants as if they were really in default, when they were not so. It must therefore be reversed.

The entry in the court of appeals was as follows:

"The court is of opinion that the judgment is erroneous in this, that after the cause had been remanded to the rules, it ought to have been regularly proceeded in there, to an issue or office judgment, unless by consent an issue had been made up in court; and it was altogether irregular to enter up the judgment in court without such previous proceeding." Therefore, judgment reversed with cost. "And this court, not deciding upon the sufficiency of the declaration, as that question does not properly arise in the present state of the case, doth order that the cause be remanded to the circuit superior court, to be sent back to the rules for further proceedings to be had therein."

# **581 \*Scott's Administrator v. Tankersley's Executor.**

February, 1840, Richmond.

(Absent PARKER and BROOKE, J.)

## **Sheriff's—Motion against Deputy\*—Estoppel—Case at Bar**

A decree is rendered against the administrator of a sheriff, for the default of the sheriff's deputy in not returning an execution; and thereupon a motion is made by the administrator of the sheriff against the executor of the deputy. At the hearing of the motion, evidence is offered to shew that the motion against the sheriff's administrator was not within ten years from the return day of the execution. But it appearing that the executor of the deputy had notice from the administrator of the sheriff to defend the motion against the said administrator, and promised to attend to it, HELD, the sheriff's adminis-

\***Sheriff's—Judgment against, for Default of Deputy—Motion against Deputy.**—It is competent for the sheriff to maintain a motion against the deputy and his securities, for the amount of the judgment recovered against the sheriff, for, or on account of, any default or misconduct of such deputy, although such judgment may have been previously paid off

trator is entitled to judgment against the deputy's executor.

**Same—Same—Measure of Recovery.**†—The decree against the sheriff's administrator being for £76. 6. 7. with interest on £45. 11. from the 19th of May 1827 till paid, and 22 dollars, and the same being satisfied by the payment of 323 dollars 44 cents on the 19th of May 1830, the sheriff's administrator, on his motion against the deputy's executor will not obtain a judgment for the 323 dollars 44 cents with interest from the 19th of May 1830, but merely for the amount of the decree against him, to wit, the £76. 6. 7. with interest on £45. 11. from the 19th of May 1827, and 22 dollars. Accord. *Stowers adm'r of Bragg v. Smith's ex'x*, 5 Munf. 401, and *Jacobs v. Hill and others*, 2 Leigh 393.

At a superior court of chancery held in the town of Fredericksburg on the 22d of May 1827, it appeared that Francis W. Scott had had ten days notice that a motion would be made by Mildred Skinker as administratrix of John Skinker, against the said Francis W. Scott as administrator of John Scott, for a fine because of the failure of Reuben Tankersley, deputy for the said John Scott as sheriff of Caroline, to return an execution which issued from the clerk's office of the said court of chancery on the first day of November 1815, in favour of the plaintiff 582 against Elizabeth Turner executrix \*of Reuben Turner deceased; and the defendant not appearing, the court, on consideration of the motion, decreed that the defendant, out of the estate of his testator, pay to the plaintiff the sum of £76. 6. 7. with interest at the rate of six per centum per annum on £45. 11. part thereof, from the 19th day of May 1827 till paid, (being a sum less than five per cent. per month on the amount of the execution,) and also pay to the plaintiff the costs of the motion. And the plaintiff thereupon, in open court, released the estates of Reuben Tankersley and John Scott from any and all claims for failing to pay the amount received under the execution.

On the 19th of May 1830, Francis W. Scott, as administrator of John Scott, paid John Dickinson, as the agent and attorney of mrs. Skinker, 323 dollars 44 cents in full of the decree, and took a receipt for the same.

Thereupon Francis W. Scott, as administrator of John Scott, gave notice to Byrd George, as executor of Reuben Tankersley, that he should, on the second day of the June term of Caroline county court in 1830, move for a judgment against him for the sum of 323 dollars 44 cents which he had so

and discharged by the sheriff. *Weaver v. Skinker*, 4 Gratt. 162, citing the principal case as establishing the proposition.

†**Same—Same—Same—Measure of Recovery.**—But, according to the authority of the principal case, the sheriff is only entitled to recover, by this summary proceeding, the amount of the judgment so recovered against him, and not the aggregate amount of debt, interest and cost paid by him, with interest on the sum so paid. *Weaver v. Skinker*, 4 Gratt. 162.

The principal case was also cited in *Crawford v. Turk*, 24 Gratt. 189; *Poling v. Maddox*, 41 W. Va. 784, 24 S. E. Rep. 1001.

paid in discharge of the decree, with interest thereon from the 19th of May 1830.

The motion was continued until the 15th of March 1833, when the parties appeared and the case was heard. The plaintiff offered in evidence a copy of the decree, with the receipt indorsed thereon, and the testimony of John Dickinson; who testified, that he was some years ago employed by Mrs. Mildred Skinker, administratrix of John Skinker, to collect her claim under an execution which had issued from the chancery court of Fredericksburg against the estate of Reuben Turner; and finding that the execution had gone into the hands of Reuben Tankersley, he applied to Byrd George, the executor of Tankersley, for the amount, stating

583 ing \*that he should have to proceed against the sheriff's representatives unless it were paid. George refusing to pay, he Dickinson gave notice to Francis W. Scott administrator of John Scott, who said that he knew nothing about the matter and should rely on George to make the defence, and desired him Dickinson, if he met with George before the trial of the notice, to apprise him of it; stating at the same time, that he Scott would also deliver him the notice which had been served on himself. After this, and before the hearing of the notice, Dickinson met George, who told him he should attend to the case, though he was afraid he should not be able to defend it, as he could find no receipt or evidence of payment amongst Tankersley's papers. After getting the judgment, Dickinson mentioned to George that the court had given a judgment for the amount of the execution, and expressed a hope that he would settle it and relieve Scott's estate. George said he had been advised by Mr. Robert G. Scott, that he could not safely pay it without judgment. Dickinson told him that Scott could not get a judgment without first paying the decree, which would be very inconvenient, as he had distributed the estate. Nevertheless George adhered to the opinion that he could not pay before a judgment, without making himself liable; saying, however, that Mr. Scott might settle the decree, and proceed at once to have his judgment. Dickinson informed Scott of George's refusal to pay, and of what he said; and to enable Scott to obtain a judgment, the decree was settled and a receipt given therefor.

It was farther proved that the papers in the case of Skinker's administratrix against Scott's administrator, on which the decree was rendered, had been since lost or mislaid, so that they could not now be produced.

And a witness on behalf of the defendant testified, that soon after the commencement of this motion, he \*was retained 584 by the defendant to defend the motion, and for that purpose made an examination of the papers in the case of Skinker's administratrix against Scott's administrator, which were then in the clerk's office of the court of chancery; and from those papers it appeared that the execution against Turner's executrix was issued on the first of November 1815, returnable to the first day of the April term 1816, and that the motion on which the decree against Scott's administrator was

rendered, was made upon a notice given to Scott's administrator in October 1826.

Upon the whole evidence, the county court gave judgment against Tankersley's executor for the sum of 323 dollars 44 cents paid by Scott's administrator, with interest from the 19th of May 1830 till paid, and the costs of the motion. To which judgment Tankersley's executor excepted, and the bill of exceptions contained the evidence before stated.

On a supersedeas to the judgment of the county court, the circuit court reversed the same with costs.

Whereupon, on the petition of Scott's administrator, a supersedeas was awarded to the judgment of the circuit court. Scott's administrator, by his petition, insisted, that as it appeared that Tankersley's executor had notice of the motion of Skinker's administratrix against Scott's administrator, and undertook to defend that motion, the decree of the court of chancery on that motion was conclusive evidence on the motion of Scott's administrator against Tankersley's executor, and therefore the judgment of the county court was right, and that of the circuit court was wrong.

Leigh for plaintiff in error.

Scott for defendant in error.

TUCKER, P. There is in the cause no exception to the admissibility of any of 585 the evidence: its sufficiency \*is all that is in question. It is competent testimony, and moreover it is uncontradicted testimony. Whether parol evidence of the existence of the execution, and that it came to the hands of Tankersley, could have been admitted if objected to, is not now to be brought into question. It has not been objected to, but has been admitted as proper testimony. That it establishes the fact, is beyond question: and that is the main fact in the case; for if, as is proved, the execution came to Tankersley's hands, he has been guilty of the default, unless he can prove the return of it, or payment of the money, or some other matter of excuse; and if he cannot, the fine was properly imposed. To this, however, the defendant in error does not pretend. No countervailing evidence is offered by him; so that the case stands thus—The witness proves that Tankersley had the execution; the defendant in error offers no proof that it was returned; and the record of the decree shews that the high sheriff was fined for the failure. The case is thus completely made out.

It was much argued at the bar, that the record of the proceeding against the sheriff was evidence of nothing but the fact that there was a judgment, and furnished no proof that the execution came to Tankersley's hands. The argument was unnecessary, as the fact in question is proved by the witness, without the necessity of resorting to the record for proof of it. So that if there be nothing to countervail the facts above stated, there can be no doubt of the justice of the plaintiff's demand.

It is contended, however, that the statute of limitations would have protected the plaintiff in error, if he had properly defended

himself, instead of suffering judgment to go by default. Non constat that this is so. If it were, it should have been relied on by the defendant in error on the trial; and peradventure the supposed bar might have been avoided. But if, upon the \*motion against him, he had established the bar of the statute; if he had proved that he never had the execution; if he had shewn that it had never issued, or that it was duly returned, or that the money was paid,—all this would not have availed on Scott's motion against him, since it was his duty to prove those facts on the creditor's motion against Scott. For that was in fact his suit; it was for the default of his testator, and he had notice from the sheriff to defend it, and promised that he would attend to it. What farther duty devolved on Scott? What obligation rested on him to attend farther to a case of which he knew nothing, which was in fact the cause of the deputy sheriff, and which that deputy's executor undertook to attend to? Lulled into security by the defendant in error, can he be fairly charged with suffering judgment by default? It was indeed by default; but it was the default of the defendant in error, who was bound to defend it and had promised to do so.

With these views, I think the judgment of the circuit court must be reversed. I regret that we cannot affirm that of the county court; but it is for too much, and is therefore also erroneous.

STANARD and CABELL, J., concurred with the president in the judgment entered in the court of appeals. After reversing the judgment of the circuit court with costs, and declaring that of the county court to be also erroneous, it was "considered that the same be reversed and annulled, and that the plaintiff recover against the defendant 76 pounds 6 shillings and 7 pence, with interest on 45 pounds 11 shillings from the 19th of May 1827 till paid, and 22 dollars, and his costs about the motion in the said county court expended," to be levied &c. And it was farther considered that the defendant recover against the plaintiff the costs expended by the said defendant in the circuit court, to be levied &c.

#### 587 \*Hill's Ex'or v. Fox's Adm'r.

February, 1840, Richmond.

(Absent STANARD and PARKER, J.)

**Decrees—Finality.—Statute of Limitations—Application.**—A decree for a sum of money provides that if no property of the debtor can be found, other than that conveyed by him by a deed of trust and a mortgage, then he shall deliver up the trust and mortgage property to the marshal, to be sold to satisfy the money secured by the trust and mortgage, and then to satisfy the decree. The debtor

**\*Decrees—Finality.**—The principal case was cited on this subject in *Cocke v. Gilpin*, 1 Rob. 36, 45, 47, 48, 49, 52; *Ryan v. McLeod*, 32 Gratt. 379; *Manion v. Fahy*, 11 W. Va. 498; *State v. Hays*, 30 W. Va. 120, 3 S. E. Rep. 184; *foot-note* to *Grymes v. Pendleton*, 1 Call 54; *foot-note* to *Fleming v. Bolling*, 8 Gratt. 293.

In *Rawlings v. Rawlings*, 75 Va. 87, it is said: "The

dying, a bill of revivor and supplement is filed against his administrator, to obtain payment of the decree out of the assets in his hands. And the administrator, by his answer, relies upon the 17th, and also upon the 5th section of the statute of limitations, 1 Rev. Code, ch. 128. HELD, the decree in this case is not a final decree, and if it were, is not such a one as the statutes can apply to.

On the 9th of February 1801, James Primm entered into a bond with Patrick Home, Leonard Hill, Nathaniel Fox and Charles Ralls his sureties, which, after reciting that he had been appointed sheriff of the county of Stafford by a commission from the governor, under the seal of the commonwealth, dated the 20th day of November 1800, was conditioned that Primm should truly and faithfully collect, account for and pay the taxes imposed by law in his said county.

Primm having broken the condition of the bond, and Leonard Hill, one of the sureties, having been compelled to pay money on account thereof, suit was brought by him, in the superior court of chancery holden in Richmond, to recover so much of what he had paid as he was entitled to. The bill alleged that Primm was insolvent; that Home had died insolvent and intestate, and no person had administered on his estate; that Ralls had removed from Virginia, had died insolvent, and no person had administered on his estate; and that Fox had conveyed his property in trust \*and by mortgage to Robert Dunbar and Zachariah Vowles.

The cause, after being revived in the names of Thomas Hill and William Hill as executors of Leonard Hill, was removed to the superior court of chancery at Fredericksburg. That court, on the 30th of September 1819, decreed that the plaintiffs recover of the defendant Nathaniel Fox 558 dollars 70 cents, with interest on 255 dollars 57 cents, part thereof, from the 21st of January 1807, and on 303 dollars 13 cents, other part thereof, from the 25th of October 1810, until paid, and the costs expended by the plaintiffs and their intestate in the prosecution of this suit; "and if no property of the said defendant can be found, out of which this decree can be satisfied, or not sufficient for

inference which seems to have been drawn by JUDGE TUCKER in *Hill's Ex'or v. Fox's Adm'r*, 10 Leigh 587, 591, that the decree in that case was interlocutory because an attachment was necessary to enforce it, would appear not to be consistent with the established doctrine as laid down in *Cocke's Adm'r v. Gilpin*, 1 Rob. 20; and JUDGE BROOKE, who sat in both cases, took occasion to say in the latter case, that he concurred in the result of the opinion delivered by the president (in the former case), that the decree was interlocutory, but certainly not on the ground that it was to be enforced by attachment, as said by the president; because all decrees must be enforced by attachment when any party is in contempt of the court, and this necessity is most frequent in cases of final decrees."

See further on this subject, cases and notes cited in *foot-note* to *Cocke v. Gilpin*, 1 Rob. 20; *monographic note* on "Decrees" appended to *Evans v. Spurgin*, 11 Gratt. 615.

that purpose, other than that conveyed by the deed of trust and mortgage in the proceedings mentioned, that then the said Fox do deliver the property in the said deed of trust and mortgage mentioned, or so much thereof as may be necessary for the purpose of paying this decree and the sums herein aftermentioned, to the marshal of this court, to be by him sold, after advertising the time and place of sale, in some newspaper printed in the town of Fredericksburg, for three weeks successively, to the highest bidder for cash; and that he, out of the proceeds of such sale, shall, after defraying the costs of sale, first deposit in the bank of Virginia at Fredericksburg, subject to the future order of the court in this cause, the following sums of money, viz. £205. 4. 4½. with interest thereon at the rate of six per centum per annum from the 1st day of October 1801 until so deposited, and £250. 0. 2½. with the like interest thereon from the 17th day of May 1803 until so deposited, and then, out of the residue of the proceeds of sale, pay to the plaintiffs the principal, interest and costs aforesaid decreed to them; and that the said marshal report his proceedings  
589 herein to the court." And \*the bill of the plaintiffs, as to the defendants Robert Dunbar and Zachariah Vowles, was dismissed.

At July rules 1820, a scire facias was awarded to revive the suit against Nathaniel W. D. Fox administrator of Nathaniel Fox; and at October rules 1820, the scire facias being returned executed, and the said Nathaniel W. D. Fox failing to appear and shew cause against the revival thereby sought, it was ordered that the suit stand and be revived against the said Nathaniel W. D. Fox administrator as aforesaid, and be in all things in the same plight and condition as it was at the time of the death of the said Nathaniel Fox deceased.

The suit being continued upon the docket of the superior court of chancery holden at Fredericksburg, until that court was abolished, and afterwards continued upon the docket of the circuit court of Spotsylvania, on the 27th of May 1836 an amended bill was filed, by leave of the latter court, in the name of Thomas Hill surviving executor of Leonard Hill, setting forth, that the administration of the said Nathaniel W. D. Fox has been revoked, and the estate of the said Nathaniel Fox committed to Benjamin Tolson late sheriff of the county of Stafford, for administration; that John Moncure, the deputy of Tolson, took charge of the estate, and in the course of his administration collected considerable sums of money due the estate; and the complainant is advised that the same should properly be applied to the discharge of the decree, which remains unsatisfied and in full force.

Tolson and Moncure answered this amended bill, submitting whether the plaintiff is now entitled to revive his decree against either of them. They file a copy of the order of the county court of Stafford, shewing that on the 10th of November 1823, the letters of administration previously granted to Nathaniel W. D. Fox were revoked, and the

estate of Nathaniel Fox committed to Tolson as sheriff of Stafford, for administration;  
590 tion; they \*rely upon the fact that more than five years elapsed after the date of that order, before the amended bill was filed; and they pray the benefit of the statute of limitations. They also rely upon the fact that the decree was revived by scire facias against Nathaniel W. D. Fox as administrator of Nathaniel Fox, before proceedings were commenced against them, and though various executions were taken out against the said Nathaniel W. D. Fox on the said revived decree, yet no return was made on any such execution. And they pray the benefit also of the statute of limitations applicable to this state of the case.

It appeared by a certificate of the clerk of the court of chancery, that on the 29th of October 1819, an execution was issued on the decree, on which a return was made, stating that the defendant was dead before the execution came to hand, and therefore it was not acted on; that on the 30th of November 1821, a new execution issued against Nathaniel W. D. Fox administrator of Nathaniel Fox; that Thomas Hill, one of the plaintiffs, returned it the 30th of October 1822, and obtained another, which he returned on the 28th of October 1823; that he then obtained another, which he returned the 22d of October 1824; that another was then issued, which was never returned; and that afterwards, on the 3d of June 1826, another issued, which was never returned.

The circuit court of Spotsylvania decreed that the amended bill be dismissed, and that the plaintiff, out of the goods of his testator, pay to the defendants their costs.

On the petition of Hill's executor, an appeal was allowed from the decree.

Harrison for the appellant.

Daniel for the appellees.

591 \*TUCKER, P. I do not think it necessary, in this case, to decide whether a final decree in a court of equity is a judgment, within the meaning of the two clauses of the statute of limitations relied upon by the defendants, or within the equity of that statute. I am satisfied that this decree is not to be taken to be a final decree, and even if it were, it is not such an one as the statute could apply to. It is a decree, indeed, against Nathaniel Fox for a sum of money; but it farther provides that if no property of his can be found, then he shall deliver up certain trust and mortgage property to the marshal, to be sold to satisfy the plaintiff's demand. If the debt was not made by execution, this part of the decree came into operation; and as it could only be enforced by attachment if obedience to it were refused, so it seems to me obviously to be without the provisions of either of the clauses of the statute. Had the creditor found it necessary to proceed to enforce this provision of the decree, it could only be done by attachment against Fox in his lifetime, or by bill demanding from his representatives, or others in possession of the property, a compliance with the decree, and enforcing it against them by attachment. It is true, this course has not been taken, the creditor still in-

sisting that there are assets. But the provision itself gives the character to the decree; for the cause never could be out of the possession of the court, so long as its direct action might be called for to compel the delivery of the property. And even now it is competent to the party, upon failure to make his debt out of the assets of Fox, to amend his bill, setting forth that fact, and asking the enforcement of the alternative branch of the decree. I am of opinion, therefore, to reverse the decree and send the cause back for further proceedings.

Decree reversed, and cause remanded.

592 \*Ransone v. Frayser's Ex'ors.

February, 1840. Richmond.

(Absent BROOKE and PARKER, J.)

**Mortgage—Absolute Sale\*—Case at Bar.**—Upon a bill in chancery representing an absolute bill of sale of slaves as in fact a mortgage or pawn to secure payment of money lent, the case was, according to the plaintiff's pretensions, that while he was to retain possession of the property, there was no time appointed for payment of the money, nor any stipulation for payment of interest, nor any bond or note taken for the debt, so that the borrower had time during his whole life to pay the money. HELD, such circumstances, added to the absolute form of the written contract, would alone suffice to shew, that a mortgage was not intended.

By an instrument under seal, dated the 26th August 1826, Thomas Ransone acknowledged the receipt of 800 dollars from Robert Frayser, in full for the purchase money of a female slave and her four children, and conveyed the slaves absolutely to Frayser, with warranty of the title. The slaves were delivered to Frayser on the same day, or not long afterwards, and they remained for some time, though not long, in his possession, and then he hired them to Ransone from time to time. The hire agreed on for the year 1828 was 20 dollars; and in May 1828, Ransone gave Frayser his bond for that sum payable on the 25th December following, with a covenant to return the slaves well clothed on that day. Frayser died in July 1828, and by his will bequeathed these slaves to one of his daughters. At the end of the year, Ransone, being desirous to hire the slaves for another year, made application to the legatee to hire them to him; which she refused to do; and then he refused to deliver the slaves to Frayser's executors; upon which one of the executors went to Ransone's house, and took possession of the slaves, and delivered them to the legatee. Thus far, the facts of the case were not controverted.

\***Mortgage—Sale.**—In *Edwards v. Wall*, 79 Va. 322, the plaintiff claimed that a conveyance absolute on its face was intended as a mortgage to secure a loan. No personal security was taken for the alleged loan, nor was there any agreement between the parties either as to the payment of interest or the repayment of the principal. The court, on the authority of the principal case, held these to be important circumstances in determining whether a mortgage or sale was intended.

593 \*In August 1833, Ransone exhibited a bill in chancery, in the circuit superior court of Cumberland, against the executors of Frayser; alleging, that though his bill of sale of the slaves to Frayser, of August 1826, was absolute upon its face, the transaction was in fact a pawn or mortgage of the slaves to Frayser to secure the payment of 800 dollars lent by Frayser to him, upon an agreement, that Ransone might hold the property, and redeem it upon repayment of the money at any time; and praying, that he might be now allowed to redeem; and to that end, that the slaves might be sold, and the proceeds applied to the payment of the balance which should remain of the debt and interest after deducting the profits which had accrued since the defendants had got possession of them (of which an account was asked), and the surplus decreed to him.

Frayser's executors answered, that the transaction was, what it purported to be by the bill of sale of August 1826, an absolute sale of the slaves to their testator, for a full price paid down.

On the part of Ransone, one witness deposed, that he was present when the original agreement between Ransone and Frayser was made, and that the contract was, that the slaves in question were to be put into Frayser's hands as a pawn for 800 dollars lent by him to Ransone, and that the latter was to be at liberty to redeem them whenever he should return the purchase money. And three other witnesses deposed, that Frayser told them, at several times, that Ransone had a right to redeem the property, at any time, by returning the money.

On the other hand, three witnesses deposed, that Ransone told them, at several times, that he had sold the slaves to Frayser for 800 dollars, representing the transaction as an absolute sale, without any apparent motive so to represent it, if it was not the truth. There was proof that Frayser intended to lay out his money in a purchase

594 of slaves, and regarded the slaves conveyed \*by Ransone's bill of sale as his absolute property. A witness, who drew the bill of sale, deposed, that he understood the contract to be an absolute sale, nothing being said by either party to intimate that a pawn or mortgage was intended. Nor was there any reason shewn, or even suggested, to account for the omission in the written contract of any mention of the right of redemption, if a pawn or loan was intended under the form of an absolute sale. A physician who attended the family of slaves at Ransone's house in 1828, was told by him to charge his bill for medical services to Frayser. It was proved, that 800 dollars was a full and fair price for the property at the time of the contract. Ransone adduced no proof, nor did he even pretend, that any time was appointed for the repayment of the money, or for the payment of interest. Nor did he account, or attempt to account, for the fact of his having given a bond for 20 dollars for the hire of the slaves for the year 1828; a sum less than half the annual interest of the money he said was lent him by Frayser.

The circuit superior court dismissed the bill. And on the petition of the plaintiff to this court, an appeal was allowed him.

Robertson, for the appellant.

Leigh, for the appellees.

TUCKER, P. I think the weight of the parol evidence in this case decidedly with the appellees. I take occasion to remark how dangerous is the admission of the testimony of witnesses, to change and modify the agreement of the parties by setting up a secret trust or right of redemption. It is not denied, that such testimony is admissible; but whether it was wise to have established the rule, except in cases of fraud, or oppression or mistake of the scrivener, may well be doubted. Here are four

595 witnesses, who swear \*to facts which, standing uncontradicted, might have established this transaction as a mortgage: yet the facts and circumstances are conclusive of the contrary. In the first place, here is an absolute bill of sale, for which there seems to have been no assignable motive on the part of Ransone. He was not in the power of Frayser. He does not pretend, that the instrument was intended to be otherwise written, and that it was fraudulently imposed upon him in its present form. It was drawn not by Frayser, but by a third person, and that person (the only one present) heard nothing of a right of redemption. It is not pretended, that Frayser had insisted as a condition of the loan, that Ransone should not disclose the real character of the transaction. What, then, could have been Ransone's motive for suffering the instrument to be drawn as a bill of sale with a warranty, if he was to have the right to redeem? He must have known the difference. And what was his motive for the various gratuitous falsehoods to numerous witnesses, to whom he repeatedly acknowledged he had sold the slaves to Frayser? for the dishonest act of refusing to pay the physician for his services to his own slaves? for giving his bond for the hire of his own property? Was it that he did not know he could establish his rights? His witnesses were his near connexions, and always at hand. Was it that he was in Frayser's power? According to his version of the transaction, Frayser was in his power. For he had lent him 800 dollars for an indefinite period; he had taken a mortgage for his security with an indefinite power of redemption at any time during life; and he had neither bond, note nor covenant for repayment. In the mean time, Ransone held the slaves; and, according to the ordinary course of things, had a right to the possession of them until default made in payment, which could not be while he lived. Moreover, there was nothing to bind him to annual

596 \*payments of interest, so that Frayser could neither recover from him principal nor interest during his life; while, according to Ransone's pretensions, he had a right to retain the property as his own during the same time. This state of things negatives, beyond question, the notion of his being in Frayser's power, and acting and speaking under duress of circumstances. But it likewise negatives, decisively, the pre-

tension that this was a mortgage. It is not conceivable, that the parties, situated as they were, ever should have entered into such a contract: that Frayser ever could have lent his money, without any definite period of repayment, and without bond, note or covenant for its return; depending only upon a mortgage of a female slave and her children, and such a mortgage as never could be foreclosed as long as the borrower lived. This circumstance, then, and the absolute form of the bill of sale are, in my opinion, sufficient to give the stamp of falsehood to the appellant's pretensions, and to shew the extreme danger of permitting the written evidences of contract to be disarmed of all their obligation, by parol evidence of secret trusts and pretended equities of redemption.

Decree affirmed.

#### 597 \*Burton's Ex'or v. Burton's Adm'r.

March, 1840, Richmond.

(Absent CABELL and PARKER, J.)

**Revolutionary Officers—Arrears of Pay—Claims Improperly Paid Officer's Widow—Remedy of His Executor.**—The ex'or of a deceased officer, and his widow, prefer conflicting claims at the treasury of the U. States, for the arrears of pay accrued to the officer during his life, under the act of congress of May 15, 1828, "for the relief of certain surviving officers and soldiers of the revolution:" the officers of the treasury reject the claim of the ex'or, and pay the money to the widow. **HOLD**, even if the payment to the widow was wrong, the ex'or cannot maintain an action for the money against her, as money had and received by her to his use, there being no privity between them; his remedy is against the treasury.

**Same—Same—Right of Officer's Executor to.**—But the ex'or of the officer, has no right to claim of the treasury such arrears of pay accrued to his testator during his life.

**Assumpsit**, in the circuit superior court of Orange, by Stephens executor of James Burton, against Watts administrator of Elizabeth Burton, for money had and received by the defendant's intestate in her lifetime to the plaintiff's use. Plea, the general issue.

At the trial, the jury found a special verdict, by which it appeared, that James Burton was a surviving officer of the army of the revolution, who was entitled (under the act of congress of May 1828, "for the relief of certain surviving officers and soldiers of the revolution") to full pay for life, according to his rank &c. commencing from the 3rd March 1826. James Burton being so entitled, died in August 1829, without having received the money. After his death, his executor, the plaintiff Stephens, and his widow (the defendant's intestate) Elizabeth Burton, preferred conflicting claims for the money due to him under the act of congress, at the treasury of the United States. The amount of pay, computed from the 3rd March 1826 to the 26th August 1829, was adjusted at 598 the treasury, ascertained to be \*1665 dollars, and allowed. But the officers of the treasury rejected the claim of Burton's executor to the money, and paid it to his

widow. And this action was brought by Burton's executor against the administrator of the widow, to recover the money as money had and received to his use or to the use of his testator's estate.

Upon this state of facts, the circuit superior court held, that the plaintiff was not entitled to recover, and gave judgment upon the special verdict for the defendant: to which this court, upon the petition of the plaintiff, allowed a supersedeas.

Leigh, for the plaintiff in error.

Patton, for the defendant.

BROOKE, J. I think it well settled, that where two persons claim, each in his separate right, the same sum of money from a third party, and the third party pays it to one of the claimants, the other cannot recover it from him who receives it, in this or in any other form of action; for there is no privity between them. Whether he can recover from the third party, who has rejected his claim and paid the money to his successful competitor, is another question, which does not belong to this case.

On the merits, whether the widow of Burton was entitled to the money in question or not, there is no ground for the claim of his executor to it. The act of congress of the 15th May 1828 repudiates his pretensions. The act was passed in pursuance of a memorial of the surviving officers of the revolution assembled at Baltimore. That memorial protested, in strong terms, against any compensation from congress in the nature of pension: it admitted, that congress was under no legal obligation to make them compensation for the depreciation of their pay and of their commutation certificates; but it represented, that the nation was under a moral obligation to

599 \*make them compensation. The provisions of that act of congress are responsive to the claim. As the government was under no legal obligation by the existing law to make any such compensation, congress had power to give it on such terms as it thought proper; and as it was difficult to ascertain the loss of each officer in the sale of his certificates, congress thought proper to allow to each full pay for life, but none to receive more than a captain's pay. It thought proper also to make the compensation personal to the officer; the 4th section of the act declaring, that it should not be transferable, or liable to attachment, levy or seizure, by any legal process whatever, but should enure wholly to the personal benefit of the officer or soldier entitled to the same; thus excluding his executors or administrators. The act distinguishes it from a pension, by calling it pay. Pensions are not granted in consequence of a deficiency of pay while in service: they are gratuities for honourable service, when the party, in most cases, is unable to render further service. Dr. Johnson's ill-natured definition of a pension in his dictionary—that in England it is generally understood to mean pay given to a state hireling for treason to his country—can never be applied to the pay given by this act of congress to the surviving officers and soldiers of the

revolution, or to the pensions bestowed as gratuities on pensioners by any act of congress.

Whether Burton's widow was entitled to the arrears of pay allowed to her husband, it is not necessary in this case to decide. The judgment should be affirmed.

TUCKER, P. If the merits of this case were with the plaintiff, I should still be of opinion that the action could not be maintained. If the executor of the pensioner, and not his widow, was entitled to his unpaid pension, then the payment to the widow by the government was a payment in

its own wrong, and the executor 600 \*may still justly demand payment to himself from the proper department.

He cannot demand of the widow to pay over to him what she has received; for that was not his money. His money is in the hands of the government. What she received, she received as her own, claiming title to it as her own; and her claim being admitted and paid, she can never be compelled to refund. *Mayor &c. v. Judah*, 5 Leigh 305. And if the government cannot compel her to refund by direct action, it seems to follow, that she cannot be, indirectly, compelled to refund, by being forced to pay over the amount to another claimant with pretensions adverse to her own. There is no privity between them, nor is there any ground on which to rest an implied contract. The reasoning of the court in *Rogers v. Kelly*, 2 Camp. 123, seems to me to be in point. The government and the widow cannot both be the debtors of the executor. Now, if the payment was improperly made, the government is not discharged, and is still debtor to him. The widow, therefore, cannot be his debtor.

But upon the merits, I think (contrary to my first impressions) that the payment to the widow was right. The act of congress was made under no legal obligation to make the provision it contained: congress had power to do it upon its own terms, and of course to provide, that this retribution for meritorious services should enure to the personal benefit of the officer, and pass according to its discretion. In the exercise of its discretion, it reduced general officers to the compensation of a captain, and limited the commencement of the allowance to March 1826. By whatever name we may designate the allowance directed to be paid, it must still go according to the will of the legislative body; which expressly exempted the gift from attachment, levy, seizure or assignment; and declared, that "it should enure wholly to the personal benefit of the officer." It made no mention

of his executors or administrators; 601 \*and but for the subsequent act of

March 2, 1829, which gave all arrears of pensions to the widow of the deceased officer, it may well be doubted whether they would have been payable to any one after his death. The executor would seem to have no pretensions to claim them; since, in his hands, the pension would be applicable to the payment of debts, which would defeat the declared purpose of the act of May

1828. Therefore, the subsequent act of March 1829, which gives all arrears to the widows, was no invasion of any prior vested right; for until this last act was passed, there was no provision of law declaring what should become of the arrears of the pensions.

Upon both grounds, I think the judgment should be affirmed.

STANARD, J., concurred with the president.

Judgment affirmed.

602 \*Dawson v. Dawson's Ex'or & Others.

March, 1840. Richmond.

(Absent PARKER and STANARD, J.)

**Will—Construction—Emancipation of Slaves\*—Revocation of Devise—Case at Bar.**—Testator directs all his slaves to be emancipated and sent to a country where slavery is not tolerated. If within twelve months they shall elect to be emancipated on those terms, otherwise to be sold; and then, after sundry bequests, gives all the residuum of his estate, including a parcel of land called Belle Air, to charitable uses; afterwards, by a codicil, he gives the Belle Air estate to B. D. for the support and maintenance of the slaves thereon: HELD, the devise of the Belle Air estate to B. D. only created a trust for the support and maintenance of the slaves thereon, till they should be emancipated or sold; the devisee's interest was commensurate with and limited by the purpose of the trust, and was determined by the emancipation or sale of the slaves; and the codicil was a revocation of the devise of Belle Air contained in the will only pro tanto; yet the trustee was not accountable for any surplus of profits beyond the expense of supporting and maintaining the slaves.

This was an appeal taken by Benjamin Dawson from a part of the same decree from which the appeal was taken by the president and directors of the literary fund, in the case of *The Literary Fund v. Dawsons*, reported ante, p. 147.

The parts of the will of the testator Martin Dawson late of Albemarle, on the construction and effect of which the question in this branch of the cause depended, were the 2d, part of the 16th, the 17th and 21st clauses, and the codicil. They were in the following words:

"2d. It is my will and desire, that what slaves I may depart this life the owner of, be emancipated by my executors, and removed to some part of the world where slavery is not tolerated, and from my present view, the settlement in Africa of the African Colonization Society, is most desirable; and for the object of so

603 \*removing them, and finding them with the necessities of life, my executors are to use out of my estate, for each slave so emancipated, 200 dollars. Should

it be contrary to the laws of the country to emancipate slaves at my death, and such leave cannot be obtained, or should any of the slaves I may depart this life owner of, choose to remain slaves at or before the expiration of twelve months from my death, such as choose to remain slaves to be sold in families, and to be allowed to choose their masters so far as practicable; for this object, my estate to remain together twelve months after my death, except the perishable parts thereof.—16. It is my will and desire, that the balance of my estate, real and personal, be used by my executors for the purpose of erecting three seminaries of learning; one on my tract of land called Belle Air; one on my tract of land around the town of Milton, my lots in said town to be taken as part; one in the county of Nelson, as near the graveyard in this will mentioned as a proper site can be procured: said tracts of land, as also the one to be procured, to remain forever for the use and benefit of the seminaries of learning.—17. Should my executors fail to carry into effect said 16th devise for seminaries of learning (which I hope and trust they will not) then the real and personal estate devised for said objects, to be used by my executors in constituting a part of The Literary Fund of the state of Virginia; and two thirds of the interest on it to be used by the school commissioners for the county of Albemarle, in the same way the school fund allotted for the said county is used; the other third of the interest on it to be appropriated and used by the school commissioners for the county of Nelson in the same way: and from time to time, as the legislature may think advisable, the principal may be used for like objects, for the benefit of the said counties, in the same proportions as the interest is directed to be used. An act of assembly

604 \*for said object, supposed can be obtained.—21. I do hereby constitute and appoint my friends Henry T. Harris, William C. Rives, Alexander Rives, and William W. Dawson executors of this my last will and testament; who (my said executors) are authorized to dispose of all my estate, both real and personal, not in this will otherwise disposed of: such sale not to take place in less than twelve months after my death, except the perishable parts. I would advise, that my executor W. T. Harris attend to the seminary of learning in the county of Nelson, and the emancipation of the slaves; my executors W. C. and A. Rives attend to the seminaries in this county; and my executor W. W. Dawson attend to the payment of legacies." The will was dated the 31st July 1833. The testator added the following codicil, dated the 22d of May 1835—"A codicil to this my last will and testament, which is deposited in the hands of Martin Thatcher for safe-keeping. And my Belle Air estate I give to my nephew Benjamin Dawson for the equitable support and maintenance of the slave population thereon. I give Martin Thatcher 1000 dollars &c."

The will and codicil were proved in the

\*Will—Emancipation—Dependent on Slave's Election—Effect.—On this subject, see foot-note to *Balley v. Poindexter*, 14 Gratt. 132. See principal case cited in *Balley v. Poindexter*, 14 Gratt. 204, 210, 211 (dissenting opinion of MONCURE, J.): *Williamson v. Coalter*, 14 Gratt. 404, 406.



county court of Albemarle at its June term 1835; and three of the executors named in the will, A. Rives, Harris and Dawson, qualified; but the powers of the two former were revoked before this suit was set for hearing in the circuit superior court, so that Dawson remained the only acting executor.

The bill was exhibited by the heirs and next of kin of the testator, against his executors, his nephew Benjamin Dawson mentioned in the codicil, and all the devisees and legatees named in the will, particularly the president and directors of the literary fund: and one of the objects of the bill was, to ascertain which of the testator's slaves would choose to remain slaves and be sold in Virginia rather than be sent 605 to another country \*where slavery is not tolerated; and another and main object was, to have the devises and bequests contained in the 16th and 17th clauses, for the three seminaries of learning, or for the benefit of The Literary Fund, declared void, and, consequently, to have the real and personal subjects of those devises and bequests divided among the testator's heirs and next of kin, as if he were pro tanto intestate.

The defendant Benjamin Dawson, in his answer, insisted, that the codicil giving him "the Belle Air estate for the equitable support and maintenance of the slave population thereon," was a revocation of the devise of the Belle Air estate contained in the 16th clause of the will, and of so much of the 2nd clause as emancipated the slaves who were on that estate; and a devise and bequest to him, in fee and absolute property, of that land and of those slaves; a provision which, he said, the testator had, in several former wills, always made for him.

The circuit superior court, in an interlocutory decree for settling the rights of the parties, declared and decreed, among other things, that the codicil gave the defendant Benjamin Dawson no absolute interest in the Belle Air estate, either in the lands, or in the slaves thereon, or in the stock thereto belonging, but only the use thereof, in trust for the benefit of the slaves, for their support and maintenance, during the interval of twelve months or longer, which might elapse between the death of the testator and the election of the slaves; but that, nevertheless, as the slaves were not yet freemen, and would not be until they so elected, they, therefore, had no capacity to enforce against Dawson the trustee any accountability over and above their maintenance, and he was entitled to all the profits beyond, discharged of the trust, namely, the use of the Belle Air estate until the slaves thereon should make their election. From this part of the decree, the defendant Benjamin Dawson 606

\*applied by petition to this court for an appeal; which was allowed.

The cause was argued here, by R. C. Stanard and Lyons for the appellant, and by the attorney general and Johnson for the appellees. The counsel for the appel-

lant contended, that the effect of the codicil was, not to create a trust for the support and maintenance of the slaves thereon, but to give the Belle Air estate to Benjamin Dawson, charged with the support and maintenance of the slaves thereon; and as the charge of supporting and maintaining them might far exceed the profits, and as the word estate was alone sufficient to describe the whole interest, and the statute 1 Rev. Code ch. 99, § 27, p. 369, dispensed with words of inheritance, therefor the devisee took the fee simple, for (meaning in consideration of) his support and maintenance of the slaves. And thus understood, the codicil revoked the devise of the Belle Air land contained in the sixteenth clause of the will.

TUCKER, P. The only question upon this appeal, is as to the construction of the codicil to the will of Martin Dawson; and that question seems to me to be without difficulty. It cannot be denied, that so far as the codicil contains a disposition of the testator's property, different from the will, or modifying its provisions, the will must yield, although the codicil contains no clause of revocation. But, I take it, the codicil is to be considered a revocation to that extent only; for a codicil (so expressed to be upon its face) is designed to be a part of the will already made, and not a new and independent instrument. It may add to, take from, or modify and restrain, the dispositions of the will, but so far as the will can stand consistently with the codicil, so far is it unrevoked by it, unless there be an express revocation. Willet v. 607 Sandford, 1 Ves. sen. \*178, 186; Ld. Carrington v. Payne, 5 Ves. jun. 404; Beckett v. Harden, 4 Mau. & Selw. 1. With this simple proposition premised, let us proceed to consider the case.

By the second clause of the will, the testator's slaves are directed to be emancipated, and twelve months are given for them to elect to be sold or to be free; and for that object the estate is directed to remain together for twelve months. By the sixteenth and seventeenth clauses, the balance of the testator's estate, after certain bequests, is directed to be used by the executors in the erection of three seminaries of learning, and if that object cannot be effected, then the whole is to be used for the benefit of The Literary Fund; and by the last clause of the will, the executors are invested with a complete authority to sell. The Belle Air estate is a part of the property thus disposed of. Two years after the will was made, the testator added the codicil. It is declared to be a codicil, and begins as if continuing the dispositions of the will, thus: "And my Belle Air estate I give to my nephew Benjamin Dawson for the equitable support and maintenance of the slave population thereon." It is to my mind very clear, that the testator, by this devise, designed no benefit to, or charge upon, Benjamin Dawson. The words are too plain to admit of doubt. He devises the estate to Dawson—for his own benefit? By no means; but "for the equitable support

of the slaves thereon," which were the very slaves he had directed to be emancipated. It was a trust for their support, until the time when their emancipation, or sale, was to take place, which was to be within twelve months. There is nothing from which any provision in favour of Dawson can be implied. The purpose and object of the gift have no reference to him; they refer to the slaves alone: and if he failed to fulfil the trust, it might have been enforced, if not by the slaves, by the executor, since unless supported

608 \*by Dawson, according to the will, the burden would fall upon him. It is said, that the testator, in former wills, had made provision for Dawson; but the inference from that fact is more than balanced by the pretermission of him in the will of 1833, which remained two years without alteration. It is said, too, that the word for often signifies in consideration of, and so the codicil gives the Belle Air estate to Dawson, in consideration of his support and maintenance of the slaves: but, in this connexion, the word for clearly expresses nothing more than the purpose of the gift, and that purpose was to provide for the slaves. It does not imply a gift of the absolute property in a fine estate, for the paltry consideration of supporting the slaves upon it for one year.

Dawson then took no beneficial interest in the property. Being only a trustee, what estate did he take? Was it a fee, or a less estate? I am clearly of opinion that the title he acquired was only commensurate with the purpose of the trust. *Doe v. Simpson*, 5 East 162; *Doe v. Nicholls*, 1 Barn. & Cress. 336, 8 Eng. C. L. R. 92, the purpose, namely, of maintaining the slaves for the year within which they were to be emancipated or sold. This purpose limits the quantity of estate which he took, and controls the construction which would otherwise have given him a fee, either from the effect of the word estate, or from the operation of our statute dispensing with words of inheritance, 1 Rev. Code, ch. 99, § 27, p. 369.

Upon the whole, I am of opinion, that the construction of the circuit superior court as to the meaning and effect of the codicil, is substantially right, and that the decree should be affirmed.

BROOKE and CABELL, J., concurred. Decree affirmed.

609 \**Overton & Wife v. Maben & Others.*  
March, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

**Wills—Construction\*—Case at Bar.**—Testator, having provided that his debts should be paid out of the first moneys collected from his outstanding debts, and then that his real estate, his slaves and his furniture, should be sold, and the proceeds applied, along with the first collections from his outstanding debts, to the discharge of his debts, bequeaths to his wife a specific legacy. "In addi-

tion to what the law allows her:" HELD, the widow is entitled to the portion which the law allowed her, of the testator's estate, real and personal, as it stood at the testator's death, not to such portion as the law would have allowed her if the whole estate had been money.

Matthew Maben late of the town of Petersburg, in and by his last will and testament, devised and bequeathed as follows: "I direct, 1. That all my just and lawful debts be paid out of the first moneys collected from my outstanding debts. 2. That all my real estate (which consists of the house and lot on which I live, a small plantation in Chesterfield, and a lot situated above Poplar Spring Lawn) be sold on a credit of twelve months, that my household furniture, and whatever stock of goods may be on hand, be also sold on a credit of twelve months, and such of my negroes as are not hereafter bequeathed be sold for cash, and that the proceeds be applied, along with the first collections from my outstanding debts, to the discharge of my just and lawful debts. 3. In addition to what the law allows my wife Martha C. Maben, I give her my carriage and horses, a negro woman which col. Perkinson gave me when I was married, named Sukey, and Lucy and Martha, two negro children. 4. I give Edmund Williams his freedom in consideration of his faithful services to me since he was a child. 5. I give to my nephew

610 \*John Maben (son of my late brother David) 1000 dollars. 6. I give to my cousin John Maben of Dumfries in North Britain 500 dollars; but in case of his death before this legacy is paid, his sister Ann and her children must have the benefit of it. 7. I give to Matthew Maben Jamieson of the town of Ayr in North Britain, 1000 dollars, to be remitted to his father James Jamieson, also of the town of Ayr. 8. and lastly, I give to my nephew Matthew Maben and my niece Mary Maben the residue of my estate, to be divided equally between them, after all my just debts and the above legacies are paid off. My nephew Matthew's proportion of my estate must be vested in bank stock until he becomes of age, and the interest arising from it must be applied to educating and supporting him during his minority; but in the event of his death before he attains the age of twenty-one years, his portion of my estate must devolve on his brother John and sister Mary, to be equally divided between them; but in the event of John or Mary's dying subsequent to their brother Matthew and prior to the division of my estate among the legatees before named, the survivor shall inherit the whole of Matthew's proportion; but should both John and Mary die subsequent to Matthew and before a division is made of my estate among the legatees as above, then the proportion that would have fallen to Matthew Maben out of my estate, I direct shall be put under the management of the common hall of the town of Petersburg, to be disposed of by them in educating poor children of this place, and in any other charitable way that their judgment may direct."

\*The principal case was cited in *Newton v. Poole*. 12 Leigh 142.

The testator died without leaving children or other offspring. His wife Martha survived him. She was afterwards twice married, first to Willis Vick, and last to William Overton.

The executors appointed by the will having renounced the executorship, administration with the will "annexed" was granted to James Jamieson; but his letters of administration were afterwards revoked, and the administration de bonis non &c. was granted to John Hobson, who had married the legatee Mary Maben.

In a suit brought in the superior court of chancery of Richmond (afterwards transferred to the circuit superior court of Henrico) by the legatees Matthew Maben, John Maben, John Hobson and Mary his wife, and Hobson as administrator de bonis non &c. of the testator, against Jamieson, the first administrator, and Vick and his wife, revived after Vick's death and her marriage with Overton against Overton and wife, for the purpose of having a settlement of Jamieson's accounts of administration, and a division of the testator's estate among the parties according to his will, the following question arose: Whether the testator's real estate and slaves, which his will directed should be sold, should be considered as thereby converted into money, so that, the testator having left no children, his widow should be entitled to an absolute estate in one moiety of this property, or of the proceeds of sale thereof, according to the statute of distributions, 1 Rev. Code, ch. 104, § 29, p. 382? Or, whether she was entitled only to such provision as the law made for her, considering the property such as it was at the testator's death, real estate and slaves? that is, to dower of the real estate, and a moiety of the slaves for life, and if sold, to the same interest in the proceeds of sale.

The circuit superior court held, that the widow was entitled to have her portion of the estate according to its character at the testator's death; and decreed, that dower of the real estate should be assigned to her, and one half of the slave property to be held by her for life, and half of the other personal estate in absolute property. From which decree, this court, upon the petition of Overton and wife, allowed them an appeal.

612 \*Macfarland, for the appellants, contended, that the testator intended, for all the purposes of his will, to convert his real estate and slaves into money, out and out, and to divide it as money among his legatees including his widow, giving her such portion as the law would give her of the property so converted into money. That a conversion of the property into money, at all events, was intended, he said, was plain from several considerations: in directing the sale, he blended real estate, slaves, and other personalty, together: he gave pecuniary legacies, to be paid out of the proceeds, to foreigners; and when he came to divide the residuum between Mary and Matthew Maben, he directed that Matthew's moiety should be vested in bank stock. And having converted the whole

into money, out and out, for all the purposes of his will, one of which was the provision for his wife, when he gave his wife specific legacies "in addition to what the law allowed her," he meant in addition to what the law would allow her of the estate so converted into money. He said, that in all cases of conversion into money directed by will, it should be confirmed and carried out, at least for all the purposes of the will contemplated by the testator; and in all questions between claimants under the will, the property should be considered as money; though it was otherwise, where there was a claim independent of the will. The widow was not to be put off with an equivalent: she was to take under the law, or under the will; if she took under the law, she took her legal share of the property in kind, unaffected by the will; if under the will, she took her share of the property, such as the will made it; and the will making it money, she was entitled to take her share of it as money. He cited *Mallabar v. Mallabar*, Ca. Temp. Talb. 79; *Durour v. Motteux*, 1 Ves. sen. 321; *Cruse v. Barley*, 3 P. Wms. 203; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Chitty v. Parker*, 613 2 Ves. jun. 271; *Kennell v. Abbott*, 4 Ves. 802; *Brown v. Bigg*, 7 Ves. 279; *Wilson v. Major*, 11 Ves. 205; *Wright v. Wright*, 16 Ves. 188; *Maugham v. Mason*, 1 Ves. & Beam. 410.

Taylor, for the appellees, maintained that the decree was right. He said, that the testator directed a sale of his real estate and slaves as well as his household furniture, for the specific purpose of raising a fund, in aid of his outstanding debts, for the payment of his debts: if it was not necessary for that purpose, no sale was required. And when he gave his wife specific legacies, "in addition to what the law allowed her," having given her by his will nothing but the specific legacies, he referred to the law alone to ascertain what should be allowed her. Now, the law allowed her dower of the real estate, and, subject to debts, a moiety of the slaves for life, and of the other personalty in absolute property.

TUCKER, P. I am of opinion, that the court below rightly rejected the construction of the testator's will contended for by the appellants; the widow being entitled to have her portion of the estate estimated according to its character at the testator's death, and not otherwise. He never designed, that her share should be estimated as if the whole estate were personalty; thereby enlarging her rights from one third of the real estate for life to one half of its value in absolute property. His intention was, that she should have what the law allowed as her dower in lands, and if with her assent the whole estate should be sold out and out, he intended she should have one third of the proceeds of sale for life. And so of the slaves. Had he designed one half of the proceeds of sale for her, he would have said so in so many words, instead of using expressions, the natural import of which would give her only what the

law allowed of his estate, in its existing condition at the time of his death.

614 \*Such seems to me the obvious intention of the testator as declared in this will. And however closely we scan his expressions, the result will be the same. Thus, he gives to the wife certain specific legacies, "in addition to what the law allows her." He does not profess to give her what the law gives, but only something in addition. She does not take her portion then under the will, but under the law. Now the law cannot give it to her in the landed estate as if it were personalty. If it is to be considered as personalty, it is by virtue of the will, and she would take it, not by gift of the law, but by force of the will. Instead of holding paramount to the will by law, she would hold under the will by bequest; whereas, as has been already said, she clearly holds by law and not by the bequest. And the difference might be very material; since if she took under the will, she would take subject to the debts. In her present condition, too, if she takes money, her husband pockets the whole, but if she takes land, it is at her own disposal. Or, if it be admitted that she had a right to take either land or money, her husband cannot elect to take money to her prejudice; whereas if her rights are only to money, they belong absolutely to him. *Pratt v. Taliaferro*, 3 Leigh 419.

It has been attempted to maintain the right of the wife to one half the estate, by an argument rested on two propositions; 1. that the whole estate real and personal, including the dower interest, was by the will converted into personalty; and 2. that by the words, "in addition to what the law allows my wife of my estate," the testator had reference to the conversion of it into personalty, and meant to give her of the proceeds of sale as much as the law would allow her if his whole estate were personal. To say nothing of the gratuitous character of this supposition, and of the inadmissible liberty thus taken with the testator's words,

it is enough to say, that the first 615 proposition, on which \*the whole argument rests, is utterly untenable. There was no conversion by the will, either legal or equitable, of so much of the realty as constituted the wife's third. The whole equitable doctrine of the absolute conversion of land into money, rests upon the *jus disponendi*. *Cujus est dare, ejus est disponere*. But where there is no *jus disponendi*, there can be no equitable conversion by will. Now, here, the husband had no *jus disponendi* of the dower of his wife. There was, then, no conversion of that portion of his estate. If, indeed, after his death, she had assented to a sale out and out, there might have been a conversion; yet not by his will, but by her contract; and she would only have had title to the value of her third for life, out of the proceeds of sale. There is, therefore, no foundation for the supposed construction, resting upon the postulate that there was an equitable conversion, out and out, of the whole land into personal estate. In

every view of the case, I am satisfied that the construction contended for by the appellants is wrong.

It was suggested in the argument, that the slave Edmund Williams, who was emancipated, was not embraced in the decretal order, directing the estate to be divided, and the widow's portion laid off. I think this is a mistake. The commissioners are directed to divide the slaves of which the testator died possessed: the slave Edmund Williams was one of these, and, of course, is embraced in the order. If the commissioners, in making the division, should not take him into account, or should assign him to the widow, it will be in her power to except to their report.

Upon the whole, I think there is no error in the decree, and that it should be affirmed.

The other judges concurring, decree affirmed.

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\*Botts v. Tabb &amp; Others.

March, 1804, Richmond.

(Before a special court of appeals, consisting of SCOTT, LEIGH and ALLEN, Judges of the general court.)

**Legislature—Privilege of Member—Case at Bar.**—A member of assembly, by bill in equity, obtains an injunction, before the session of the assembly, to stay proceedings on an execution at law against his property: on a motion to dissolve the injunction, made during the session of the assembly, he objects that his privilege ought to prevent the court from any action in the case at that time: the court overrules the objection: **Held**, the objection was properly overruled.

Execution having been awarded on a forfeited forthcoming bond, taken upon a *fieri facias* sued out upon a judgment recovered by William Scott, assignee of Charles Boots, who was assignee of P. Harrison, against John M. Botts, the defendant John M. Botts obtained an injunction to stay proceedings at law on the execution, which being dissolved, another execution was sued out on the forthcoming bond. Before the return day of this execution, but after it had been levied on the defendant Botts's property, Scott, the creditor, having a pressing demand for ready money, applied to Tabb, a broker, to negotiate a sale of his claim on the execution, upon the best terms he could for cash. Tabb made several efforts to effect a sale, without success; and Scott becoming very urgent, Tabb at length applied to Brooke to purchase one moiety of the claim upon the execution, saying that he held a sum of money as the agent of his two sisters which he was willing to invest in the purchase of the other moiety. Brooke, after some hesitation, assented, upon condition, however, that his name should not appear in the transaction, because he wished to avoid importunities for indulgence. The claim was purchased, one half for Brooke, and 617 the other half with \*the money and for the benefit of Tabb's sisters; and Scott executed an assignment of the execution, and an order on the sheriff for the proceeds thereof, to Tabb, as "agent," but

neither the assignment nor the order expressed for whom Tabb was agent.

After this, Botts exhibited another bill in the circuit superior court for Henrico and Richmond, against Tabb and Scott, in which he stated, that Tabb had taken an assignment of the execution in his own name; that Botts was the owner of three judgments against Tabb, amounting nearly to the sum due on Scott's execution against him which had been assigned to Tabb; that Tabb was insolvent, and had taken the benefit of the statute for relief of insolvent debtors; so that Botts could not sue out executions on the judgments against Tabb, while Tabb was proceeding on the execution against Botts, which Scott had assigned to him; and praying, therefore, that the debt due to Botts on the judgments against Tabb, should be set off against the execution against Botts, which had been assigned by Scott to Tabb, and that, in the mean time, Scott and Tabb should be enjoined from further proceedings on that execution. The injunction was awarded.

Tabb, in his answer, admitted the justice of Botts's claims against him, but he denied, that he had any interest in Scott's execution against Botts; and declared, that he had purchased it as agent for his sisters and for Brooke, as above stated. And Scott, in his answer, confirmed Tabb's account of the transaction.

On the 8th March 1838, the defendants moved the court to dissolve the injunction. Botts opposed the motion, first on the merits, and secondly, upon the ground, that he was a member of the general assembly then in session, and his privilege as such ought to prevent any action on the subject at that time. The court overruled this last objection; but it also overruled the motion

to dissolve the injunction, with leave  
618 to the defendants to \*renew it, and to Botts to amend his bill and make new parties.

Botts filed an amended bill, making Brooke and the two sisters of Tabb (for whose benefit, and with whose money, Tabb said he had purchased Scott's execution, as their agent) parties defendants; and they filed their answers immediately. Brooke, in his answer, said, that Tabb had purchased one moiety of the claim due on Scott's execution, as his special agent for the purpose, with his money, and for his benefit; and the two sisters of Tabb said, that he had purchased the other moiety of it, as their general agent, with their money and for their benefit; and the answers denied, that Tabb had any beneficial interest in the claim. And that this was the true state of the case, seemed clear, not only from the answers of the parties, but from the assignment of Scott's execution to Tabb as "agent," and other evidence in the cause.

On the 31st March 1838, the circuit superior court, on the motion of the defendants, dissolved the injunction. Botts applied by petition to a judge of this court, for an appeal; which was allowed.

The cause was argued here by Harrison

for the appellant, and R. T. Daniel for the appellees.

I. The question on the merits, whether Tabb had any beneficial interest in the execution against Botts, which was assigned by Scott to him as agent, was a mere question of fact upon the evidence.

II. Harrison contended, that the privilege of Botts as a member of the general assembly, should have prevented the court from acting on the case at all, during the session. He referred to the statute, 1 Rev. Code, ch. 51, § 31, p. 163, which provides, that "the members of the general assembly are, and ought to be, and forever shall be, in their persons, servants and estates, both real and personal, free, exempt and priv-  
619 ileged \*from all arrests, attachments, executions and all other process what-

soever, save only for treason, felony or breach of the peace, during their attendance upon the general assembly, and one day, before and after, for every twenty miles they must necessarily travel to and from home; and, in the mean time, process in which they are parties shall be suspended without abatement or discontinuance; and if any person taken in execution, be delivered by privilege of either house of the general assembly, so soon as such privilege ceaseth, he shall return himself a prisoner in execution, or be liable to an escape." And he said, the statute required all process, whatever was its nature, to which a member might be a party, to be suspended, whether the member was party as plaintiff or defendant; and process, there, could only mean the suit pending or in process. In England, privilege of parliament extended to protect a member from all civil process whatever; from citation or summons, as well as process on which he might be arrested. 1 Black. Comm. 164, 5; 4 Inst. 24, 5. And one of the reasons on which the privilege was founded, was, that the member was obliged to attend the service of the public, 5 Bac. Abr. Privilege, C. 1, p. 636; and ought not to have his attendance on the public business withdrawn, in order to attend to his law suits; a reason which required, that the proceedings should be suspended in all suits to which he was a party, as well as that he should be exempt from the service of process. One being chosen a burgess of Buckingham, and having a trial at bar to be had on tuesday before the sitting of parliament, moved to have his privilege, but was denied in regard the parliament was not sitting, nor to sit till after the trial had; Id. 642, where the reason for denying the privilege, shewed that if parliament had been in session, it must have been allowed. In Bolton v. Martin, 1 Dall. 296, a member of the convention of

Pennsylvania, called for the ratification \*or rejection of the constitution  
620 of the U. States, having been served with a summons from the court of common pleas of Philadelphia during the session of the convention, the court discharged him from the action; because, the court said, "a member of assembly ought not to be diverted from the public business by law

suits brought against him during the sitting of the house, which, though not attended with the arrest of his person, might yet oblige him to attend to those law suits, and to bring witnesses from a distant county, to a place, whether he came, perhaps solely, on account of public business." And in Geyer's lessee v. Irwin, 4 Dall. 107, in ejectment, the defendant's attorney, on the cause being called for trial, confessed judgment; and on motion to set aside the judgment, on the ground, that the defendant was a member of the general assembly, attending his public duty at Philadelphia at the time of marking the cause for trial and confessing judgment, the court denied the motion, because the defendant's privilege had not been objected in due time, but it said—"A member of assembly is undoubtedly privileged from arrest, summons, citation, or other civil process, during his attendance on the public business confided to him: and we think, on principle, his suits cannot be forced to trial and decision, while the session of the legislature continues."

Daniel answered, that the appellant was not a defendant in the court of chancery against whom process was sought, but a plaintiff who, before the session of the assembly, had asked and obtained process from that court to injoin proceedings on an execution at law, sued out against his property, not his body, before the session: there was no process of any kind pending against him in the court of chancery. He had not been drawn into that court by process at the suit of others; he had gone there, of his own accord, for process against others:

the appellees had taken no measures  
621 \*against the member of assembly to divert him from his attendance on the public business; it was he who had taken measures against them that required his attendance in court. The privileges of members of assembly were defined by the statute of Virginia; and they had no privilege but that which the statute gave them. The word process, as used in the statute, did not mean proceedings, but original, mesne or final process; process of the same kind with that mentioned in the statute; and there was no such process in the court of chancery, against the appellant, which the court could have suspended.

PER CURIAM. The order of the circuit superior court is affirmed.

## 622 \*O'Rear's Adm'rs v. Kiger.

March, 1840. Richmond.

(Before a special court of appeals, consisting of BROOKE, Judge of the court of appeals, and SCOTT, LEIGH and ALLEN, Judges of the general court.)

**Contracts\*—Buying and Selling Office—Case at Bar.**—O'R. a justice of the peace, expecting to be appointed to the shrievalty of his county at a future time, covenants, for a sum in gross to be paid him by K. to appoint K. his deputy of the whole office.

\*See monographic note on "Contracts" appended to Enders v. Board of Public Works, 1 Gratt. 364.

when and in case he himself shall be appointed sheriff in the order in which he stands on the list of justices for the county; he is afterwards so appointed; and then refuses to appoint K. his deputy according to the covenant: in an action by K. against O'R. for breach of the covenant, HELD, the contract was contrary to the statute against buying and selling offices, and therefore void.

Benjamin O'Rear, a justice of the peace of Frederick, expecting to be appointed in his turn to the shrievalty of that county, entered into a covenant with George Kiger to sell the deputation of that office to him, when and in case he himself should be appointed to it. The covenant was in the following words:

"Articles of agreement made and entered into this 2d day of November 1818, between Benjamin O'Rear of the one part and George Kiger of the other part, witnesseth: That the said O'Rear, for and in consideration of 1333 dollars 33 cents to be paid as herein-after mentioned by the said Kiger, hereby covenants for himself and his heirs, that he will appoint the said Kiger to the office of his deputy, as soon as the said O'Rear shall obtain the high shrievalty for the county of Frederick, and that the said Kiger shall have the privilege of appointing such associates in the office as deputy sheriff as the said Kiger shall think proper; and the said O'Rear further covenants, that the said Kiger shall continue his deputy during the whole of the said

623 \*O'Rear's term; on the following conditions: the said Kiger is to pay the said O'Rear the sum of £100. on the 15th day of the present month, the further sum of 500 dollars on the day on which the said Kiger shall be sworn in as deputy, and the remaining sum of 500 dollars in one year after the said Kiger shall be sworn in. The said O'Rear further covenants for himself and his heirs, that in case he shall not be appointed high sheriff, he will return to the said Kiger or his heirs, the aforesaid sum of £100. on the day on which the said O'Rear would be appointed high sheriff in the order in which he now stands on the list of magistrates for this county; the said money to be returned on the day aforesaid without interest. The said Kiger further agrees, that he will procure ample security, both for the said O'Rear and himself, for executing the duties of the said office. For the true performance of the above contract, we bind ourselves, each to the other, in the penal sum of 1000 dollars. Witness our hands and seals &c."

Kiger brought an action against O'Rear for a breach of this covenant, in the circuit court of Frederick; pending which action O'Rear died, and it was revived against his administrators. The declaration, after setting out the covenant, alleged, in substance, that Kiger was prevented by the act and contrivance of O'Rear, from paying him, on the 15th November 1818, the £100. which he covenanted to pay him on that day, and that he tendered him that sum on the 16th November, but O'Rear refused to receive it; and then alleged, that O'Rear

was afterwards, to wit, on the — day of — 1819, appointed to the office of high sheriff of the county of Frederick, and obtained the said office in the order in which he stood on the list of magistrates for the county; and that on the day on which O'Rear and his deputies were qualified to the office, to wit, on the — day of — 1819, and

624 \*when Kiger should have been sworn in, if he had been appointed deputy according to the terms of the covenant, Kiger was ready and offered to pay to O'Rear the sum of 500 dollars appointed by the covenant to be paid by Kiger on the day on which he should be sworn in as deputy, and was ready and offered to procure and give ample security, both for O'Rear and himself, for executing the duties of the office, but O'Rear refused to receive the said 500 dollars or to avail himself of the said security: and averring, that Kiger was ready and willing, and offered to O'Rear, to do and perform all things which by the covenant he was to do and perform on his part, and that O'Rear on his part refused to accept the proffered performance, the declaration assigned the breach of the covenant, that O'Rear did not and would not appoint Kiger his deputy in the office of sheriff. The administrators of O'Rear (against whom the action had been revived) put in a general demurrer to the declaration, and pleaded covenants performed, on which an issue was made up. The court overruled the demurrer. And upon the trial of the issue, the defendants demurred to the evidence. The jury found a verdict for the plaintiff for 5000. dollars damages, subject to the opinion of the court on the demurrer to evidence; upon which the court held, that the law was for the plaintiff, and gave him judgment for the damages assessed by the verdict. O'Rear's administrators applied to this court for a supersedeas to the judgment; which was allowed.

The cause was argued here, by R. C. Stanard and Lyons for the plaintiffs in error, and Leigh for the defendant.

Many points arising both on the demurrer to the declaration and on the demurrer to the evidence, were debated at the bar; but the cause was decided on a single point, made by Stanard and Lyons; 625 namely, \*that, though a sale of the deputation of the office of sheriff, made by the sheriff after his appointment to the office, was valid according to the decision of this court in *Salling v. M'Kinney*, 1 Leigh 42, yet a covenant by a justice of the peace for the sale of the deputation of the office of sheriff, prospectively, when and in case he should, at a future time, be appointed to it, was contrary to the statute against buying and selling offices, criminal and void. They referred to the statute 1 Rev. Code, ch. 145, p. 559, and maintained, that such a prospective executory contract as this between O'Rear and Kiger, for the sale of the office of sheriff, which O'Rear might or might not obtain at a future and uncertain time, was condemned by the three first sections of the statute, and was

not protected by the proviso contained in the fourth section, "that nothing in the act contained should be so construed, as to prohibit the appointment, qualification and acting of any deputy clerk, or deputy sheriff, who should be employed to assist their principals in the execution of their respective offices." For, they said, the proviso excepted out of the inhibition of the statute the deputation only of actually existing offices. And the sanction of such a contract as this would be of most pernicious consequence; since the sheriff, after his appointment to office, would have the strongest inducement to appoint the person to whom he had contracted to sell the office, his deputy, though he should, in the interval between the contract and the appointment, have proved wholly unworthy of the trust, and so avoid an action on his covenant, and damages for the breach of it.

Leigh said, the counsel for the appellant, in *Salling v. M'Kinney*, had contended, that the true effect of the proviso in the statute was to except out of the previous inhibition, not the sale of the office of deputy sheriff, but only the fair deputation of the office, which had \*always 626 been held legal in the construction of the english statutes in *pari materia*; *Gulliford v. De Cardonell*, 2 Salk. 466; *Godolphin v. Tudor*, Id. 468; *Willes* 575; S. C. in note. But this court held, that the effect of the proviso was to except the deputation of the office of sheriff wholly out of the statute; so that though, in that case, there was unquestionably a sale of the office, the contract was held legal; and to shew that this was the precise point there decided, he referred to the opinions of the judges. And in that case, the contract was for the sale of the office of deputy sheriff, not only for the first year for which M'Kinney had been appointed, but for the second year also, for which he had not yet been, but for which he expected to be, appointed: in regard to the second year of the office, that was, like this, a prospective executory contract for the deputation of the office, when and in case the principal should be appointed to it; and the prospective executory contract was held good; for it was under the contract for the deputation of the second year of the office that the case arose. It was too late, now, to depart from the construction put on the statute in *Salling v. M'Kinney*; almost all the contracts between sheriffs and their deputies, made since that adjudication, had been regulated by it; and if the law as there declared, ought to be altered, the alteration should be made by the legislature. He said, he could see no distinction, in principle, between the case of *Salling v. M'Kinney* and this case. If a contract for the sale of the deputation of the office of sheriff actually existing, was not prohibited by the statute, and was lawful and valid, he could see no reason why a contract for the sale of such an office when it should be obtained in future, should be void. As to the mischievous consequences which had been suggested, he said, it was as much the duty of the sheriff to remove from

office a deputy whom he had actually appointed, in case he should prove unworthy of the trust, as it was his duty not to 627 appoint a \*deputy who was unworthy; and the inducement of the sheriff to appoint an unworthy deputy, in order to avoid an action on his covenant for the deputation of the office, and damages for the breach of it, was not stronger than the inducement to continue a deputy in office whom he had appointed, after he had proved himself unworthy of trust, in order to avoid an action for breach of his covenant for the deputation of the office during the whole term. He thought it probable, that at least half of the deputations of the office of sheriff throughout the commonwealth, had been made under prospective contracts, like that in the case before the court, for deputations of the office when the principals should be appointed in future. [Scott, J., said, that in his part of the country, the practice was general, if not universal.] If such prospective contracts were criminal and void ab initio, the appointment of deputies in pursuance of them, after the principals had received their appointments, could not cure the original vice which annulled the contracts; and the sheriffs, in all such cases, would be deprived of all remedy against their deputies and their sureties, for neglect or malfeasance in office.

BROOKE, J., delivered the opinion of the court, that the contract set out in the declaration did not come within the proviso contained in the fourth section of the statute against buying and selling offices, but was plainly within the three first sections of that statute, and was therefore illegal and void: and that, therefore, the judgment should be reversed, and judgment entered for the defendants on the demurrer to the declaration.\*

SCOTT, J., dissented.

628 \*Dunbar's Ex'ors v. Woodcock's Ex'or.

March, 1840, Richmond.

(Before a special court of appeals consisting of BROOKE, Judge of the court of appeals, and SCOTT, LEIGH and ALLEN, Judges of the general court.)

**Will—Construction—Residuary Bequest for Life and in Remainder—Case at Bar.**—Testator, a Virginia farmer, gives the residuum of his estate, real and personal, to his wife for life, and after her death, gives the same, as well the land as all the other property remaining at her decease, to D. and wife, who are not of kin to him, appoints his wife and D. his ex'ors, and directs that his estate shall not be appraised; the residuum consists of land including the farm on which testator lived, slaves and live stock thereon, furniture and farming utensils, crops of grain on hand, money and debts due; the testator's wife takes and holds in kind, during her life, the slaves, live stock, furniture and farming utensils, and she takes the whole of the crops on hand, and appropriates them to her

own use: in a controversy after her death, between her ex'or and the remaindermen, **Held**,  
1. **Same—Same—Same—Right of Legatee for Life to Dispose of Personality.**—That the will gave the legatee for life no absolute power of disposal of any part of the personal property, and as to all of it the limitation over in remainder was good and effectual.

2. **Same—Same—Same—Rights of Legatee for Life in Grain.**—That as to the crops of grain left by the testator on hand, the legatee for life was entitled to so much as was necessary for consumption in her family and on the farm for the year ensuing the testator's death, but her estate, after her death, was accountable to the remaindermen, for the proceeds or value of the surplus thereof, which in the ordinary course of business was intended for market.

3. **Same—Same—Same—Rights of Legatee for Life in Personal Chattels.**—That, in this case, the legatee was entitled to enjoy the personal chattels in kind:

**Same—Same—Same—Same—Work Horses Must Be Returned in Kind.**—That as to work horses, farming utensils and the like, such as were forthcoming at her death to be returned in kind, though worn and impaired, were to be handed over to the remaindermen in their then state; such as died or were entirely worn out, were not to be charged to the estate of the legatee for life; her estate was to be charged with the principal of what she had sold, unless other articles of the same kind were substituted; and such as, from circumstances, might reasonably be presumed to be dead or worn out, should not be charged to her estate:

629 \***Same—Same—Same—Same—Brood Mares Must Be Returned in Kind.**—And that as to brood mares, flocks of sheep and the like, the legatee for life was bound to keep them up in kind, and her estate was accountable for them accordingly, unless destroyed or impaired by casualty

\***Will—Life Estate in Chattels—Right of the Legatee for Life.**—Where chattels are given by will to a person for his life, without any limitation over in remainder, the legatee for life has not absolute property in such chattels, but his estate is accountable to the estate of the testator for such chattels as the legatee, in his lifetime, sold and converted to his use, or his administrator, after his death, sold and converted to the use of such legatee's estate; but such is not the case with such chattels as are consumed in their use (*quæ in usu consumuntur*) in which the legatee for life has an absolute property. But, in order to vest in such legatee an absolute property in such chattels as are consumed in their use, they must be given as a specific, not as a general, legacy, and not as a part of the residuum. *Bartlett v. Patton*, 33 W. Va. 71, 74, 80, 10 S. E. Rep. 21, 22, 24, citing the principal case.

**Life Tenant in Chattels—Security for Return of Property upon Termination of Life Estate—When May Be Required.**—A life tenant of personal property or money is entitled to the possession thereof and cannot be required to give security for the return of the property or money to those in remainder or reversion as a matter of course, but only as a matter of sound discretion in the courts to be exercised according to circumstances. *Houser v. Ruffner*, 18 W. Va. 252, 253, citing as its authority, among others, the principal case. See further *foot-note* to *Frazer v. Bevill*, 11 Gratt. 9. Digitized by Google

\*The reporter understood, that the court did not mean to disturb the authority of *Salling v. McKinney*, 1 Leigh 42.



**Life Estate in Bond—Valid Gift of.**—Testator holding a bond for a debt, bequeaths that bond *inter alia* to his wife for life, remainder to D. and wife, and appoints his wife and D. his ex'ors; the legatee for life and ex' delivers this bond to her coex'or, the remainderman D. with intent to give and transfer to him her interest in the bond as legatee, and gives him a written, but not a sealed, instrument to that effect: though there was no consideration for this gift, yet HELD, it was a valid executed gift, which passed the interest of the legatee for life to the donee.

**Decrees—Interlocutory—New Evidence.**†—An interlocutory decree in chancery, deciding a question of fact in litigation, pronounced in the progress of an account, upon exceptions to a report, or instructions to a commissioner, as to the propriety of items of debit or credit, is not such a final decree, as precludes a party from taking new evidence touching the same question of fact, without having obtained a review or rehearing of the decree, and without shewing that the new evidence had been discovered since the decree.

**Same—Same—Same—Quere.**—What would be such a final decree as would preclude a party from filing such new evidence touching a question thereby decided, according to the chancery practice of Virginia, and the provision of the statute of March 1826, Supp. to Rev. Code, ch. 108, § 9?

**\*Bonds—Gift of.**—The principal case was cited in *Lee v. Boak*, 11 Gratt. 188. On the subject of gifts, see monographic note on "Gifts" appended to *Barker v. Barker*, 2 Gratt. 344. As to bonds, see monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

**Interlocutory Decree—New Evidence.**—There is no rule of practice or of law which precludes a party from taking new evidence upon a question of fact passed upon by an interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court, and all the circumstances of the particular case. *Summers v. Darne*, 31 Gratt. 805, citing the principal case, and *Moore v. Hilton*, 12 Leigh 1.

The Code of 1873, ch. 172, § 36 (Va. Code 1887, § 3362), provides, "In a suit in equity, a deposition may be read, if returned before the hearing of the cause, or, though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree." In *Richardson v. Duble*, 33 Gratt. 789, *STAPLES, J.*, in delivering the opinion of the court, said that this provision was, no doubt, adopted with a view to remove a difficulty, and some uncertainty in the practice growing out of the decision in *Dunbar v. Woodcock*, 10 Leigh 628, 654; and in *Moore v. Hilton*, 12 Leigh 1. Continuing, the judge says: "In the first named case (*i. e.*, the principal case), the court held, that an opinion of the lower court given in the progress of an account upon exceptions to a report, or instructions to a commissioner, as to the propriety of allowing items of debit and credit, is not such a final decree, as precludes a party from taking new evidence touching the same question, without having obtained a review or rehearing of the decree.

"In *Moore v. Hilton*, it was held, that after an interlocutory decree on a hearing, neither party has the absolute right to introduce new evidence in respect to a matter decided; but the right to introduce and use such evidence as a ground for changing or setting aside such decree, depends on the sound judicial discretion of the court, and the

**Commissioner's Report—Interest on Interest.**‡—A commissioner's report shews a balance due from the defendant, consisting entirely of interest found due on an account never before settled, and states, that that balance of interest is to bear interest from a remote day; there is no exception to the report; and the court decrees the balance with interest accordingly: HELD, the decree was erroneous in giving interest upon the interest from a remote day; interest ought to be allowed only from the date of the final decree.

**Robert Woodcock**, late of the county of Frederick, died in the year 1808, without children or other descendants; and, by his last will and testament, bequeathed a legacy of £50. to Thomas Shearman; emancipated four slaves by name; and devised one parcel of land to his sister in law Mrs. Rust for life, and after her death to Robert Dunbar and Hannah his wife and their joint heirs; the remainder after his wife's death 630 of another parcel of \*land to George Murray in fee; and the remainder after his wife's death of another parcel of land on which he lived to Cyrus Murray in fee; and then devised and bequeathed as follows—"I leave the use of all the rest, residue and remainder of my estate, real, personal or mixed, to my well beloved wife, Frances Woodcock, during her natural life, and after her death I give and bequeath the same of every description, as well the land

sufficiency of the excuse for the failure to produce the testimony in due time; to be offered to the court upon a motion or petition for a rehearing.

"Under the present statute, when there has been an interlocutory decree, a deposition taken thereafter, cannot be read as to any matter thereby adjudicated, unless indeed as the foundation for a motion or petition to rehear the cause. If no interlocutory decree has been rendered, or even though one has been rendered, a deposition taken, and returned before a final hearing as to any matter not adjudicated, may be read. But the right is not an absolute one. The statute does not say the deposition shall be, but it may be read."

**Same—Bill of Review.**—To the point that an interlocutory decree cannot be reversed upon a bill of review, the principal case is cited in *Suckley v. Rotchford*, 12 Gratt. 70. See also, monographic note on "Bills of Review" appended to *Campbell v. Campbell*, 23 Gratt. 649.

**Decrees—When Interlocutory.**—In *Butler v. Butler*, 8 W. Va. 674, 678, the fourth headnote reads, "An order directing a special commissioner to pay a certain sum of money to general creditors according to priorities, 'if any there be'; not designating the creditors, the sum or *pro rata* sum they are entitled to, is an interlocutory order, and the court pronouncing the order has the right to retain the cause for a future direct action upon all matters that the interest and convenience of the parties, and the very justice of the case requires." The court bases its decision upon the authority of the principal case, and *Cocke v. Gilpin*, 1 Rob. 20.

**Commissioner's Report—Interest on Interest.**—On all matters pertaining to interest, see monographic note on "Interest" appended to *Fred v. Dixon*, 27 Gratt. 541. As to reports of commissioners in chancery, see monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376.

I bought of John Acre as all the other property remaining at her decease, to my friend Robert Dunbar and Hannah his wife and their joint heirs forever." And he appointed his wife and Dunbar executrix and executor of his will, directing that security for due administration should not be required of them, and that his estate should not be appraised. They both qualified in the district court of Winchester, at its September term 1808.

The widow continued in possession of the land on which the testator resided, and all the personal property upon it, consisting of slaves, stocks of horses, cattle &c. furniture, farming utensils, the crops gathered and growing, grain and flour at the mill and on the way to market, and she retained also a small sum out of the money he left on hand. Much the greater part of the money, as well as the bonds and other securities for debts due to the testator, came to the hands of Dunbar. And a minute and exact inventory, both of the specific chattels and of the money and bonds, was made out.

A controversy arose between Mrs. Woodcock and Dunbar in the lifetime of the parties; and in 1812, she brought a suit against Dunbar, and he brought a cross suit against her, in the superior court of chancery of Winchester; but neither of those suits was determined during the lives of the parties, nor were any proceedings had in either of them after Mrs. Woodcock's death; but the pleadings, and all the proceedings, depositions and other evidence in both of them, were filed as exhibits in this cause.

631 \*Dunbar died in April 1815, and Mrs. Woodcock in August 1816.

In 1820, Peter Rust, the executor of Mrs. Woodcock, exhibited a bill in the superior court of chancery of Winchester against Lewis Hoff and Samuel Briarly the executors of Dunbar, setting forth the will of the testator John Woodcock; alleging, that money of that testator to the amount of about 8000 dollars, and bonds and other securities for debts to the amount of above 12000 dollars, came to the hands of Dunbar, to the interest accruing on which during Mrs. Woodcock's life, she was entitled under her husband's will, but that Dunbar appropriated those moneys and all the debts which he collected of his testator's estate to his own use, and failed and refused to account for and pay to Mrs. Woodcock the interest thereon as it accrued; and praying, therefore, an account of the moneys of the testator John Woodcock's estate received and collected by Dunbar, and of the payments, if any, made by him to Mrs. Woodcock, and a decree for the balance of the interest which accrued on the fund during Mrs. Woodcock's life, which had not been paid to her.

Dunbar's executors, in their answer, stated, that money of the estate of the testator John Woodcock, which came to the hands of Dunbar, was, with the approbation of Mrs. Woodcock, invested in a purchase of land for the use of Mrs. Woodcock during her life, and of Dunbar after her

death, and she accordingly held possession of it during her life paying no rent; that she also held all the slaves, the stocks of horses, cattle &c. the furniture, the farming utensils, and the crops on hand at the testator's death, collected some debts due to his estate, and released others, and had rendered no account of the personal property or of the debts so appropriated to her own use; that the money received by her, the grain and flour of the testator's estate sold

632 by her and of which she received the proceeds, the stock \*and other personal chattels which she took possession of and which were not forthcoming at her death, together with a bond of one Benedict Rust for a debt due to the testator's estate which she released, exceeded the interest which accrued during her life on the moneys of the estate received and collected by Dunbar, and that thus she was in fact in his debt. They stated, in regard to a debt due from one Briarly to the testator at his death, that Mrs. Woodcock, in compliance with a direction of the testator on his deathbed, relinquished her interest in that debt to Dunbar, by a written instrument which they exhibited. And they also exhibited and relied on a general release from Mrs. Woodcock to Dunbar.

The court referred the accounts between the parties to a commissioner; and the main points in controversy were presented by exceptions to his report, or objections thereto for errors apparent on its face.

The manner in which the accounts were stated in the report, and the amount of Mrs. Woodcock's claim and Dunbar's liability ascertained, was thus: Dunbar's executorial account had never been previously settled, and the commissioner first stated that account, striking annual balances from 1808 to 1816, and carrying the interest on the balances found against the executor, computed from the end of each year to the date of Mrs. Woodcock's death, into a separate column. And then he stated an account between Mrs. Woodcock and Dunbar, wherein he charged her with such sums for which she was supposed to be liable to Dunbar, and credited her with the aggregate amount of the interest appearing due on his executorial account, and thus shewed a large balance due to her at the close of the transactions in 1816, on account of interest which he ought to have paid her, which balance was to bear interest from that time.

There were seven exceptions taken by the plaintiff to the commissioner's state-  
633 of the account between Mrs. \*Woodcock and Dunbar. But only the first and fifth of them involved questions of law, and these only need be stated; the others presented mere questions of fact.

The first exception was to a charge against Mrs. Woodcock of 1424 dollars, on account of crops left by the testator Woodcock on hand at the time of his death, which she took and appropriated to her own use.—The following was the state of facts touching the point: The testator left crops of grain on hand, much more than sufficient

for consumption at home, and of course the greater part was intended for market. Of the crop of wheat 56 barrels of flour had been manufactured before his death, and were then on the way to market: they were sold, and the proceeds were received by Mrs. Woodcock, amounting to 210 dollars. The rest of the crop of wheat was on the farm; there was a parcel of indian corn on hand, and a crop of it not yet severed; and Mrs. Woodcock took and enjoyed all. The commissioner deducted an ample supply, both of wheat and indian corn, for the consumption of Mrs. Woodcock's family and on the farm, for the year ensuing the testator's death, which he allowed her, and charged her with the value of the residue amounting to 1214 dollars. The plaintiff claimed that his testatrix was entitled under the bequest in her husband's will, to an absolute interest in all the crops he left on hand, and that, therefore, her estate was improperly debited with those sums.

The fifth exception was to the omission of a credit claimed for Mrs. Woodcock's estate, for the interest that accrued during her life on a debt due upon a bond of one Richard Briarly to the testator's estate for 4697 dollars, the principal and interest of which were collected by Dunbar, and applied to his own use.—The plaintiff claimed the interest of this debt that accrued during the life of his testatrix, as profits of the property bequeathed to her for life by her husband's will. Dunbar's executors insisted, that his estate ought not to

634 be \*charged with the interest of this debt, on the following grounds: that the testator John Woodcock having declared and directed, on his deathbed, in the presence of Mrs. Woodcock, that Dunbar should have the interest on Briarly's bond, and that that bond and the interest upon it should go to the immediate use of Dunbar and his family, Mrs. Woodcock delivered the bond to Dunbar, with intent to comply with the wishes of her husband thus expressed, and to relinquish to him all her interest in the debt due by the bond. And, accordingly, she gave Dunbar a written declaration to that effect (though it was not a sealed instrument) in the following words: "This is to certify, that the day before Mr. Woodcock's death, in my presence, in his directions to Dr. Dunbar, as his appointed executor, he directed him to receive the interest of a bond of Richard Briarly due Mr. Woodcock for fourteen hundred and odd pounds, with different credits on said bond, as it was the desire and direction of Mr. Woodcock, that this bond and interest should be for the immediate use and benefit of Dr. Dunbar and his family: I, therefore, do relinquish and agree that the same shall be applied to that purpose, as being the desire of Mr. Woodcock. Given under my hand this 7th February 1809. (Signed) Frances Woodcock." She afterwards signed, sealed and delivered to Dunbar, another instrument in the following words: "This is to certify, that in my husband's lifetime, among the various and complicated business in which he was

engaged for himself and for others, I never knew of any transactions in which he was engaged but what were conducted with the utmost justness and uprightness, and that I am confident no bond, note or paper, evidencing any debt due to himself or others, was ever cancelled by any promise, or any paper tending to cancel the debt, or to do any act or acts that would tend to that import, so as to prevent the recovery of the

principal and interest, rents or profits,  
535 due to himself or others. And \*further, to save much trouble and to expedite the finishing of all the affairs relative to my husband's estate, I hereby relinquish all my right, title and interest, of all bonds, notes, and every paper evidencing any debt due my husband's estate, as having already received debts due the estate in lieu thereof. And I also further certify, that I never gave any paper or promise that would cancel any bond, note or paper, as before mentioned, so as to prevent the full recovery of every debt due my husband's estate or the estate of others. Given under my hand and seal this 22nd November 1810." On the other hand, the plaintiff adduced evidence to prove, that the recital in the instrument of the 7th February 1809, of Woodcock's directions to Dunbar, on the day before his death, that he was to take the bond of Briarly, and the interest to accrue upon it, to the immediate use of himself and his family, was and could not be true, because (according to this evidence) Dunbar was not at the testator's house and did not see him the day before, or for many days before, his death; and to prove further, that Dunbar had himself admitted in his lifetime, that the instrument of the 7th February 1809, and that of the 22nd November 1810, were executed and delivered by Mrs. Woodcock to him, and intended by them both, to answer, the sole purpose of enabling him to collect the debts without any interference on her part: that, therefore, so far as those instruments expressed any other purpose, the instruments (which were written by Dunbar himself) were fraudulent impositions upon her ignorance or over confidence in him. And this being the state of the evidence upon the point, the executor of Mrs. Woodcock contended, that the commissioner ought to have credited the estate of his testatrix, and charged the estate of Dunbar, with the interest on the debt due from Briarly that accrued during her lifetime: that the instrument of the 7th February 1809 was, like that of the 22d  
November 1801, intended as a mere  
636 power to \*collect the debt; but if not, it was, at most, a nude contract ineffectual for want of consideration.

The cause coming on for hearing upon the report of the commissioner and the exceptions thereto, the plaintiff objected as for error apparent on the face of the accounts, that the commissioner had proceeded on the supposition, that Mr. Woodcock was entitled only to a life estate in the personal property bequeathed to her by her husband's will, whereas the plaintiff claimed and insisted, that the will gave her an ab-

solute right to all the personalty bequeathed to her; a claim which had been nowise before asserted, and was thus for the first time set up at the hearing.

The court declared, that the bequest in the will of the testator John Woodcock had not the effect contended for by the plaintiff, of giving Mrs. Woodcock an absolute interest in all the personal property thereby bequeathed to her, and that the bequest of the remainder thereof to Dunbar and wife, after Mrs. Woodcock's death, was good and valid. But the court further declared, that all articles, the use of which consisted in the consumption, such as corn, provisions, flour, hay, fatted hogs &c. were excluded by law from the limitation over to the legatees in remainder: that though some articles which indeed could only be enjoyed in the use, such as money, stock in the funds, or the like, were nevertheless to be accounted for after the death of the legatee for life to the remaindermen, yet even of these the capital only was to be accounted for, not the annual profits; and by parity of reasoning the crops of the estate devised to Mrs. Woodcock for life were not to be accounted for: that though the crops in question were made at the time of the testator's death, yet they clearly passed by the bequest and devise of the use of all the rest of the testator's estate to his wife; and the court could not say that her use of these crops should

be more restrained than her use of  
637 the crops of succeeding \*years, for which it was obvious she was not to account: and but for this construction, Mrs. Woodcock would have been without support until she could have made a crop herself. Therefore, the plaintiff's first exception to the commissioner's report (above stated) was sustained. The court also sustained the plaintiff's fifth exception, touching the interest which accrued on the bond of Briarly during Mrs. Woodcock's life; holding, that there was no reason to consider the alleged gift of that bond by the testator to Dunbar, a donatio causa mortis, as the counsel for Dunbar's executors had contended; and a claim to it, as a gift or release from Mrs. Woodcock to Dunbar, could not be supported. And the court, sustaining the plaintiff's fourth exception also, and overruling the second, third, sixth and seventh, (all of which, as has been stated, presented mere questions of fact,) proceeded to give the following general instructions to the commissioner as to the accounts: that as to such articles as horses, wagons, implements of husbandry, and the like, the enjoyment of which might or might not consume the subject in the lifetime of the legatee for life, the following principles should be observed in stating the accounts: 1. Such as were returned in specie, though worn and impaired, were to be handed over in their then state to the remaindermen; 2. such as had died, or were entirely worn out, were not to be charged to Mrs. Woodcock's estate, though they were not forthcoming; 3. the principal (without interest) of what should appear to have been sold, was to be charged, unless

it should appear that other property of the same kind had been substituted; and 4. such as from their nature, and from the circumstances, might reasonably be presumed to be dead or worn out, should not be charged. That as to flocks of sheep and the like, though they are principally enjoyed in the consumption, yet constituting a species of capital stock, they ought  
638 to be kept up in \*kind, unless it should appear that they have been destroyed or impaired by casualty; and that the same principle applied to brood mares kept as such by the testator, but not to mares kept principally for labour and other uses, and only occasionally put to breeding, nor did it apply to milch cows, which the tenant for life would not be bound to restore in kind. And the court made an interlocutory decree, recommitting the accounts to the commissioner, to be reformed according to its opinions upon the several exceptions to the former report, and to the instructions above stated.

At the next term, Dunbar's executors filed a petition for a rehearing, for several alleged errors in the interlocutory decree apparent on the face of it, and upon additional evidence taken since the decree, upon some of the points therein decided, particularly the question touching the bond of Briarly, without alleging that this additional evidence had been discovered since the decree, so that it had not been in the power of the petitioners to produce it before the decree was pronounced. The additional evidence on the subject of Briarly's bond, consisted in the deposition of a witness, proving that Dunbar was with the testator Woodcock at his house the day before he died: that the witness was present afterwards, when Mrs. Woodcock delivered to Dunbar the bond of Briarly in question, along with other bonds, notes and evidences of debt; and that after Dunbar's departure, the witness asked her, what induced her to deliver the bonds &c. to him; upon which she said, that he was to be put in possession of Briarly's bond, and to have it, at the request of her deceased husband, and she was desirous of complying with her husband's wishes, and that she did not wish to keep any of the papers or to be troubled with them. The court was of opinion, that the interlocutory decree of the former term should be opened for a rehearing as to any error apparent on the face of the decree; but that as to  
639 alleged \*errors in point of fact, the case could only be reheard upon the evidence as it stood at the time the decree was pronounced, without regard to the additional evidence taken and filed, but not alleged to have been discovered, since the decree; which (the court held) was inadmissible, and could not be heard.

The commissioner having reformed the accounts, according to the general instructions of the court, and its opinions on the plaintiff's exceptions, contained in the interlocutory decree; and the cause coming on for hearing before the circuit superior court of Frederick, on the report thus reformed; the court so far altered

its opinion on the first exception, as to direct that mrs. Woodcock's estate should be charged with the 210 dollars, the proceeds of the 56 barrels of flour which were on the way to market at the time of her husband's death; still exempting her estate from accountability for the residue of his crops of grain on hand at his death, even for the surplus thereof after allowing her a full supply for consumption in her family and upon the farm, for the year ensuing the testator's death; the value of which surplus was (as before stated) 1214 dollars. And the commissioner being directed to remodel the accounts by charging mrs. Woodcock with the 210 dollars, it appeared by his final report, that the estate of Dunbar was indebted to that of mrs. Woodcock the sum of 3059 dollars, being a balance of the aggregate of interest on the annual balances found in his executorial account, computed to the close of the accounts in September 1816; which balance, the commissioner reported, should bear interest from September 1816. And there being no exception to the report in this particular, the court decreed, that Dunbar's executors should pay the plaintiff the sum of 3059 dollars, with interest from September 1816.

Dunbar's executors presented a petition to this court, praying an appeal from the decree; which was allowed.

640 \*The cause was argued here, by R. C. Stanard, Lyons and Leigh for the appellants, and by G. N. Johnson and C. Johnson for the appellee.

I. The counsel for the appellee insisted, that mrs. Woodcock was entitled, under her husband's will, to an absolute estate in all the personal property thereby bequeathed to her. Adverting to the language of the will, whereby the testator gave the use of all the residuum of his estate to his wife for life, and after her death gave the same of every description, as well the land bought of John Acre, as all the other property remaining at her decease, to Dunbar and wife; they said, that the words "remaining at her decease" did not apply to the land, but did apply to all the other property; namely, to all the personal subject bequeathed. And they argued, that the testator intended to give the remaindermen only so much of all the other property as should remain at his wife's decease; meaning, so much as she should not use or dispose of during her life; and if she had power to use or dispose of it, she took an absolute estate in the subject, and the bequest of the remainder after her death was nugatory. *Riddick v. Cohoon*, 4 Rand. 547; *Grey v. Montagu*, 3 Bro. Parl. Ca. 314; *Sprange v. Barnard*, 2 Bro. C. C. 585; *Pushman v. Filliter*, 3 Ves. 7; *Bull v. Kingston*, 1 Meriv. 314.

The counsel for the appellants answered, that the subject having been first bequeathed to the use of the testator's wife for life, in express terms, the bequest to Dunbar and wife of all the property remaining at her death, referred to the life estate previously given to her, and gave them what should re-

main after her use thereof for life, not what should remain undisposed of by her. In all the cases cited for the appellee, the property was given to the first taker indefinitely or expressly in fee, with an absolute power of disposition expressed or plainly implied, and then only what should remain undisposed of by the first taker was

641 \*limited over to the remainderman.

Here, an interest for life only (in express terms) was given to the testator's wife, and there were no words from which an absolute power of disposition could be implied for her, without the utmost violence of construction. They cited *Upwell v. Halsey*, 1 P. Wms. 651; *Bradley v. Westcott*, 13 Ves. 445; *Madden v. Madden's ex'ors*, 2 Leigh 377.

II. The counsel for the appellants maintained, that the opinion of the court of chancery sustaining the plaintiff's first exception to the commissioner's report, was erroneous. They said, mrs. Woodcock's estate was accountable to the remainderman, for at least so much of the testator's crops of grain on hand and growing at his death, as exceeded the ample allowance made to her by the commissioner, for consumption in her family and on her farm during the ensuing year; in other words, for the surplus which was to be sent to market, and converted into money. The court of chancery held, upon this residuary bequest of articles *quæ ipso usu consumuntur* along with articles of a different description, that the legacy to mrs. Woodcock for her life gave her the whole property of all articles consumable in the use, and that all such articles were by law excluded from the limitation to the legatees in remainder; and then it held, that the surplus of the crops of grain, destined not for consumption at home but to be sent to market and converted into money, was to be classed among articles consumable in the use. Now, they said, supposing the first proposition correct in point of law, (which, however, they denied,) yet the surplus of the crops of grain that was to be used by being converted into money, could no more be regarded as consumable in the use than money: money, as well as the surplus of these crops, could not be used without being parted with. Articles *quæ ipso usu consumuntur*, in the true sense of

642 that phrase, were articles \*consumable by the legatee or donee for life in the use thereof in kind: but the surplus of the crops could only be used by the sale thereof and enjoyment of the proceeds. The surplus of the crops could not be regarded as consumable in the use, merely because the subject was, in its nature, consumable in food; that was not the way the testator intended the legatee for life should enjoy the use. The stock of corn of a corn merchant, the stock of wine of a vintner, the stock of cloths of a clothier, were intended, ultimately, to be eaten, or drunk, or worn; that is, to be sold to others who should so consume them; and if the principle of this decree were properly applicable to the surplus crops of grain grown by a farmer for

market, then, with as good reason, if a merchant dying with a stock of goods on hand, should leave them to his wife for life, with remainder to another, the legatee for life would take the whole property, and the bequest of the remainder would be nugatory. If, then, this had been a specific bequest of the testator's crops on hand to mrs. Woodcock for life, remainder to Dunbar and wife, her estate would have been accountable to the remaindermen for the proceeds or for the value of the marketable surplus. Indeed, the allowance made to her by the commissioner of an ample supply for consumption during the year ensuing the testator's death, was more than she was entitled to: for the testator died in September 1808, and by our statute of emblements, 1 Rev. Code, ch. 104, § 53, p. 388, she was entitled to demand, that the levies and taxes of the slaves, their tools, the expense of feeding them till the last of December following, and of then delivering them to her well clothed, should be deducted from the growing crop. And this was all that she was entitled to in absolute property. But this was not a specific bequest of the testator's crops on hand: it was a general residuary devise and bequest of 643 all the residue of the testator's \*estate to his wife for life, remainder to Dunbar and wife; the residuum including lands, slaves, money, live stock, furniture, and farming utensils, as well as the crops on hand. In *Randall v. Russell*, 3 Meriv. 193, sir W. Grant, after stating, that doubts had arisen on the question as to the nature of the interest which a widow, as tenant for life, takes in articles (such as corn and hay) of which the use consists in the consumption, said, that his own conception was, "that a gift for life, if specific, of things *quæ ipso usu consumuntur*, is a gift of the property, and that there cannot be a limitation over after a life interest in such articles: if included in a residuary bequest for life, then they are to be sold, and the interest enjoyed by the tenant for life." In *Madden v. Madden's ex'ors*, 2 Leigh 389, judge Green, adverting to *Randall v. Russell*, declared his own opinion, "that even in the case of a specific bequest of such articles for life with a limitation over, the limitation is good: that the intention of the testator being in such case most obvious that the legatee in remainder should have the benefit of the subject after the death of the first taker, it ought to be carried into effect, if possible: and it may be effectuated by requiring the representative of the first taker to deliver articles of the same kind and quality, or to pay their value, to the remainderman." It was not necessary here to discuss the point of difference between these able jurists: it never had been doubted, that in the case of a residuary bequest to one for life with remainder to another, including articles consumable in the use with others of a different kind in the same disposition, the representative of the legatee for life was accountable to the remainderman for the value of the whole subject. And the reason

was quite obvious: the intention of the testator, in such a residuary bequest, was to give the same interest, both to the legatee for life and to the remainderman, in the whole subject, without discrimination. 644 \*Then, even if the crops of grain which the testator in this case had on hand at the time of his death, could possibly be regarded as articles *quæ ipso usu consumuntur*, yet the legatee for life was accountable for them to the remaindermen. And her representative should have been held to account for the value, not only of the marketable surplus, but of the whole of the grain she received, except only so much of the crop growing at the testator's death as our statute of emblements gave her. But further, in the general instructions to the commissioner, touching the live stock of horses, cattle, sheep, the furniture, the farming utensils, and the like, the court of chancery departed from the settled law on the subject. The representative of the legatee should have been held to account to the remaindermen for all those articles in value as they existed at the testator's death and as she received them: he ought to have been required to deliver to the remaindermen other articles of like kind and quality, or to pay the value of them in money. *Covenhoven v. Shuler*, 2 Paige 122, 133; *Bracken v. Bentley*, 1 Ch. Rep. 110; *Slanning v. Style*, 3 P. Wms. 334; *Leeke v. Bennet*, 1 Atk. 471; *Bill v. Kinaston*, 2 Atk. 82; *Foley v. Burnell*, 1 Bro. C. C. 274.

The counsel for the appellee did not controvert the general principles of law on which the counsel for the appellants rested their argument: they denied that they were justly applicable to the present case. The testator was a Virginia farmer, of moderate though competent estate, who had no offspring or any near relation to provide for but his wife. It was natural that he should leave his property to her to be enjoyed for the remainder of her days in the same manner as they had enjoyed it together during his life. As to his crops on hand, he would, if he had lived, have set apart a large portion of them for the consumption of his family: so much ought to be considered as dead victuals, intended 645 \*to be consumed during the year ensuing his death; and so much, therefore, without doubt, ought to have been allowed to his wife, for the maintenance of herself and a family, until she could make another crop. And even as to the surplus of the crop of grain which he would have sent to market, he would, if he had lived, have laid out the proceeds in the purchase of other articles of subsistence of foreign growth, and of clothing, for his family. He could not have intended, in making provision for his wife, to subject her to the necessity of incurring a debt for necessities, which would be a heavy burden on her, in order to preserve, for the benefit of the remaindermen who had no natural claim on his bounty, a fund which he himself would have used to avoid the incurring of a debt for the same purposes. In giving his wife

the use of the crops in question, he meant that she should have the use of them in the manner which was necessary for her comfort, and to the purposes to which such means were ordinarily applied. As to the specific chattels, the furniture, the farming utensils, and the live stock; they said, no Virginia testator, having a house and furniture, and a farm with stock upon it, and giving to his wife for life, the house and farm, with the furniture and stock, ever had any other intention than that she should enjoy the furniture and stock, as well as the house and farm, in kind. They appealed to the experience of the court, whether such testamentary provision for a wife, so common in this country, was not always so understood, and so carried into effect. And furniture, farming utensils and live stock, being in their nature consumable in the use, or more properly (in the language of our statute, 1 Rev. Code, ch. 104, § 47, p. 387,) being "liable to perish, be consumed, or rendered worse by keeping," no Virginia testator making a bequest of such articles to his wife for life, to be enjoyed in kind, ever intended to make

her debtor for the value of them at the time she received \*them, however they should be impaired, worn out or destroyed, by time and use. No testator ever intended to impose such a burden upon his wife even for the sake of his own children; much less was it intended by this testator, for the benefit of remaindermen who were strangers to his blood. And he indicated very clearly, that he had no such intention, by directing that his estate should not be appraised; thereby preventing the use of the only means by which the value of the subject at the time of his death could be ascertained: a direction which could have had no other essential purpose, but to save his wife from the very accountability which the remaindermen were now seeking to impose upon her representative. And it afforded an argument, equally applicable and forcible, of the justice of the opinion of the court of chancery on the first exception touching the crops, and of the correctness of its general instructions to the commissioner.

III. The counsel for the appellants insisted, that the decree was erroneous in charging Dunbar's estate with the interest which accrued on Briarly's bond during the life of Mrs. Woodcock. Upon the evidence as it stood when the cause was heard upon the commissioner's first report, and on the exception of the plaintiff to the omission of the credit for the interest on that debt, which he claimed for the estate of the testatrix, it might be doubtful, whether the recital, in Mrs. Woodcock's instrument of February 1809, of the testator's deathbed direction that Dunbar and his family should have the immediate use of that bond and the interest that should accrue on it, was true; it might be doubtful, whether that instrument had been fairly obtained from her; and doubtful, whether the fact alleged by Dunbar's executors was true, that she had delivered the bond to

him with intent to transfer to him, in his individual character, the interest she had in it as legatee. But the additional evidence on that point of the controversy, put the \*state of facts alleged by Dunbar's executors in regard to it beyond doubt. The court thought the additional evidence could not properly be heard. They insisted, that the court ought to have heard and weighed it. They said, that in our chancery practice, there was no necessity for a petition for a rehearing, or for a supplemental bill in the nature of a bill of review, for the correction of such errors of law or of fact in any interlocutory decree, as appeared upon the state of the case as presented by the pleadings and the evidence at the time the decree was pronounced. As it was within the court's power, so it was surely its duty, to correct errors in its interlocutory decrees, pointed out by the parties, or suggested by its own reflection, before or at the final hearing. The question was, whether the court ought to admit new evidence on points determined by an interlocutory decree, when it was not alleged that the new evidence offered had been discovered since the decree. It might be supposed, that new evidence ought not to be admitted under such circumstances, because upon a supplemental bill in the nature of a bill of review of a decree not final, if the review was asked upon the ground of new matter, it could not be allowed unless the new matter was discovered since the decree. But the supplemental bill in the nature of a bill of review was a proceeding proper in the case of a decree really final, in its nature and its terms, and only technically not final. Mitf. Plead. 81, 2. The interlocutory decree in this case could in no sense be regarded as final: it consisted, in truth, of mere instructions to the commissioner on contested items of account. And they said, in our practice, there was no decree merely interlocutory, which might not be corrected upon new evidence adduced before the final hearing, whether the new evidence was discovered before or after the interlocutory decree was pronounced.

Formerly, by statutory regulation, after the commission for taking depositions \*was closed, and the cause set for hearing, new evidence might be introduced, in any stage of it, under a special order of the court, but not without such a special order. 1 Rev. Code, ch. 66, § 103, p. 216. And in the practice of the superior courts of chancery, handed down from the high court of chancery in chancellor Wythe's time, the special order for taking new evidence was always made upon motion, if the evidence was material, unless it appeared to have been kept back for purposes of delay or chicanery. The leave to take new evidence was almost a matter of course, when it was asked; and it was more frequent after than before an interlocutory decree. And it was only necessary to reflect upon the loose and unadvised manner in which depositions in chancery were taken, generally by the parties them-



selves in the country, to understand why the strictness of the english chancery practice had never prevailed, and how the liberal indulgence of our practice became indispensable to the ends of truth and justice. With knowledge of the existence of this practice, and aware that the opening of the cause for new evidence, upon motion for the purpose, had become matter of course, the legislature, by the statute of March 1826, dispensed with the necessity of the motion and the special leave of court, by providing, "that from the filing of the bill until the final hearing of any case, either party may, without any order of court, obtain general commissions and take depositions to be read therein." Supp. to Rev. Code, ch. 103, § 9, p. 132. The new evidence, therefore, upon the controverted question in regard to Briarly's bond, ought to have been received and weighed upon the final hearing. And taking up the question upon the state of facts which that evidence made indubitable, they thought there could hardly be a doubt, that mrs. Woodcock's executor had no right to claim a

credit for the interest which accrued  
649 on Briarly's bond during \*her life.

If she had held that bond in her own right, and had transferred it by delivery to Dunbar, with intent to give him the debt thereby due, such transfer and delivery of the bond would have passed the property in the debt to Dunbar. And the question was whether, holding the bond as executrix of the obligee, and being entitled as legatee to the interest which should accrue upon it during her life, the actual delivery of the bond by her to Dunbar, with intent to transfer to him all her right in it as legatee, and this intent declared by a written instrument, was a valid gift to him of her life estate in the debt due by the bond? To shew that it was a valid gift, a contract of gift executed and perfected, they cited the case of *Elam v. Keen*, 4 Leigh 333. If it should be objected, that there was no consideration to support the alleged gift, that was no objection to the validity of a gift of a chattel interest, or of a gift of an interest in a bond more than any other chattel, perfected by actual transfer of possession with intent to transfer the right. There was at least as much reason to hold the contract in *Elam v. Keen* an executory one as the contract in this case. But, they said, even if this was only an executory contract on mrs. Woodcock's part, yet it was founded on a consideration sufficient to support it. In consideration of the wish and purpose of her husband, declared on his deathbed in her presence, and acquiesced in by her at the time, she agreed, after his death, to release to Dunbar for the immediate use and benefit of himself and his family, the interest bequeathed to her by her husband's will in this bond of Briarly: and this, though not a valuable, was a sufficient moral consideration to support the agreement. *Lee v. Muggeridge*, 5 Taunt. 37, 1 Eng. C. L. R. 10. And if the instrument of February 1809, being a simple contract, was not binding on her for want of con-

sideration, her deed of November  
650 \*1810 was a complete release of her interest in this bond of Briarly.

The counsel for the appellee answered, that the release contained in mrs. Woodcock's deed of November 1810, was inserted in it for the declared purpose of "saving trouble and expediting the finishing of the affairs of her husband's estate;" and, in equity, the release, however general in its terms, should be limited to the accomplishment of its purpose. With regard to the instrument of February 1809, they insisted, that it was, upon its face, a mere agreement of mrs. Woodcock to release to Dunbar her interest in the debt due from Briarly. And as there was no pretence of any valuable consideration, so there was no moral obligation on her part to release her rights, which could raise a consideration to support the agreement. The moral duty to do any thing which would afford a consideration to support an agreement to do it, must be a duty growing out of some act or omission of the party to be bound, importing benefit to the promiser or detriment to the promisee. Then, as to mrs. Woodcock's actual delivery of the bond of Briarly to Dunbar; if the facts on which the executors of Dunbar rest their claim were proved, yet considering the double character which the parties sustained towards each other and in regard to the subject, each having a beneficial interest in the bond as legatee, and each an equal right to the possession of it as executor, the delivery was at the most an equivocal act, equally referrible to the transfer of the possession from one co-executor to the other, as to a gift by the legatee for life of her interest to the legatee in remainder. And thus, this case was distinguishable from *Elam v. Keen*; there, the delivery of possession could only be attributed to the purpose of giving the bond; here, the legal rights of the parties remained exactly the same, after the transfer of the possession of the bond from the one coexecutor to the

other, as before the transfer, and the  
651 transfer \*of the possession was not necessarily referrible to the purpose of giving the interest of the one legatee to the other. But, they said, the state of facts on which Dunbar's executors rested their pretensions, was not proved by any evidence which the court could or ought to regard. The evidence offered upon this point of the controversy, after the cause had been regularly brought to hearing, and the point had been determined by the court, without any pretence that this evidence had been discovered since the interlocutory decree, ought not to have been admitted. They said, it was the practice of our courts of chancery, formerly, before the statute of March 1826, when the general commission to take depositions had been closed, to open the commission by special order, on motion, at any time before the hearing; but after the hearing, and an interlocutory decree deciding the questions of fact, the court never gave leave to take new depositions on a point decided, unless upon affidavit



that the new evidence had been discovered since the decree. This was, perhaps, sometimes done informally, upon motion, and sometimes, regularly, upon supplemental bill in the nature of a bill of review of the interlocutory decree; but in whichever way it was done, the principle on which the new evidence was received was the same; namely, that it had been newly discovered. And it was necessary, that this principle should be observed; for otherwise, the litigation of questions of fact, however solemnly decided by the court on a full hearing, would have been perpetually renewed, and there would have been no end of it; and the admission of new evidence, under such circumstances, would have been a temptation to carelessness and neglect, if not to subornation of evidence. The statute of March 1826 was designed to dispense with the motion for leave to take depositions and the special order for that purpose, in cases in which the former practice required 652 them, but only in such \*cases; not to render the interlocutory decision of questions of fact nugatory, or to dispense with the supplemental bill in the nature of a bill of review of interlocutory decrees, or to abrogate the principle on which alone such bills of review could be allowed. Though the words of this statute were general, that from the filing of the bill until the final hearing of any case, depositions may be taken to be read therein, without any order of court; yet the final hearing there meant, was such final hearing as had formerly concluded the questions of fact; and formerly, the questions of fact might have been settled by an interlocutory decree as well as by a final one.

IV. The counsel for the appellants objected, that it was erroneous to give interest on the balance found against Dunbar's estate from the close of the accounts in 1816. That balance consisted entirely of interest; and of interest on balances of principal in his executorial accounts, which balances had never been ascertained during his life; nor could he have known what he was bound to pay Mrs. Woodcock, until the accounts between him and her were settled, and the moneys received by her, and with which she was chargeable, had been ascertained. The decree was a decree for interest upon a balance of interest.

The counsel for the appellee said, the interest on the balances due on Dunbar's executorial accounts, was part of the annual revenue given to Mrs. Woodcock by her husband's will for her support, and Dunbar ought to have paid it to her as it accrued. The commissioner's report gave interest on the balance found due from Dunbar's estate to that of Mrs. Woodcock with interest from September 1816, and there was no exception to the report in that particular: it was too late to take the exception in the appellate court. *Foreman v. Murray*, 7 Leigh

412.

653 \*In the reply, it was said, that *Foreman v. Murray* was the case of a guardian's account, in which the guardian was charged with moneys as for interest

received by him from an executor, though it did not appear by positive proof that he had received it; and this charge was incorporated in the guardian's account, and no exception was taken to it. Here, the balance consisted of interest, and the interest upon the interest was nowise incorporated in the account; the commissioner only suggested, that the balance of interest should bear interest.

SCOTT, J., delivered the opinion of the court—That the rule which gives to a legatee for life, the absolute property in articles consumable in the use, is applicable only to such as the testator intended for consumption, not to such as in the ordinary course of business are for sale. That the commissioner in his first report, properly allowed to Mrs. Woodcock so much of the crops left by the testator on hand as was necessary for consumption in her family and on the farm, and properly charged her with the proceeds and value of the surplus; and, therefore, the first exception of the appellee to that report ought to have been overruled. And that the general instructions of the court of chancery to the commissioner, in regard to such articles as horses, wagons, implements of husbandry, and the like, the enjoyment of which might or might not have consumed the subject during the life of the legatee for life, and in regard to flocks of sheep and such like, were, in this case, proper.

That Mrs. Woodcock's gift of Briarly's bond, or of her interest in it, to Dunbar, was valid; and, therefore, the interest which accrued on that bond during her life, ought not to have been charged to his estate. That the opinion, declared in the interlocutory order of the court of chancery, sustaining the appellee's fifth exception to 654 \*the commissioner's first report, for omitting that charge against Dunbar's estate, might have been, upon the state of facts then appearing, and probably was, correct; but without deciding whether it was so or not, the court was of opinion, that, upon the evidence subsequently filed, that exception ought also to have been overruled. That the court, without intending to say what would be a final decree, which would preclude a party from taking new evidence without having obtained a review or rehearing, was of opinion, that an opinion given, in the progress of an account, upon exceptions to a report, or instructions to a commissioner, as to the propriety of allowing items of debit or credit, was not such a final decree; and therefore the new evidence in this case ought to have been received and considered.

That the court of chancery erred, in sustaining the appellee's fourth exception to the commissioner's first report, and properly overruled his second, third, sixth, and seventh exceptions thereto.

And that the court of chancery erred, in decreeing interest on the balance reported against Dunbar's estate, from September 1816.

Therefore, the decree was reversed with costs, and the cause remanded to the circuit

superior court of Frederick, for further proceedings to be had therein according to the principles declared in this decree, with instructions to allow interest on the balance which may be found due from the date of the final decree.

Decree reversed, and cause remanded.

655 \***Randolph's Ex'or and Others v. Tucker and Another.**

March, 1840, Richmond.

(Before a special court of appeals, consisting of SCOTT, THOMPSON and CLOPTON, judges of the general court.)

**Circuit Superior Courts—Jurisdiction over Injunctions.**\*—The 41st section of the circuit superior law, Supp. to Rev. Code, ch. 100, giving jurisdiction to each of the judges of the circuit superior courts, to award injunctions to judgments rendered or proceedings apprehended out of his own circuit, but directing that, in such case, the order for the process of injunction shall be directed to the clerk of the court of that county wherein the judgment is rendered or the apprehended proceeding is to be had, gives the judge jurisdiction only to award the injunction, not to hear and determine the cause.

**Same—Same—Case at Bar.**—Therefore, where the judge of the circuit superior court of James City awarded an injunction to proceedings to be had in the county of Charlotte, and directed the order for the process of injunction, not to the clerk of the court of Charlotte, but to the clerk of the court of James City, though the defendant whose proceedings were enjoined was the judge of the court of Charlotte, yet **HOLD**, the process, and the subsequent proceedings in the court of James City being founded on it, were without authority and erroneous.

The general court, in July 1836, admitted to probat and record, as the last will and testament of the late John Randolph of Roanoke, several testamentary papers, namely, a paper purporting to be his will, without date, but supposed to have been written in 1821; a codicil thereto dated the 5th December 1821; another codicil dated the 31st January 1826; four other codicils dated the 6th May 1828; and lastly, another codicil dated the 26th August 1831. By the original will and the codicil of January 1826, mr. Randolph emancipated all his slaves; and bequeathed to his executor (William Leigh) the sum of 8000 dollars, and other funds, for transporting and settling the emancipated slaves in some other state or territory of the U.

656 \*States, and purchasing lands for them; and he devised valuable lands in Virginia to be sold at his executor's discretion, and bequeathed the proceeds to Francis Scott Key and William Meade, to be disposed of towards bettering their condition. The will and codicils were pro-

pounded for probat by mr. Meade. The heirs at law and next of kin of mr. Randolph were his nephew John St. G. Randolph (a lunatic) who was the only child of a deceased brother of mr. Randolph, and his only heir of the whole blood, Henry St. G. Tucker and Nathaniel Beverly Tucker, his brothers of the half blood, and St. George Tucker Coalter and Elizabeth Tucker Bryan (wife of John Randolph Bryan) children of his deceased sister of the half blood; and of these John St. G. Randolph by Frederick Hobson his committee, Henry St. G. Tucker, and John R. Bryan and wife, appeared as parties in the general court, contesting the probat of the will and codicils; but Nathaniel B. Tucker and St. George T. Coalter did not appear by the record to have been parties. Hobson, the committee of John St. G. Randolph, took an appeal from the sentence of probat to the court of appeals; and Henry St. G. Tucker and John R. Bryan and wife appealed from so much of the sentence as admitted to probat the instruments other than the codicil of the 26th August 1831. The court of appeals affirmed the sentence. And William Leigh, the sole executor named in the will, qualified as such, in the general court, at December term 1837.

Immediately after the qualification of the executor, Nathaniel B. Tucker and St. George T. Coalter exhibited a bill in chancery in the circuit superior court for the county of James City and city of Williamsburg, against Leigh the executor, Meade and Key the trustees for the emancipated slaves, and the plaintiff's coheirs and co-distributees, John St. G. Randolph, Henry St. G. Tucker, and John R. Bryan and wife, setting forth the will and

657 \*codicils of mr. Randolph above mentioned, the probat thereof, and the qualification of the executor: alleging that mr. Randolph, at the time of making and publishing the testamentary papers which had been admitted to probat, and each and every of them, was of unsound mind and memory, and therefore not of capacity to dispose of his estate by will; that he had afterwards cancelled the first of the testamentary papers, namely, the will to which the others were codicils; that he had, in the spring of the year 1832, subsequently to the last of the codicils, made a will, whereby he devised and bequeathed his whole estate to his heirs at law and next of kin, of the whole and of the half blood, above named, to be divided among them according to the statutes of descents and distributions, and revoked all former wills; and that this his true last will had never been cancelled or otherwise revoked by him during his life, but it had been lost and destroyed by some person to the plaintiffs unknown: suggesting, that by the admission of the above mentioned testamentary papers to probat, and the grant of administration thereupon to Leigh the executor, he and Meade and Key, the trustees for the slaves thereby emancipated, would consider themselves empowered and required to carry into effect the provisions in relation to the slaves, and

\*The principal case is cited in *Beckley v. Palmer*, 11 Gratt. 632; *Muller v. Bayly*, 21 Gratt. 530, 533. See generally, monographic note on "Injunctions" appended to *Clayton v. Anthony*, 15 Gratt. 518; monographic note on "Jurisdiction" appended to *Phippen v. Durham*, 8 Gratt. 457.

would, unless restrained by the court, immediately transport them beyond the limits of the commonwealth, so that in case those testamentary papers should be pronounced by the decree of the court not to be the last will and testament of Mr. Randolph, their distributable interest in the slaves would be utterly lost to the plaintiffs, or they would be forced into a foreign jurisdiction to assert their claim to them: and praying, therefore, that the court should direct an issue or issues of *devisavit vel non*, to be tried by a jury on the law side of the court, to ascertain whether the testamentary

papers which had been admitted to probat, or any of them, were the \*last will and testament of the deceased; 658 that the court should compel the production of his last will and testament made in the spring of the year 1832, when it should be discovered, or admit proof of the contents thereof, so that the same might be admitted to probat; and, in the mean time, that Leigh, the executor, should be restrained and enjoined from carrying into effect any of the provisions of the said testamentary papers in relation to the slaves, and from removing them out of the commonwealth, and from doing any act as executor prejudicial to the rights of the plaintiffs as heirs and distributees of the deceased, and that Meade and Key should likewise be restrained and enjoined from executing the trust conferred on them in relation to the slaves.

The injunction prayed for by the bill was awarded by the judge of the circuit superior court of James City and Williamsburg, and the order for the process was directed to the clerk of that court, who accordingly issued the process returnable to that court. The process was served on the defendants Bryan and wife in Williamsburg, they being there at the time, though they did not reside there: and it was sent to other parts of the commonwealth, where the other defendants resided or were found, and served on them.

The executor Leigh, in his answer, controverted all the material allegations of the bill touching the validity of the testamentary papers of his testator admitted to probat in the general court; and he alleged, that both the plaintiffs, though they did not appear on the record of the court of probat, as parties contesting the probat, yet in fact joined in contesting the probat there, and therefore could not maintain this bill; that the defendants Bryan and wife were parties on the record contesting the probat, and were made defendants in this cause, in order by serving the process on them at Williamsburg, though they

659 were only nominally defendants, \*to give colour of jurisdiction to the circuit superior court for James City and Williamsburg, in which the suit was brought; that that court was held at a great distance from the residence of all the real defendants, and of the most material witnesses upon whose evidence the validity of the will in question depended, and was a most inconvenient tribunal for the trial of the cause; and (according to the construction

put upon his answer by his counsel) he objected, that, in point of law, the court had no jurisdiction.

The defendants Meade and Key referred to the answer of the executor Leigh, and relied on the grounds of defence therein stated.

The defendant Henry St. G. Tucker, in his answer, expressed his willingness that the issues of *devisavit vel non* asked by the bill, should be directed, and made no objection to the jurisdiction of the court.

The defendants Bryan and wife, in their answer, neither contesting nor supporting the will of 1821, or the codicils of 1826 and 1828, insisted on the testamentary paper of August 1831 as the true last will and testament of the deceased; and claimed the share, to which Mrs. Bryan was entitled, as one of his heirs and distributees, of any estate as to which he died intestate. They made no objection to the jurisdiction.

And Hobson, the committee of John St. G. Randolph, answered, that he was willing the issue of *devisavit vel non* should be directed, making no objection to the jurisdiction.

Mr. Randolph's domicile was at Roanoke in the county of Charlotte. The far greater part of his landed estate, and especially the land, which by the will in question he directed should be sold by his executor, and the proceeds of which he bequeathed to Mr. Meade and Mr. Key to be disposed of for bettering the condition of his manumitted slaves, lay in Charlotte. His slaves also were living on his estate in Charlotte.

660 \*No part of his real estate or slaves was in James City or Williamsburg. All the provisions of his will in relation to his slaves were to be carried into execution in Charlotte.

The plaintiff Nathaniel B. Tucker resided at Williamsburg; the plaintiff St. George T. Coalter, in King William county. The defendant Leigh, the executor, resided in the county of Halifax. He was a judge of the general court assigned to the ninth circuit, composed of the counties of Halifax, Charlotte, Prince Edward, Lunenburg and Mecklenburg. The next or adjacent circuits were the second, the eighth and the tenth: James City and Williamsburg belonged to the third circuit, which was not adjacent to the ninth. The defendant Meade resided in the county of Clarke; the defendant Key, in the district of Columbia; the defendants Bryan and wife, in the county of Gloucester; the defendant Henry St. G. Tucker, president of the court of appeals, was a housekeeper in the city of Richmond during the session of the court there, but his residence, when he was not engaged in the discharge of his official duties at Richmond and Lewisburg, was in the county of Jefferson.

The cause coming on for hearing in November 1839, the defendants Leigh, the executor, Meade and Key, the trustees for the manumitted slaves, and Bryan and wife, moved the court, 1st, to dismiss the bill for want of jurisdiction of the court in the cause; and if that motion should be over-

ruled, then, 2dly, to remove the cause to some other court more convenient to the defendants and their witnesses; and if both those motions should be overruled, then, 3dly, to direct the issue of *devisavit vel non* to be tried at the bar of some other court more convenient to the defendants and their witnesses. The court overruled the motion to dismiss the cause for want of jurisdiction, on the ground, chiefly, that the objection to the jurisdiction was not 661 distinctly pleaded \*in the answer of the defendant Leigh, but it also expressed the opinion that it had jurisdiction; and then overruled the other two motions, and directed an issue of *devisavit vel non* to be tried by a jury on the common law side of the court.

The defendants Leigh, Meade and Key applied by petition to this court for an appeal from the order; which was allowed.

The cause was argued here by Taylor and Robertson for the appellants, and by Brooke and R. T. Daniel for the appellees, upon all the points presented by the defendants' motions in the circuit superior court; but it was decided by the court upon the question of jurisdiction alone.\*

662 \*SCOTT, J., delivered the opinion of the court—That the 41st section of the circuit superior court law, which gives general jurisdiction to each of the judges of the circuit superior courts, to award injunctions to judgments rendered, or to pro-

ceedings had or apprehended, without as well as within his own circuit, yet expressly requires, that the order of the judge awarding an injunction, in such case, shall be directed to the clerk of the court of that county or corporation, in which the judgment shall have been rendered, or the proceeding is apprehended; that, in such case, the statute, in effect, gives the judge jurisdiction only to award the process, not to hear and determine the cause, and refers the cause to another and more convenient tribunal; and that, as the proceedings which were apprehended in this case, and which were enjoined, were proceedings that were to be had in the county of Charlotte, the judge erred in directing the order for the process of injunction 663 to the clerk of the \*circuit superior court for James City and Williamsburg, and the process and the subsequent proceedings being founded on that order, were without authority and erroneous. That, therefore, the same should be reversed with costs. And the court proceeding to pronounce such a decree as the circuit superior court ought to have pronounced, it was decreed and ordered, that the bill of the appellees should be dismissed with costs.

### Corbin v. Emmerson.

March, 1840, Richmond.

(Before a special court of appeals consisting of BROOKE and CABELL, judges of the court of appeals, and SCOTT, judge of the general court.)

**Assignments—Suit by Assignee—Parties—Assignor—Proof of Assignment.**—In every case of a bill in

court itself, order any such suit to be removed to the circuit superior court of the county or corporation, wherein the defendant or defendants principally interested or chargeable may reside."

And §. the 41st section of the same statute, which provides, that "the judges of the circuit superior courts shall have and exercise a general jurisdiction in awarding injunctions, whether the judgment or proceeding enjoined be rendered by a superior or inferior court, within or without their respective circuits, or the party against whose proceeding the injunction be asked, be a resident within or without the circuit of such judge awarding the same; but the order of such judge, awarding an injunction to a judgment or proceeding not within his circuit, shall be directed to the clerk of the court of that county or corporation, in which such judgment shall be rendered, or proceeding apprehended; on which such proceedings in all respects shall be hereafter had, as if the order had been made by the judge in whose circuit such judgment may have been rendered, or proceeding had or apprehended."—Note in Original Edition.

†**Assignments—Suit by Assignee—Parties—Assignor—Proof of Assignment.**—In this state it must be regarded as settled law, that in every case of a bill in equity asking relief for the plaintiff as assignee of the rights of another, the assignor must be made a party to the cause, and the assignment ought to be shown and proved, though the fact be not denied, nor proof of it called for in the answers. *Lynchburg Iron Co. v. Tayloe*, 79 Va. 675, 676, citing the principal case. *Vance v. Evans*, 11 W. Va. 382, citing the principal case as its authority, says that

\*The question of jurisdiction depended on the following statutory provisions—

1. The provisions of the circuit court law of 1819, 1 Rev. Code, ch. 69, § 53, 54, p. 229. "If either of the judges of the general court be interested in any suit, which, in the case of any other person, would have been proper for the jurisdiction of such judge, it shall be lawful to institute such suit in any court within an adjacent circuit, and the process from such adjacent court may be served in the circuit to which such judge shall be allotted, or in which he shall reside, and proceedings shall be thereupon had."—"When any judge of a circuit court shall be interested in any cause depending in his circuit, or related to either of the parties, or in any manner situated so as to render it improper, in his judgment, to preside at the trial, it shall be lawful for such judge to cause the same to be removed to the next circuit, and to the most convenient court in that circuit, for trial."

2. The 38th section of the circuit superior court law, Supp. to Rev. Code, ch. 109, p. 151. "If there be more than one defendant in any suit in chancery, brought or pending in any circuit superior court, the said suit may be instituted in the circuit superior court of the county or corporation wherein either of them may reside, and the clerk shall and may issue process against the other defendant or defendants, directed to the counties or corporations in which they may be found; and on the return thereof, the like proceedings shall be had as if all the defendants resided within such county or corporation: Provided, that any such circuit superior court sitting in chancery, may, at any time, on motion and for good cause shewn by any defendant or defendants residing in any other county or corporation than that wherein such suit in chancery may be brought, or for reasons appearing to the

equity asking relief for the plaintiff as assignee of the rights of another, the assignor must be made a party, and the assignment ought to be shewn and proved, though not denied, nor proof of it called for, in the answers; and the production and proof of the assignment can only be dispensed with by the admission thereof by the assignor and the parties against whom the relief is sought.

James B. Burwell, late of Richmond county, by his will dated in September 1811, after devising to his uncle Bacon Burwell part of his land and farm lying in the counties of Frederick and Berkeley, bequeathed to him one half of the personal estate on that farm (chargeable with £1000. to be paid to the testator's aunt Rachel Emmerson of Tennessee within two years after his decease) and to John R. F. Corbin all the remainder of his estate in those counties. The probat of the will being contested, Corbin was appointed, in November 1811, curator of the testator's estate in Richmond, and Bacon  
664 \*Burwell curator of his estate in Frederick and Berkeley. But in March 1812, after the probat, administra-

the general rule is, that where it is necessary to adjudicate the rights of an assignee, the assignor, or if he be dead, his personal representative must be made a party to the cause. As an exception to this rule, the court states the proposition laid down in *James River, etc., Co. v. Littlejohn*, 18 Gratt. 54. For this proposition, see next paragraph. See also, *Jameson v. Myles*, 7 W. Va. 311, 322, citing the principal case as holding that, in every case of a bill in equity, asking relief for the plaintiff, as assignee of the rights of another, the assignor must be made a party. See also, *foot-note* to *Richardson v. Davis*, 21 Gratt. 709.

In *James River, etc., Co. v. Littlejohn*, 18 Gratt. 82, it is said: "It is sometimes laid down, that to a bill filed by the assignee of a chose in action, the assignor is in all cases an indispensable party. It was so said by JUDGE SCOTT, delivering the opinion of a special court in *Corbin v. Emmerson*, 10 Leigh 663. But this language ought to be understood with reference to the case in which it was used. There was no proof of the assignment in that case; it was not before the court, and the court could not say, therefore, whether it was absolute and unconditional or otherwise. The want of proof of the assignment seems to have been the point mainly urged in the argument, and the authorities bearing on the necessity of making the assignor a party were not cited. That there are cases in which the assignor is not a necessary party to a bill filed by an assignee, appears from *Newman v. Chapman*, 2 Rand. 93, which was not cited in *Corbin v. Emmerson*. I do not think, therefore, that *Corbin v. Emmerson*, can be regarded as settling, that in all cases whatsoever the assignor is an indispensable party." In this case it was held that, to a bill filed by an assignee of a chose in action, if the assignment purports to transfer the whole interest of the assignor, and there is nothing in the pleadings and proof to induce the belief that it really did not do so, the assignor is not a necessary party. For other cases in accord with this decision, see *foot-note* to *Zirkle v. McCue*, 26 Gratt. 517.

See further on this subject, monographic note on "Assignments" appended to *Ragsdale v. Hagy*, 9 Gratt. 409.

tion with the will annexed was granted to Corbin, and he took possession of the whole of the testator's personal estate. The will was the subject of controversy in the case of *Burwell v. Corbin*, 1 Rand. 131-164, decided in April 1822, in which it was held, that it was not well proved as a will of real estate, leaving it as to the personal in full force.

In June 1823, Thomas Emmerson, husband of the legatee Rachel Emmerson, brought a suit in the superior court of chancery of Richmond to recover, not his wife's legacy of £1000. but whatever should be found due to Bacon Burwell on account of the legacy bequeathed to him by the testator's will as above stated, which the plaintiff claimed as the assignee of that legatee. The bill alleged, that Corbin, the administrator, had not accounted for and paid to Bacon Burwell all that was due to him as legatee, had not returned a full and true inventory of the estate, had converted to his own use the profits of a large number of slaves which were part of the legacy bequeathed to Bacon Burwell, and had become wholly insolvent; and that Bacon Burwell had made an assignment to the plaintiff, of all his interest in the testator's estate, particularly his claim for the profits of the slaves bequeathed to him, and had given the plaintiff an irrevocable power of attorney to sue for, collect and appropriate to his own use, whatever upon a full and fair settlement of the accounts should be found due from Corbin, the administrator, to Bacon Burwell, on account of his legacy, as (the bill said) would appear by the power of attorney now filed in the office of the court, which would be produced when necessary. The bill made Bacon Burwell, Corbin, the administrator with the will annexed, Tebbs and Settle, surviving sureties of Corbin in his administration bond, and Beale and Chris-  
665 topher administrators of Turbeville \*a deceased surety, parties defendant. And it prayed an account of Corbin's administration, and especially an account of the profits of the slaves belonging to Bacon Burwell's legacy, and a decree against Corbin and his sureties, for whatever should be found due from Corbin to the legatee.

But though Bacon Burwell was made a party defendant, it did not appear that any process was served upon him, or that he ever appeared as a party in the cause: but he died pending the suit, and his administrator appeared as a party before the commissioner to whom the accounts were referred, and he afterwards consented in court to the recommitment of the report. And Bacon Burwell's assignment to the plaintiff of his claim against Corbin, and irrevocable power of attorney to the plaintiff to sue for and collect the money due from Corbin and to appropriate it to his own use, though the bill referred to the instrument as filed in the office of the court, ready to be produced when necessary, did not appear by the record to have been in fact exhibited, nor was there any proof thereof.

Corbin answered, that he had made and

returned full and true inventories of his testator's estate, which he exhibited: that in November 1818, a division was made by commissioners under a decree of the county court of Frederick, of all the slaves on the testator's farm in Frederick and Berkeley, between Bacon Burwell and himself to whom the same were bequeathed, and he and Burwell, at the same time, divided between themselves all the other personal property on that farm; for proof of which he exhibited the report of the commissioners, whereby it appeared that about seventy slaves were allotted to Burwell: and, in regard to the profits, that many of the slaves having been in fact chargeable, and the defendant having, on his part,

waived all charge for his commission 666 and compensation \*for his trouble, Burwell, on his part, had waived the account of the profits which his assignee now asserted. The defendants Tebbs and Settle, and Beale one of the administrators of Turbeville, put in their answers, in which, referring to Corbin's answer, they controverted the right of Bacon Burwell, and consequently of the plaintiff, to call for an account of profits, or any other account.

But neither in the answer of Corbin, nor in that of Tebbs and Settle, was the fact alleged in the bill, of Bacon Burwell's assignment of his claim to the plaintiff, in any way denied, nor did those defendants call for proof of the assignment. And the answer of Beale did not deny the fact of the alleged assignment, or call for proof of it in any other way than by disclaiming, in general terms, all knowledge of the claims alleged in the bill.

Christopher, the other administrator of Turbeville, did not answer, nor was there any process in the record whereby the cause was matured for hearing against him on his default. Yet the record shewed, that he in fact appeared by counsel, and joined in the defence: for he, with Tebbs and Settle, and his coadministrator Beale, filed exceptions to the first account of profits reported by the commissioner; and that account was recommitted, by consent of all the parties, including Christopher; and then, the counsel of all the parties, including Christopher, attended the taking of the account before the commissioner, which was finally reported, and was the foundation of the decree of the court.

The defendant Corbin died pending the suit, and it was revived against his administrator. And the report of the commissioner to whom the accounts were referred, shewing a balance of 12977 dollars, with interest on 8291 dollars, part thereof, from the 1st September 1826, due from Corbin 667 the administrator to the legatee \*Burwell, on account of the profits of the slaves from the year 1812 to 1818, during which time they were in Corbin's hands; and there being no exceptions to this report; the court, upon the final hearing, decreed that the defendants should pay the plaintiff, as assignee of Bacon Burwell, the above mentioned balance with interest &c.

From which decree the defendants Beale and Christopher, by petition to a judge of this court, prayed an appeal; which was allowed.

The cause was argued here by C. Johnson and G. N. Johnson for the appellants, and Leigh for the appellees.

The main question, on the merits, was a question of fact depending on the evidence: Whether, at the time of the division between Corbin and Bacon Burwell in November 1818, Burwell waived and abandoned his claim to have an account of profits from Corbin, as Corbin alleged in his answer, and for the reasons and considerations therein stated?

Supposing that Burwell did not abandon his claim to profits, there were many other questions of fact and of law, arising on the accounts, and the proceedings in the cause, which were argued at the bar; but of these questions it is necessary to mention only one, since the court decided no other—The counsel for the appellants objected, that there was no proof of the assignment by Bacon Burwell to the plaintiff of this claim of Burwell against Corbin; and that as the assignment was the whole foundation of the plaintiff's claim to relief, proof of it was indispensable, even if Burwell had been regularly brought before the court; but though he was a necessary party, and though he was made a party by the bill, he never appeared, and no process was taken out against him. They cited Ray v. Fenwick, 3 Bro. C. C. 25; Cathcart v. Lewis, 1 Ves. jun. 463; Purcell v. Maddox, 3 Munf. 79; Clark v. Long, 4 Rand. 451; Tennent's heirs v. Pattons, 6 Leigh 196, 207.

668 \*Leigh said, that none of the process had been inserted in the record, and for aught that appeared to the contrary, there might have been a decree nisi served on the defendant Burwell; but however that was, his administrator, after his death, was made a party, and he appeared. The fact of Burwell's assignment of his claim to the plaintiff, was one in which none of the defendants but Burwell, and after his death his administrator, had any interest; and Burwell's administrator made no complaint, and had not appealed from the decree. The decree would be a complete protection to the defendants whom it charged with the debt, against a claim for the same debt by the representative of the assignor; which was all those defendants could desire. The alleged assignment was not denied by any of the answers; nor was proof of it called for in any of them, unless the general disclaimer in Beale's answer, of all knowledge of the claims alleged in the bill, could be supposed to call for proof of the assignment; but that was only a disclaimer of knowledge on the subject of Burwell's claims, not of his assignment of those claims to the plaintiff. It was obvious the court below proceeded on the supposition, that the assignment under which the plaintiff claimed, was unquestionable as it was unquestioned; and the omission to exhibit the instrument of assignment was the result of inadvertence or, more

probably, of the circumstance, apparent on the record, that the assignment was not a point of dispute between the parties. Therefore, if the court should reverse the decree for want of proof of the assignment, he submitted, that it ought to settle the other points in the cause, and then remand it in order that the plaintiff might have an opportunity of supplying the proof.

SCOTT, J., delivered the opinion of the court—That in every case of a bill in equity asking relief for the plaintiff as assignee of the rights of another, the assignor 669 \*must be made a party to the cause, and the assignment ought to be shewn and proved, though the fact be not denied, nor proof of it called for, in the answers. The production and proof of the assignment can only be dispensed with by an admission of the fact by both the assignor and the parties against whom the relief is asked. Much more were the production and proof of the alleged assignment indispensable in this case, in which the assignor and his administrator, if the cause was regularly matured for hearing as to either of them at all, were in default; so that it cannot be pretended, that they or either of them admitted the assignment. This objection is fatal to the decree, upon the record as it now stands. But if this were the only error in the decree, the court, reversing it for this error, might remand the cause to the court of chancery, where the plaintiff might have an opportunity of producing and proving the assignment. The court has, therefore, examined the case upon the merits. And upon a view of all the circumstances of the case proved by the evidence, we are of opinion, that Bacon Burwell, at the time of the division between him and Corbin as legatees in 1818, waived, and intended to waive and abandon, all further claim against Corbin as administrator of his testator, on account of the legacy bequeathed to him, and especially all claim for an account of the profits of the slaves; and that, therefore, Burwell, if he had filed this bill himself preferring the claim on his own behalf, would not have been entitled to relief. Of course, the plaintiff, his assignee, is entitled to none. Therefore, the decree is to be reversed with costs, and the bill dismissed.

Decree reversed.

#### CASES DECIDED BY THE GENERAL COURT OF VIRGINIA.

673 \*JUNE TERM 1840.  
JUDGES PRESENT.

Smith, Lomax, Clopton, Allen,  
Upshur, Thompson, Baker, Douglass,  
Field, Brown, Christian, Wilson.

#### Fisher v. Commonwealth.

June, 1840.

Criminal Law.—Employing Free Negroes—Indictment.\*—  
Under the statute 1 Rev. Code, ch. 75, § 5, an in-

dictment for employing or harbouring a free negro or mulatto, contrary to the statute Id. ch. 111, § 75, is a regular proceeding.

Same—Same—Same—Sufficiency.—What is a sufficient indictment for such offence.

In the circuit superior court of Mason, at April term 1838, the grand jury found an indictment against Henry J. Fisher for a misdemeanour. The indictment contained two counts. The first charged that Henry J. Fisher, on &c. at the county aforesaid 674 said, "did unlawfully employ \*and harbour John, a free negro man, who has been emancipated within the commonwealth of Virginia since the first day of May 1806, and has unlawfully remained in the county of Mason and commonwealth aforesaid, from the time of his emancipation until &c. being a period of more than twelve months after his title to freedom accrued, and after he had attained the age of twenty-one years, without having obtained leave so to do according to law, and without having his certificate registered in the said county of Mason, contrary to the form of the statute &c." The second count charged that the said Henry J. Fisher, on &c. at the county aforesaid &c. "did unlawfully employ and harbour John, a free negro man, going at large and hiring himself out to labour in the said county, without having his certificate of freedom registered in the said county of Mason, and without having in his possession a certified copy of the said certificate, contrary to the form of the statute &c."

A summons having been awarded against the defendant, he appeared, and put in a general demurrer to the indictment, in which the attorney for the commonwealth joined. After argument, the court overruled the demurrer, and proceeded to render judgment against the defendant for a fine of five dollars and the costs of prosecution. To this judgment the general court, on the petition of Fisher, awarded a writ of error.

The cause was argued in writing, by the plaintiff in error. 1. He maintained, that it was a familiar principle of law, that where a statute creates an offence, and inflicts a penalty, which it directs to be recovered in a particular manner or before a particular forum, the penalty cannot be recovered in any other manner or before any other forum. Now, by the statute under which this prosecution is instituted, 1 Rev. Code, ch. 111, § 75, p. 441, the penalty is 675 made recoverable by \*warrant before a justice of the peace. And though, by the statute 1 Rev. Code, ch. 75, § 5, p. 265, a grand jury for a superior court is empowered to present all offences made penal by the laws of the commonwealth, although the recovery of the fines for such offences be otherwise directed, except where the penalty is less than five dollars, yet that statute, in terms, authorizes a proceeding by presentment only; and the statute 1 Rev. Code, ch. 169, § 65, p. 614, which prescribes the mode of proceeding in the

"Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

\*Indictments.—See generally, monographic note on

superior courts for offences where the penalties exceed not 20 dollars, enacts that in a presentment to the court for such offence, no information thereupon shall be filed; manifesting the intent and understanding of the legislature, that the presentments authorized by the 5th section of the 75th chapter must be such, whereupon, but for the prohibitory enactment in the 169th chapter, an information might regularly and properly be filed; presentments in the strict sense of the term, as distinguished from indictments, in respect to which the prohibition was unnecessary and nugatory. As to the distinction between presentments and indictments, he referred to 1 Chitt. Crim. Law, American ed. of 1832, p. 163. *Terms de la Ley*, 265; *Jacob's Law Dict.* title Presentment, and as to the necessity of proceeding in the particular mode pointed out by the statute, to the cases of *Webb v. Commonwealth*, 2 Leigh 721; *White v. King &c.*, 5 Leigh 726; *Sims v. Alderson*, 8 Leigh 479; *Ex parte Fisher*, 6 Leigh 619.

2. He contended, that the first count is defective, because it does not allege, otherwise than by implication, that the negro remained in the commonwealth more than twelve months after his right to freedom accrued; citing *Jacobs et al. v. Commonwealth*, 2 Leigh 709.

3. He submitted, that the first count ought to have charged that the employing and harbouring was with knowledge on the part of the defendant that the negro  
676 \*was remaining in the commonwealth contrary to law. On this point he cited *Rex v. Burridge*, 3 P. Wms. 439

PER CURIAM. Judgment affirmed with costs.

By the 61st section of the act concerning slaves, free negroes and mulattoes, 1 Rev. Code, ch. 111, p. 486, it is enacted, that "if any slave hereafter emancipated shall remain within this commonwealth more than twelve months after his or her right to freedom shall have accrued, he or she shall forfeit all such right, and may be apprehended and sold by the overseers of the poor"—"but this provision shall not extend to any infant slave or slaves who shall be emancipated, until such slave or slaves shall have remained within this commonwealth twelve months after he, she or they shall have attained the age of twenty-one years." By the 74th section, Id. p. 440, it is enacted (for the prevention of free negroes and mulattoes going at large in the several counties of the commonwealth) "that no free negro or mulatto shall be allowed to go at large or hire himself or herself to labour in any county, without having his or her certificate registered in the clerk's office of the county wherein he or she resides, and having a certified copy of the said certificate;" and by the 75th section, Id. p. 441, "any person employing or harbouring any such negro or mulatto, coming within the purview hereof, shall forfeit and pay, for each offence, five dollars, to the use of the informer, to be recovered by a warrant before a justice of the peace."

By the 8th section of the act concerning juries, 1 Rev. Code, ch. 75, p. 265, "every grand jury for a superior court of law shall and may present all offences made penal by the laws of this common-

wealth, although the recovery of the fines for such offences shall be otherwise directed by the laws inflicting the same; except only, that no presentment shall be made in a superior court of law, of any offence where the penalty inflicted by law is less than five dollars."

By the 65th section of the act regulating criminal proceedings against free persons, 1 Rev. Code, ch. 100, p. 614, "in a presentment to a county or corporation court, if the penalty of the offence exceed not five dollars, or to the superior court, if the penalty exceed not twenty dollars, no information thereupon shall be filed, but a summons shall be issued against the defendant to answer the presentment, and such summons having been served upon him, or a copy thereof having been left at his usual place of abode at least ten days before the return day, if he do not appear, judgment shall be rendered against him for the penalty, and if he do appear, the  
677 \*court shall, in a summary way, without a jury, hear and determine the matter of the presentment in the form in which it shall have been made, and give judgment thereupon according to law and the very right of the case, disregarding any exception that may or might be taken to the form of the presentment."

See the case of *Commonwealth v. Collins*, 9 Leigh 666.—Note in Original Edition.

## 678 \*DECEMBER TERM 1840.

JUDGES PRESENT.

*Smith,  
Upshur,  
Lomax,  
Leigh,  
Duncan,  
Fry,*

*Baker,  
Christian,  
Allen,  
Mason,  
Nicholas,  
Wilson,*

*Clopton.*

## Commonwealth v. Stockley.

December, 1840.

**Felony—Jurors—Power of Court to Examine on Voir Dire.**\*—A circuit court has the right and power, on the trial of an indictment for felony, to compel a venireman or bystander called to serve as a juror on the trial, to be sworn on his voir dire, and to answer proper questions touching his fitness as a juror in the particular case.

**Perjury—Information—Sufficiency.**†—What is a sufficient information for perjury committed by a juror on his voir dire.

On the 25th of May 1839, the circuit superior court of Northampton, upon the motion of the attorney for the commonwealth, founded on the affidavit of B. P. Dalby a deputy sheriff, ordered that Charles B. Stockley be summoned to appear forthwith, to shew cause why an information should not be filed against him for wilful and corrupt perjury committed by him during the sitting of the then term of the court, in this, that he, being a bystander, was

\***Jurors.**—On matters pertaining to Jurors, see monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

†**Perjury—Information.**—See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.



called upon as a venireman in a certain prosecution against one William Garrison for larceny, then pending against the said Garrison in the said court, 679 \*and being interrogated on his voir dire by the court whether he had made up and expressed his opinion as to the guilt or innocence of the said Garrison of the said larceny, he said that he had not, and thereupon he was elected and sworn as a venireman in the said prosecution, when in fact and in truth he had made up and expressed an opinion favourable to the acquittal of the said Garrison of the said charge. The summons having been issued and executed on Stockley, and he not appearing, an information was ordered and accordingly filed, which was in the following terms:

"Commonwealth of Virginia, third judicial circuit, county of Northampton to wit: Be it remembered that Peter P. Mayo, attorney for the commonwealth of Virginia prosecuting in the circuit superior court of law and chancery for the said county, cometh into the said court on the 25th day of the month of May in the year 1839, leave of the said court being first had and obtained, and giveth the said court, in his own proper person, to understand and be informed, in behalf of the said commonwealth, that at the circuit superior court of law and chancery begun and held for the said county of Northampton on the 21st of the said month of May in the year 1839, a certain issue was then and there pending between the commonwealth of Virginia and one William Garrison, in a certain plea of felony and larceny, which came on to be tried in due form of law; upon which trial a certain Charles B. Stockley, in the county aforesaid and within the jurisdiction of this court, was duly and legally called upon by George F. Wilkins a deputy sheriff of said county, he the said Charles B. Stockley being then and there a bystander, as a juror, to discharge the duties and function of a juror in the said issue then and there pending between the said commonwealth and the said William Garrison in the said plea of felony and larceny, and he the said

680 Charles B. Stockley was then and there duly sworn on his voir \*dire in the said circuit superior court of law and chancery for the said county of Northampton, by the said court on the 21st day of the said month of May in the year aforesaid, and took his corporal oath upon the holy gospel of God, before the honourable Abel P. Ushur judge of the said circuit superior court of law and chancery for the said county of Northampton, then and there holding said court, the said circuit superior court of law and chancery then and there having competent authority to administer the said oath to the said Charles B. Stockley in that behalf; and he the said Charles B. Stockley, after having duly sworn as aforesaid, was interrogated and enquired of by the said circuit superior court of law and chancery for the said county of Northampton, on the said 21st day of May in the year aforesaid, whether he the said

Charles B. Stockley had made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony. And the said Peter P. Mayo giveth the court here further to understand and be informed that at and upon the trial of the said issue between the said commonwealth of Virginia and the said William Garrison, it then and there became and it was a material question and fact whether he the said Charles B. Stockley had made up and expressed his opinion concerning the guilt or innocence of the said William Garrison of the said larceny and felony. And the said Peter P. Mayo giveth the said court further to understand and be informed that the said Charles B. Stockley, being so sworn as aforesaid, not regarding the laws of this commonwealth, and contriving and intending to prevent the due course of law and justice, then and there, in answer to the said interrogatory then and there propounded to him by the said circuit superior court of law and chancery for the county of Northampton aforesaid, upon his corporal oath aforesaid, wilfully,

681 corruptly, falsely and maliciously, before the said honourable \*Abel P. Upshur, then and there holding the said circuit superior court of law and chancery for the county of Northampton aforesaid, did swear that he the said Charles B. Stockley had not made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony, whereas in fact and in truth he the said Charles B. Stockley had, before the said 21st day of May in the year aforesaid, made up and expressed his opinion touching the guilt or innocence of the said William Garrison of the said larceny and felony; to the evil example of all others in like case offending, and against the statute in such cases made and provided, and against the peace and dignity of the commonwealth."

The defendant pleaded not guilty to the information, and an issue was made up thereon. In this state the cause was continued on the docket until October term 1840, when the defendant, by leave of the court, demurred generally to the information, and also filed a special demurrer thereto; in both of which demurrers the attorney for the commonwealth joined. In the special demurrer, the defendant cravedoyer of the record in the suit of the commonwealth against William Garrison, referred to in the information, and set forth the same in hæc verba. It thereby appeared, that on the 21st of May 1839, the grand jury impaneled and sworn in the circuit court of Northampton presented "an indictment against William Garrison for grand larceny, a true bill;" which charged that the said Garrison, on &c. in the said county and within the jurisdiction of the said court, feloniously did steal, take and carry away three pieces of woollen cloth of the value of 100 dollars, of the goods and chattels of G. W. Robins and W. H. Bell, against the form of the statute: that on the same day, the said Garrison, "who stands

indicted of larceny in stealing goods and chattels upwards of the value of ten  
682 dollars, was led to the bar \*in custody of the jailor, thereof arraigned, and pleaded not guilty to the indictment;" that thereupon two of the veniremen summoned for the trial, and Charles B. Stockley and four other bystanders, "were elected, tried and sworn the truth of and upon the premises to speak;" that the jury was completed on the 22d of May 1839: and that on the following day (the 23d) the jury returned a verdict finding the said William Garrison not guilty of the larceny aforesaid; whereupon, it was considered by the court that he be thereof acquitted and discharged. After setting forth the record of the proceedings against Garrison, the special demurrer proceeded to assign the following objections to the information: "1. Because the said information does not aver that the oath alleged to have been taken wilfully, corruptly, falsely and maliciously before the honourable Abel P. Upshur, was taken by his the said Charles B. Stockley's own voluntary act, consent or agreement, agreeably to the statute in such cases made and provided. 2. Because there is a variance between the record in the said prosecution against the said William Garrison, and that set forth in said information, in this, that the said record of which oyer is given shews that the said Garrison was tried on an indictment for larceny, and the said information alleges it to have been a plea of felony and larceny, which came on to be tried in due form of law. 3. Because the said information does not aver and shew at what particular place the court was held before which the alleged false oath was taken. 4. Because the said information alleges that it was at and upon the trial of the said issue (meaning the issue made up in the prosecution on behalf of the commonwealth against William Garrison) that he the said Charles B. Stockley took the alleged false oath, whereas the record does not shew that the said Charles B. Stockley was sworn on the trial of said issue. 5. Because the said information does not aver nor shew  
683 whether the said \*William Garrison was convicted or acquitted. 6. Because the said information does not aver nor shew whether the said Charles B. Stockley was elected as a juror for the trial of said William Garrison. 7. Because there is a variance between the said information and the summons to shew cause why it should not be filed. 8. Because the case of the commonwealth against said William Garrison is not correctly described in the said information."

The matters of law arising upon the demurrers having been argued, the circuit court, by consent as well of the attorney for the commonwealth as of the defendant, adjourned to this court the following questions: 1. Has the court the right and power, on the trial of an indictment for felony, to compel a venireman, or other person called from the bystanders to serve as a juror on the trial thereof, to answer on his voir dire, or to be sworn so to answer,

questions touching his fitness as a juror in the particular case? 2. All other questions arising on the record.

UPSHUR, J., delivered the opinion of the court.—As to the first question adjourned, we are unanimously of opinion that it should be answered in the affirmative. The practice throughout the commonwealth for a long series of years, hitherto without a serious doubt of its correctness, ought to be considered as settling the law in that respect. And even if it were a case of first impression, we see no reason to doubt that the power in question belongs to and may rightfully be exercised by the court, as necessary to the proper administration of the criminal laws.

As to the questions adjourned under the second head, the court, without deciding on the propriety of allowing the defendant to plead and demur at the same time, is of opinion that the information is good,  
684 and that the \*demurrers thereto should be overruled. In this opinion, however, two of the judges do not concur.

The entry in the general court was as follows:

"This court is of opinion and doth decide, 1. That a circuit court has the right and power, on the trial of an indictment for felony, to compel a venireman, or other person called from the bystanders to serve as a juror on the trial thereof, to be sworn on his voir dire, and to answer proper questions touching his fitness as a juror in the particular case. 2. That the information in this case is good, and that the demurrers thereto ought to be overruled."

The statute 1 Rev. Code, ch. 148, § 1, p. 571, enacts, that "if any person, either by the subordination, unlawful procurement or sinister persuasion of another, or by his own voluntary act, consent or agreement, shall wilfully, corruptly and falsely swear, or in solemn manner affirm, to any material matter, before any court within this commonwealth, or before any justice of the peace, or before any commissioner or commissioners appointed to take any deposition or depositions, or before any person or persons whatsoever authorized by law to administer an oath: and, at the time when such false oath or affirmation is taken, the court or justice, or commissioner or commissioners, or other person or persons, before whom it is taken, be acting under the authority of law, upon the subject matter to which such false oath or affirmation relates: such person so offending shall be deemed guilty of perjury."

As to the sufficiency of the information in the foregoing case, see 1 Hawk. P. C. by Curwood, book 1, ch. 27, § 18, 26, pp. 438, 442.—Note in Original Edition.

#### 685 \*Commonwealth v. Dever.

December, 1840.

Indictments—Omission of Title of Prosecutor—Effect.\*  
—The omission to write the title or profession of

\*Indictments—Failure to Append Names of Prosecuting Witnesses—Effect.—Com. v. Williams, 5 Gratt. 702, basing its decision upon the principal case, holds that the omission by the grand jury to write the names of the witnesses, on whose testimony an in-

the prosecutor at the foot of an information or indictment, is no ground of exception, either by motion to quash or plea in abatement.

The grand jury impaneled in the circuit superior court of Harrison county, at October term 1839, found an indictment against James Dever, for an assault and battery upon Rachel Wilkinson, wife of Joseph Wilkinson. At the bottom of the indictment were written the following words: "Upon the information of Rachel Wilkinson wife of Joseph Wilkinson of Harrison county, sworn in court at the instance of the said Joseph Wilkinson, prosecutor, and sent to the grand jury to give evidence." At October term 1840, the defendant moved the court to quash the indictment, "because the title or profession of the prosecutor is not written at the foot of the said indictment, or elsewhere;" and thereupon the court, with the consent of the defendant, adjourned to this court the questions, 1. Whether the indictment ought for that reason to be quashed? 2. What judgment ought the court to render upon said motion?

SMITH, J., delivered the opinion and judgment of the court.—A majority of the court are of opinion that the act of assembly, 1 Rev. Code, ch. 169, § 45, p. 611, requiring the title or profession of the prosecutor to be written at the foot of an information or indictment, is only directory to the officers of the court, and though the requisition be not complied with, the de-

dictment is found, at the foot thereof, is no ground for quashing the indictment.

In *State v. Shores*, 31 W. Va. 496, 7 S. E. Rep. 416, it is said: "The further objection is made to the indictment that the names of the witnesses, on whose evidence the indictment was found, were not written at the foot thereof in accordance with the requirements of the statute. This court held in the case *State v. Enoch*, 26 W. Va. 253, founding its decision on *Dever's Case*, 10 Leigh 685, and *Williams' Case*, 5 Gratt. 702, that the statute was directory, and the omission did not vitiate the indictment. We are asked to overrule these authorities, and hold the indictment fatally defective. \* \* \* The statute held directory in *Com. v. Dever*, 10 Leigh 685, required 'the title or profession of the prosecutor to be written at the foot of an information or indictment.' In *Williams' Case*, 5 Gratt. 702, the statute, held to be merely directory, is substantially the same as that in force when *Enoch's Case* was decided, and is now in our Code. *Williams' Case* was decided 40 years ago and we have no inclination to disturb it now. Whatever may have been decided elsewhere, we hold the law to be settled in Virginia and this state that such a statute is not mandatory but directory."

*Shelton v. Com.*, 80 Va. 450, 452, 16 S. E. Rep. 355, and *Porterfield v. Com.*, 91 Va. 801, 803, 23 S. E. Rep. 352, on the authority of the principal case, and *Williams v. Com.*, 5 Gratt. 702, also hold that the Code of 1887, sec. 3984, requiring names of witnesses to be written at the foot of the indictment is directory merely. See principal case also cited in *Thompson v. Com.*, 88 Va. 49, 13 S. E. Rep. 304, where it is held that § 3991, Va. Code 1887, applies only to misdemeanors.

See generally, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

defendant can take no exception on that account, either by motion to quash or plea in abatement. The court is therefore of opinion and doth decide, 1. That the indictment in this case ought not to be quashed. 2. That the motion to quash ought consequently to be overruled.

#### 686 \*Roberts and Another v. Commonwealth.

December, 1840.

#### Gaming—Presentment—Allegations—Public Place \*—

A presentment "for unlawfully playing cards at the grocery of D. and C." is defective in substance, for not alleging the grocery to be a public place, or a place of public resort.

In the county court of Amelia, at August term 1837, the grand jury made a presentment in the following terms: "We present Jacob Roberts and William Ligon for unlawfully playing cards at the grocery of Alfred R. Deaton and William B. Chapman, in the county of Amelia and within the jurisdiction of this court, within three months last past. Information by Josiah C. Jones, one of our body, sworn in open court." The defendants moved the court to quash the presentment; which motion being overruled, they pleaded not guilty; and a trial being had at March term 1839, the jury returned a verdict finding them guilty. They thereupon moved the court to arrest the judgment, on the ground that the presentment did not allege the grocery of Deaton and Chapman to be a public place. This motion also being overruled, and judgment rendered against the defendants for a fine

#### \*Gaming—Presentment—Allegations—Public Place—

A presentment for playing at cards must charge that the place at which it occurred was a public place at the time of such playing; the name of the place not of itself importing that it was at all times a public place. *Bishop v. Com.*, 13 Gratt. 785, 787, citing the principal case and *Hord's Case*, 4 Leigh 674, as its authority. For further cases in point, see foot-note to *Bishop v. Com.*, 13 Gratt. 785; monographic note on "Gaming" appended to *Neal v. Com.*, 22 Gratt. 917.

**Indictment—Effect of the Word "Unlawful."**—The words "unlawful" or "contrary to law" in an indictment serve to preclude all legal cause of excuse for the act imputed, but never to enlarge or extend the force and effect of the terms employed to describe it so as to make the act unlawful when it does not appear to be so by the description itself. *Bishop v. Com.*, 13 Gratt. 787; *Huff v. Com.*, 14 Gratt. 651, both citing the principal case as authority. See further, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

**Informations—Allegations.**—In *Com. v. Guigon*, 1 Va. Dec. 597, 599, the principal case, *Hord v. Com.*, 4 Leigh 674, *Com. v. Israel*, 4 Leigh 675, *Clark's Case*, 6 Gratt. 677, and *Bishop's Case*, 13 Gratt. 786, were cited as authority for the proposition that an information is fatally defective which fails to allege all the facts and circumstances necessary to constitute the offence with which it is sought to charge the accused. See further, monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

of 20 dollars each and the costs of the prosecution, they applied by petition to the judge of the circuit superior court of Amelia, for a writ of error; which was awarded.

At October term 1840, the circuit court, with the consent of the plaintiffs in error and of the attorney for the commonwealth, adjourned to this court the questions, 1. Is the presentment of the grand jury sufficient to justify the judgment of the county court? 2. What judgment ought the circuit court to pronounce?

SMITH, J., delivered the opinion and judgment of the court.—The court is unanimously of opinion that the presentment in this case is defective in substance, in not stating that the place where the 687 playing cards is \*alleged to have been committed was a public place, or place of public resort: and it is deemed unnecessary to enquire or decide whether there is any other defect in the said presentment. The court is therefore of opinion and doth decide, 1. That the presentment is not sufficient to justify the judgment of the county court. 2. That the circuit court ought to reverse the judgment of the county court, and, proceeding to give such judgment as the county court ought to have given, to quash the presentment.

#### Gwatkin v. Commonwealth.

December, 1840.

##### Criminal Law—Continuance—Absence of Witness.\*—

Case in which the denial to a prisoner indicted of felony, of a continuance asked on the ground of the absence of a witness, was held error for which judgment of conviction must be reversed.

Indictment against Richard C. Gwatkin for the murder of Frederick M. Pitman. This case is the same in which the general court, at December term 1839, reversed the judgment of the circuit court of Rockbridge, and awarded a new trial: see the report, 9 Leigh 678.

After the case got back, the circuit court of Rockbridge, at April term 1840, on the motion of the prisoner, ordered that the trial be postponed until the succeeding term. At the succeeding term, which was held in September 1840, the prisoner again moved for a continuance of the cause, on the ground of the absence of George A. Buckner, one of the witnesses for him. This witness had been examined in behalf of the prisoner at the first trial; on which examination, his testimony (as set out in a bill of exceptions then filed) was to the following effect—

The witness had known the prisoner eight or ten years. When he first knew 688 him, the prisoner lived \*with one Meem of Lynchburg: he then stood

very high: he was of a generous, noble disposition, and very much esteemed. He was clerk and salesman in Meem's store, and was sober and attentive to business. He became intemperate, and Meem discarded him. He then drank very hard; and having nowhere else to stay, witness took him into his room. He drank to such excess, that witness has frequently known him to go into an apothecary's shop, and drink large quantities of alcohol, saying, that liquor was not strong enough and would not produce the desired effect. He remained in Lynchburg some time, engaged in nothing but dissipation. While staying in witness's room, he one day fired a pistol over witness's head into the wall, saying he wanted to see how near he could come to his head without hitting him. He was always trying projects about pistols, dirks and bowie knives. He became very troublesome, and witness was glad to get rid of him. He left Lynchburg soon after being turned off by Meem, and witness saw him again in 1835 or 1836 at the white sulphur springs: whenever he saw him, he was excited with liquor and his face very much bloated. Witness saw him in the summer of 1838, a few days before Pitman was killed. Witness saw him and Pitman frequently together. One evening, the prisoner and Pitman came to the springs from Surber's together. Pitman went to a faro bank, and the prisoner waited for him under one of the trees in the yard till midnight. Whilst under the tree, prisoner said to witness, that Pitman was a fine fellow, and he was waiting for him: that Pitman had horses, and would lend him one to ride at any time. Prisoner then also told the witness he would never return to Lynchburg; that his sister Mrs. Royall had treated him badly, and he wished never to see her again. Witness tried to persuade him to go to Lynchburg, but he refused. Prisoner at the same time told witness, that he 689 was in \*want, and witness must pay him the money that he owed him. Prisoner had frequently before, whenever he met the witness, dunned him for 3000 or 4000 dollars, which he said the witness owed him. Witness had always regarded this as a joke; but he thought it possible the prisoner had so often repeated it, that he might perhaps really believe it. Witness did not owe him a cent, but on the contrary the prisoner owed witness about 60 dollars. Prisoner also told him that William Bailey owed him about 300 dollars, which he had drawn from the bank at Brandon, Mississippi, and had not paid over to him, and that unless he did so, he should call him to account for it. Witness saw the prisoner four or five times at Lynchburg, and two or three times at the springs, since he had staid in witness's room, and he was always drinking, and appeared worse the last time than ever. While under the tree, prisoner asked witness to lend him ten dollars, which he did not do, because he did not have it. Prisoner was not in the habit of playing cards. When witness saw him last before the deed was committed, he

##### \*Criminal Law—Continuance—Absence of Witness.—

The principal case was cited with approval in *Walton v. Com.*, 32 Gratt. 865; *Welch v. Com.*, 90 Va. 321, 18 S. E. Rep. 273; *Phillips v. Com.*, 90 Va. 403, 18 S. E. Rep. 841. The principal case was distinguished in *Roussell v. Com.*, 28 Gratt. 937. See further, monographic note on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

considered him a dangerous man, and would not have started to go anywhere with him. Witness went from the white to the blue sulphur springs about three days before Pitman was shot, and when he heard that a man had been murdered, he at once asked if it was not the prisoner who had done it, without having heard his name mentioned. Witness considered the prisoner's mind affected by his excessive intemperance. Prisoner's request for the loan of ten dollars was before he asked witness to pay him what he owed him, and the latter demand was made in a laughing way. Under the tree, prisoner told the witness that he had killed two or three men in Mississippi before he could have the standing he was entitled to.

In support of his motion for a continuance, the prisoner submitted to the court, 1. His own affidavit; in \*which he states, that he verily believes George A. Buckner of Lynchburg to be a material witness for him, without whose testimony he cannot safely go into a trial of the cause: that the said Buckner, as this affiant believes, can prove facts material to his defence, which cannot be proved by any other witness: that he was examined as a witness for this affiant on the former trial of the cause, and was summoned as a witness for him to the last term of the court, when he attended, but the cause was then continued: that said Buckner has, as this affiant is informed and believes, been summoned as a witness on his behalf to the present term, but is not in attendance, and this affiant is informed and believes he is prevented from attending by sickness. 2. The affidavit of Charles A. Gwatkin; who made oath, that he is a half brother of the prisoner: that the prisoner has been in close confinement upon the present charge for upwards of two years, and has been disabled, by that and other circumstances, from making preparations for his defence, except by the intervention and aid of other persons: that the active duty of attending to and managing the defence of the prisoner has devolved upon this affiant, who has devoted much time and labour to that object: that he has used his best exertions to prepare the case for trial, in behalf of the prisoner, at the present term, and has attended to the summoning of the witnesses on his part: that he has caused George A. Buckner of Lynchburg to be summoned to attend the present term of the court as a witness on the part of the prisoner, but is informed and believes that the said witness is prevented and disabled by sickness from attending: that he verily believes the evidence of said Buckner, who was examined as a witness for the prisoner at the former trial of the cause, to be important for the prisoner, and that Buckner can prove facts material to the defence, which cannot be proved by any other witness. 3. A  
691 subpoena issued by \*the clerk of the circuit court, dated the 29th of July 1840, and directed to the serjeant of Lynchburg, commanding him to summon George

A. Buckner to attend the said court, on the first day of the next September term, to give evidence on behalf of the prisoner; with the serjeant's return thereon, shewing that the same was duly executed. 4. The affidavit of H. H. Booker, who made oath, that he is a resident of the town of Lynchburg, and is now attending the circuit court of Rockbridge as a witness in the case of the commonwealth against Richard C. Gwatkin: that on Tuesday last this affiant visited George A. Buckner (who is also a resident of Lynchburg, and a witness summoned in the said cause) for the purpose of getting the said Buckner to travel in company with him to the circuit court: that he found Buckner on his bed, complaining of being sick: that he had the appearance of being too much indisposed to travel: and that he alleged that in consequence of sickness he was unable to travel to the court, and requested this affiant to communicate such his inability to the judge.

After the foregoing evidence had been read, the court required the prisoner to be sworn to answer questions; and he was sworn accordingly in open court. The judge thereupon propounded to him the following question—"Do you expect to prove by the witness Buckner anything more than was proved by him at the former trial?" To this the prisoner answered, that he knew nothing more about it than had been communicated to him by his friends.

The court overruled the motion for a continuance of the cause; to which opinion the prisoner excepted, setting out in his bill of exceptions the evidence above detailed, which had been offered to support the said motion. The bill of exceptions, however, did not embody the testimony of the witness Buckner given upon the former trial:

nor did it state the fact (which  
692 nevertheless \*appeared by the record) that at the April term 1840, on the motion of the prisoner, the recognizance of the said witness had been taken, conditioned for his attendance at the succeeding term to give evidence on behalf of the prisoner.

A trial of the cause being thereupon had, the jury found the prisoner guilty of murder in the first degree, and the court rendered judgment that he be hanged.

To that judgment, on the petition of the prisoner, the general court awarded a writ of error.

The cause was argued, in writing, by B. G. Baldwin for the plaintiff in error.

The attorney general for the commonwealth.

The judgment of the general court was as follows:

"It seems to the court here, that the judgment of the said circuit superior court is erroneous in this, that the said court refused to grant to the said Richard C. Gwatkin a continuance, at the term when the cause was tried, on the ground of the absence of the witness George A. Buckner." Therefore, judgment reversed, verdict set aside, and cause remanded to the circuit court for a new trial.

## 693 \*Bogart v. Commonwealth.

December, 1840.

**Forgery—Examination—Sufficiency.\***—A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for felony in forging and uttering a promissory note purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged): **Held**, the examination is sufficient, and well warrants an indictment for forging and uttering the note with intention to defraud A. D.

In the circuit superior court for the county of Henrico and city of Richmond, on the 29th of October 1840, the grand jury presented "an indictment against Alexander Bogart for forgery, a true bill." There were two counts in the indictment. The first charged that Alexander Bogart, on the 29th of March 1839, at &c. "feloniously did falsely make, forge and counterfeit" a certain note in writing, which was set out as follows: "\$250. Richmond, March 29, 1839. Ninety days after date I promise to pay to the order of Alexander Bogart two hundred and fifty dollars, without offset, negotiable at the bank of Virginia, for value received." (Signed) "Alex. Duval." The second count charged that the said Alexander Bogart, on the said 29th of March 1839, at &c. "feloniously did utter and publish as true, and use and employ as true, for his own benefit, a certain other false, forged and counterfeited note and writing" (set out in the same terms as in the first count), "he the said Alexander Bogart, at the time he so uttered and published as true, and used and employed as true, the said last mentioned false, forged and counterfeited note and writing as aforesaid, then and there, to wit, on &c. at &c. well knowing the same to be false, forged and counterfeited." In each count, the act alleged was stated to be done "with intention to defraud the said Alexander Duval;" and each count concluded against the form of the statute.

694 \*Upon his arraignment, the prisoner moved the court to quash both counts of the indictment; first, because, as he alleged, he had never been examined by a court of examination for any offence, and remanded to the said circuit court to be tried for the same; and secondly, because, if such court of examination had been held in his case, the offence in regard to which such court had been held was not that charged in either the first or the second count of the indictment. In support of the said motion, he gave in evidence the record of the examining court: whereby it appeared that the said Alexander Bogart was examined by a called court of hustings held for the city of Richmond on the 24th of October 1840, "for a felony by him committed in said city and within the jurisdiction of the hustings court of said city,

\*See monographic note on "Forgery and Counterfeiting" appended to Coleman v. Com. 25 Gratt. 865: monographic note on "Indictments, Informations, and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

within two years before the 19th day of October 1840, to wit, on the 29th day of March 1839, in then and there, and within the jurisdiction aforesaid, feloniously and falsely making, forging and counterfeiting a certain promissory note purporting to be drawn by Alexander Duval and made payable to the said Alexander Bogart, which said false, forged and counterfeit promissory note is in the following words and figures, to wit," (here the note was set out as in the indictment) "and then and there, and within the jurisdiction aforesaid, uttering and publishing as true, and employing as true, for his own benefit, the said false, forged and counterfeit promissory note, he the said Alexander Bogart then and there, and within the jurisdiction aforesaid, well knowing the said promissory note to be false, forged and counterfeit, contrary to the statute in such case made and provided." The court, having heard the evidence, was of opinion "that the said Alexander Bogart ought to be tried for the said offence before the circuit superior court of law and chancery for the county of Henrico and city of Richmond."

695 \*In the warrant for summoning the court of examination, the offence was described verbatim as in the proceedings of that court.

The circuit court overruled the motion to quash the indictment. The prisoner thereupon pleaded not guilty; a jury being impaneled found him guilty, and ascertained the term of his imprisonment in the penitentiary to be two years; and the court rendered judgment accordingly. And now he applied by petition to this court for a writ of error to the judgment.

R. G. Scott and J. A. Seddon for the petitioner.

PER CURIAM. Writ of error refused.

## Smith v. Commonwealth.

December, 1840.

**Criminal Law—Receiver of Stolen Goods—When a Principal Felon—Evidence.**—Under the statute of March 15, 1832, (Supp. to Rev. Code, ch. 187, § 10.) a white person, free negro or mulatto, knowingly receiving stolen goods from a slave, free negro or mulatto, is a principal felon, not an accessory, and so the record of conviction of the actual thief is not admissible evidence against him.

An indictment for larceny was found against James Smith in the circuit court of Rockbridge at April term 1840, charging that the said James Smith, on &c. at &c. one gold coin of the value of five dollars, commonly called a half eagle, and one promissory note of the value of fifteen dollars, made by the James river and Kanawha company, (the note was particularly described) of the property of one John Buchanan, by a certain illdisposed negro slave, the property of and belonging to a certain Jacob Judy, and named Nelson, then lately before that time feloniously stolen, taken and carried away, of the said illdisposed negro slave Nelson feloniously

696 \*did receive and have, he the said

James Smith then and there well knowing the said goods and chattels and property, viz. the said coin and promissory note, to have been feloniously stolen, taken and carried away by the said negro slave Nelson, against the form of the statute &c.

At the trial upon the plea of not guilty, the attorney for the commonwealth offered in evidence the record of the conviction of the negro slave Nelson, before justices of oyer and terminer of Rockbridge county, for the offence of burglariously breaking and entering the dwelling house of John Buchanan, and stealing therefrom (inter alia) the coin and note in the indictment mentioned. To the introduction of this evidence the prisoner by his counsel objected; but the court overruled the objection and admitted the evidence: to which opinion the prisoner excepted.

The jury found the prisoner guilty, and ascertained his term of imprisonment in the penitentiary to be two years; and the court rendered judgment accordingly. At the last term of the general court, the prisoner applied for a writ of error to the judgment; which was awarded.

John W. Brockenbrough for the plaintiff in error.

The attorney general for the commonwealth.

SMITH, J., delivered the opinion and judgment of the court.—It seems to the court that, according to the provisions of the act of assembly upon which the indictment in this case is founded, the prosecution against the prisoner is as a principal felon, and not as an accessory; consequently the record of the conviction of the negro slave Nelson in the bill of exceptions mentioned could not be used as evidence against the prisoner on his trial. Therefore it is considered by the court that the judgment aforesaid be reversed, the verdict set 697 \*aside, and a new trial awarded; on which trial the said record is not to be permitted to be given in evidence.

The indictment in the foregoing case is founded upon the act of March 15, 1832, Sess. Acts of 1831-2, ch. 22, Suppl. to Rev. Code, ch. 187, § 10, p. 248, which enacts, that "If any white person, free negro or mulatto shall hereafter receive from any slave, free negro or mulatto any stolen goods, knowing the said goods to have been stolen, he or she shall be adjudged guilty of larceny of the said goods, and punished in the same manner and to the same extent as if the receiver had actually stolen the said goods; but nothing herein contained shall be so construed as to prevent the prosecution, conviction and punishment of the person who actually shall have stolen them, as heretofore."—Note in Original Edition.

### Commonwealth v. Pleasant.

December, 1840.

**Criminal Law—Free Negro Remaining in Commonwealth—Presentment—Information.**—A slave born in this state, having been removed therefrom, and in 1798 brought back thereto, brings a suit in 1828 to recover her freedom, to which, by the judgment of the court of appeals rendered in 1833,

she is held entitled, because imported in contravention of the statute of 1792, 1 Old Rev. Code, ch. 103, § 2. In 1840, a presentment is made against her, as a person emancipated since the first day of May 1806, and unlawfully remaining in the commonwealth more than twelve months after her title to freedom had accrued and after she had attained the age of twenty-one years: HELD, no information ought to be ordered to be filed upon the presentment.

**Free Negro—Right to Remain in Commonwealth—Quere.**—Whether a person of colour so obtaining freedom is at liberty to remain in the commonwealth?

Case adjourned from the circuit superior court of Kanawha county.

On the 19th of May 1840, the grand jury impaneled in the said circuit superior court made a presentment to the following effect: "We present Pleasant, a free negro woman, who has been emancipated within this commonwealth since the first day of May 1806, for unlawfully remaining in the county of Kanawha and commonwealth \*aforesaid, and within the jurisdiction of the said circuit court, from the time of her said emancipation until the day of the finding of this presentment, being a period of more than twelve months after her title to freedom had accrued, and after she had attained the age of twenty-one years, without having obtained leave so to do according to law, contrary to the form of the statute in such cases made and provided," &c. It was thereupon ordered that the defendant be summoned to shew cause, at the ensuing term, why an information should not be filed against her upon the presentment. The summons was issued and duly executed.

At the October term 1840, the attorney for the commonwealth and the defendant agreed that the said defendant is the same negro woman Pleasant who united with Betty and others in a suit for freedom against Horton and others, in the superior court of Kanawha, whence the cause was carried to the court of appeals. They likewise agreed "the record in said case in the superior court," and the judgment of the court of appeals thereon; and upon the adjournment of the case to this court, they further agreed, that in making up the record of the case adjourned, the clerk might copy only the special verdict which was found in the suit for freedom, and the judgment of the court of appeals thereon, and that the residue of that record might be omitted.

By the said special verdict it was found, that E. G. Blake, who was born in the state of Massachusetts, removed, when a young man, to the county of Southampton in Virginia, married there, and received with his wife two slaves, the plaintiffs Betty and Pleasant. That some time after his marriage, and in the year 1797, he left Virginia, taking with him his wife and child, and the plaintiffs Betty and Pleasant, then small girls, and arrived at Boston in July 1797. That having spent about three months in visiting his friends and rela-

tions, he rented a house in Boston in 699 which his family resided, \*opened a store under the firm of E. G. Blake & Co. and stated that it was his intention to spend the rest of his days there. That he continued to reside and carry on business in Boston until July or August 1798, when his business not being prosperous, and his wife being in bad health, he disclosed his intention of returning to Virginia; and, closing his business, he left Boston for Virginia in September 1798, taking with him his wife and family, and the plaintiffs Betty and Pleasant, who had remained with him and in his service during his continuance in Massachusetts. In addition to these facts found by the special verdict, the parties to the suit for freedom agreed that the plaintiffs Betty and Pleasant were born slaves in the commonwealth of Virginia.

The judgment of the court of appeals was rendered on the 11th of July 1833. That court held, that the law upon the special verdict was for the plaintiffs; and, reversing with costs the judgment of the circuit court of Kanawha (which was in favour of the defendants), gave judgment that the plaintiffs are free, and that they recover from the defendants their damages assessed by the jury, together with their costs expended in the circuit court.

It appears by the record of the said suit for freedom (though not by the special verdict, or the judgment of the court of appeals) that the suit was instituted in the year 1828. And it appears by the opinions of the judges of the court of appeals (see them in the report of the case, under the name of Betty and others v. Horton, 5 Leigh 615, 626,) that the decision of that court proceeded on the ground that the plaintiffs, Betty and Pleasant, had been imported into this commonwealth in 1798 in violation of the statute of 1792, 1 Old Rev. Code, ch. 103, § 2, Pleasants's edi. p. 186, which enacts, that "slaves which shall hereafter be brought into this commonwealth, and kept therein one whole year together, or so long at different times as shall amount to one year, shall be free."

700 \*With the consent of the defendant, the circuit court adjourned to the general court the following questions: "Upon the facts agreed, is the defendant at liberty to remain in the commonwealth? and should an information be awarded against her?"

The response of the general court was as follows:

"This court is unanimously of opinion, and doth decide, 1. That no information ought to be ordered to be filed in this case. 2. That it is unnecessary, and would be improper, to answer the other question adjourned, as it does not arise in the cause."

#### Commonwealth v. Horner.

December, 1840.

Criminal Law—Unchartered Banking\*—Case at Bar.—  
What acts of an incorporated savings institution

\*See monographic note on "Banks and Banking" appended to Bank v. Marshall, 26 Gratt. 378.

will amount to an illegal issuing and circulating of securities for the payment of money, in a county other than that wherein the institution is located, so that a member of the institution may be prosecuted in such other county, as for a misdemeanour, under the statute of February 24, 1816, 2 Rev. Code, ch. 208, § 1.

Case adjourned from the circuit superior court of Harrison county.

On the 13th of May 1840, the grand jury impaneled in the said court presented, that certain individuals, citizens of Harrison and Monongalia counties, among whom were James Y. Horner and thirteen others (naming them) of Harrison county, on the 11th of April 1840, at the county of Harrison aforesaid, associated themselves together under the name and style of the Middletown savings bank in the county of Monongalia, and that the said James Y. Horner and the other persons named, with their associates (whose names were not all known to the jury), not having a charter incorpo-

701 rating \*them with authority to deal or trade as a bank, and to discount notes, bills or other securities for the payment of money, in the name, on account or for the benefit of said association, did nevertheless, on the day aforesaid and on divers other days since, at the county of Harrison, unlawfully issue and put into circulation in the said county of Harrison many thousand papers of the tenor following—

"5. Middletown, Va. April 10, 1840. 5

Chartered by the legislature of

Virginia.

5. Five A. No. 183. Five 5  
"D. D. Wilson hath deposited in the savings bank of Middletown five dollars, which will be paid on presentation of this certificate, in current notes, six months after date.

"Attest J. O. Watson, cash'r. C. C. Vanzandt, pres't," and that the said Horner and others as aforesaid, and their associates, under the name of the Middletown savings bank in the county of Monongalia, as aforesaid, have from time to time, and on divers days and times since the said 11th of April 1840, at the county aforesaid, traded and carried on business as a bank, by discounting notes, bills and other securities for the payment of money, in the name, on account and for the benefit of the said association: "that the said Horner and others, and their said associates, issue the said certificates and pay them to individuals who have their notes and bills discounted by the said association, and in this way such certificates are put into circulation, and the same are passed by delivery in the community as money, and are used in payment of debts as bank notes are used: that the said Horner and others as aforesaid, and their associates, claim the right to put into circulation the said certificates, under the provisions of two acts of assembly, one passed the 24th day of March 1838, and the other the 25th day of March 1839: that under the latter act the said Horner and \*others as aforesaid, and their associates,



have associated themselves together under the name and style of the Middletown savings bank in the county of Monongalia, and under that style and name they transact and carry on the business of a bank, by discounting notes and bills, and putting into circulation the said certificates as aforesaid, contrary to the acts of assembly in such case made and provided."

The attorney for the commonwealth having moved the court for a rule upon the parties presented, to shew cause why an information should not be filed against them for the offence alleged in the presentment, the defendant James Y. Horner appeared by his counsel, to shew such cause: and at a subsequent day of the term, the following evidence was submitted to the court, by agreement of the said defendant and the attorney for the commonwealth.

I. An act of the general assembly, passed the 25th of March 1839, incorporating certain individuals named, and such other persons as were then or might thereafter become associated with them, by the name and style of the Middletown savings bank in the county of Monongalia; investing them with all the rights, powers and privileges conferred, and subjecting them to all the rules, regulations and restrictions imposed, by the act prescribing general regulations for the incorporation of savings institutions, societies or banks, passed March 24, 1838. See Acts of 1839, ch. 193, p. 140, and Acts of 1838 ch. 108, p. 83.

II. The constitution and by-laws of the Middletown savings bank, purporting to be adopted in pursuance of the aforesaid act of incorporation; and the paper containing the subscriptions for stock of the bank. All the parties named in the presentment appear as subscribers for stock, and as signers of the constitution and by-laws, the first article of which requires that the stockholders "shall subscribe to the constitution and by-laws \*in person, 703 thereby testifying that they bind themselves, their heirs, administrators and assigns, to be governed and bound by the articles of association herein contained." Both sets of signatures were proved to be genuine.

By the constitution and by-laws it is provided (inter alia) that every stockholder shall pay five dollars for every hundred dollars he may subscribe, at the time of subscribing, or at such time as the board of directors may fix, and shall secure such part of the subscription as may not be paid in hand, by a lien on real estate: that depositors for ninety days shall be entitled to receive three per cent. after the first ten days, and for one hundred and eighty days, four per cent.: that the bank shall not be considered bound to pay any deposits, unless the certificates for such deposits are surrendered when payment is demanded: that the funds of the bank shall be applied to the discount of notes, drafts and other negotiable securities; but that no paper shall be discounted, having a longer time to run than four months: and that the

board of directors shall have authority to prescribe the form of stock certificates, and the different kinds of certificates of deposit.

III. Certain deeds, certified as duly recorded in the counties of Harrison and Monongalia, by which the defendant Horner and the other parties named in the presentment, reciting their subscriptions for stock of the Middletown savings bank, severally convey different parcels of land to a trustee, for the purpose of securing the payment of the instalments to become due on account of their said subscriptions.

IV. Certain proceedings of the board of directors of the Middletown savings bank, commencing the 17th of February 1840 and terminating the 3d of April 1840, whereby it appeared that on the 21st of February, the six original directors (being the six persons named in the act of incorporation) elected the defendant Horner \*as the seventh director; and that on the same day, C. C. Vanzandt, one of the directors, was by the board elected president, and James O. Watson appointed cashier. The qualification of the six original directors and of the cashier was proved by the testimony of a justice of the peace of Monongalia county, who administered to them the oath of office; and as to the defendant Horner, the minute shewing his election as a director, states that he appeared and was sworn according to the by-laws. His appointment and qualification as a director were also proved by other evidence. In the minutes of the 3d of April 1840, there appears the following entry: "It is agreed by the board, that they issue no certificates, only on the actual deposits of money." All these proceedings of the board are signed, from day to day, with the name of C. C. Vanzandt.

V. The testimony of James O. Watson, cashier of the savings bank. This witness proved, that he has been acting as the cashier, and C. C. Vanzandt as the president of the institution, ever since they were respectively appointed. That the bank commenced operations on the 26th of March 1840, by receiving deposits. That the said bank is located at Middletown in the county of Monongalia, where all the books and papers belonging to the institution have at all times been kept by the witness, and where all its business operations, of which he has any knowledge, have been transacted. That from the time the bank commenced operations, up to the 27th of May 1840, it has received on deposit, in specie and bank notes, 6580 dollars 87 cents, exclusive of sums loaned to and deposited by borrowers from the bank; and the total amount of certificates of deposit issued within that period is 17540 dollars; the difference between the amount of certificates issued and the amount deposited by others than borrowers, having been issued upon deposits made by borrowers from the institution, or by persons in whose favour the borrowers 705 \*drew checks. That the total amount of loans made by the bank within the period aforesaid is 16719 dollars 81 cents.

That the loans made by the bank are sometimes on notes under seal, payable to the bank, executed by not less than two obligors, and at other times on negotiable notes payable at other banks. That the loans are generally at sixty and ninety days. That it is not the practice of all the borrowers to deposit the amount loaned to them by the bank, and take certificates of deposit for the same; but a majority of them have done so; it is left to their discretion to do so or not. That it is the practice, when a loan is made, to retain the interest upon the sum loaned, for the time that the borrower's note has to run, and to pay out to the borrower the amount of his note except the sum so retained for interest. That when a borrower deposits the money borrowed, it is the practice to give him certificates for only the exact amount so deposited, not including interest on the deposit for the time the certificate has to run before it is payable: though, by the by-laws, depositors are entitled to interest, the rate of which depends upon the time for which the deposit is made. That a note of the defendant Horner for 500 dollars was discounted by the directors on the 3d of April 1840, but the money was not paid over to him until the 10th, on which day he was paid the sum of 492 dollars 17 cents; and on the same day he deposited 495 dollars, and took certificates therefor; a portion of which deposit, the witness presumes, was the same money that he had received upon the discount of his note. That the only deposits ever made by the said Horner, besides the one above stated, were 10 dollars deposited the 27th of March 1840, and 50 dollars paid on his subscription for stock. That since the bank commenced operations, J. S. Chisler has deposited 7552 dollars 37 cents, a portion of which was the proceeds of checks given to him by other persons for notes discounted.

706 \*That these checks were paid to the said Chisler in bank notes and specie; of which the witness presumes that a portion, but not the whole, was deposited by him. That certificates of deposit were issued in favour of the said Chisler to the amount of about 6965 dollars; for the residue of his deposits, no certificates were issued, but the same was placed to his credit on the books of the bank. That all the certificates of deposit issued by the bank have been for sums of five, ten, and twenty dollars, payable in current notes, and all of them at six months, except an amount of about 120 dollars, which were intended to be made payable at six months, but by mistake were not. That all the said certificates were with copperplate or other engravings, partly printed and partly written, each being filled up by the officers of the bank.\* That the bank never paid out its certificates of deposit as money. That borrowers always receive in money, by themselves or their

agents, the proceeds of their notes discounted, which they sometimes take away without making any deposit; at other times they deposit the whole or a portion of the money, or a sum greater than the whole proceeds of the discounted note; and at the time of making the deposit, or at some subsequent time, they receive certificates for such portion of the sum deposited as they require, which are made payable to the depositors, and delivered to them, their order, or their agents. That the sum of 1368 dollars 50 cents has been paid in by the stockholders on their subscriptions, which is included in the estimate of deposits made by others than borrowers; but upon sums so paid in by stockholders, no certificates of deposit were ever issued. That on the 10th of April, 707 the bank discounted a note \*of 300 dollars for W. Everett, who had not previously deposited any money; the proceeds of which note were paid in bank notes and specie, to D. D. Wilson, to whom Everett had given a check for the same: and on the 11th of April, Wilson deposited 170 dollars in Everett's name, and received certificates of deposit therefor, payable to Everett. That on the same 11th of April, Wilson deposited 600 dollars in the name of A. T. Smith, and 640 dollars in the name of Elias Smith, and took certificates of deposit in their names respectively, for corresponding amounts; and the witness presumes that the balance of the proceeds of Everett's note was a part of the money deposited in the name of said Smiths. That on the 10th of April, the bank discounted for the said A. T. Smith a note of 500 dollars, and for the said Elias Smith a note of like amount; the proceeds of which notes were paid, on the 11th of April, to the said Wilson, upon the checks of the said Smiths. Witness believes that Wilson deposited in the bank, on the 11th of April, the same money he received from it on that day. Neither of the Smiths had, previous to the 11th of April, made any deposit in the bank, except of moneys paid on their subscriptions for stock, for which they received no certificates of deposit. That on the 10th of April, the bank discounted for J. P. Wilson a note of 1000 dollars: that Wilson had not previously made any deposit: but on that day he deposited 1500 dollars, and certificates of deposit were issued to him for that amount. Witness is satisfied in his own mind, that the said J. P. Wilson's deposit of 1500 dollars on the 10th of April, consisted in part of the money which the bank paid to him on discounting his said note.—Being asked whether the depositors who were not borrowers received certificates of deposit for the precise amount of the sums deposited, or were in any way compensated by the bank for the interest upon the certificates of deposit for the time such certificates had to 708 run? witness \*answered, that they only received certificates for the actual amount deposited; and that, for about 2092 dollars of such deposits, no certificates at all had been issued.

VI. The testimony of Jesse Flowers; who proved, that the defendant Horner, in a conversation with the witness, stated that he believed it to be common for the borrowers

\*The witness produced one of the certificates as a specimen; and it is referred to as annexed to the record; but it became detached, and is lost. It was no doubt similar to the one set out in the presentment.—Note in Original Edition.

from the bank to deposit the money borrowed, and take certificates of deposit for the same; that the bank did not loan certificates of deposit; and that it was discretionary with the borrowers to deposit the money they received, or not. Witness thinks he has seen as much as 100 dollars of such certificates in circulation in Harrison county; and they circulate as currency.

VII. The testimony of Walter Everett; who proved, that having enquired of the defendant Horner how loans were to be obtained from the Middletown bank. Horner informed him that the bank loaned nothing but real money, but if a borrower wished to be friendly to the institution, he could deposit the money so borrowed with the cashier, and take certificates of deposit for the same; that it was optional with the borrower to take the money away or deposit it. Witness, having executed a note for 300 dollars, with W. Johnson his surety, payable to the savings bank at Middletown in 90 days after date, went with the note to Middletown from his residence in Harrison county, on the 10th of April 1840; and being informed by Mr. Watson the cashier, that he could not be accommodated that evening, as the bank had just got its paper, and had not filled it up, and others were to be accommodated before him, he left his note in the bank, and gave to the cashier a check in favor of D. D. Wilson for the proceeds of the note in case it should be discounted, requesting said Wilson to attend to his business for him. Witness left Middletown that day, and returned to his residence in Harrison county. Two or three days afterwards, he called upon Wilson (who also lives in Harrison), when Wilson paid him, in certificates of deposit issued by the said bank, 290 dollars; giving him, for the balance of the proceeds of his note, his (Wilson's) own memorandum. The certificates of deposit which witness received, he paid away as money. Part of these certificates were issued in witness's name, and part in the names of others.

VIII. The defendant Horner admitted, that he passed and put in circulation in the county of Harrison, certificates of deposit issued by the said Middletown savings bank in favour, amounting to about 60 dollars.

And the foregoing was all the evidence in the cause.

Whereupon the circuit court, with the consent of the defendant Horner, adjourned to the general court the following questions: 1. Will the evidence taken in this cause in support of the presentment of the grand jury, authorize the filing an information under the provisions of the first section of the act of the assembly, entitled "an act more effectually to prevent the circulation of notes emitted by unchartered banks," passed February 24, 1816? 2. What order ought the court to make in the premises?

The cause was argued in the general court, by the attorney general for the commonwealth, and G. H. Lee for the defendant.

The general court responded as follows: "This court is unanimously of opinion and

doth decide, that the evidence taken in this cause is sufficient to authorize the filing an information against the defendant James Y. Horner."

The 1st section of the act of February 24, 1816 enacts, "that it shall not be lawful for any association or company not having a \*charter incorporating such association or company with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed within the limits of this commonwealth, for the purpose of discounting notes, bills or other securities for the payment of money or other valuable thing, and issuing notes, drafts or bills, whether payable to order or bearer, or any other securities for the payment of money or other valuable thing, in the name, or on account, or for the benefit of any such association or company, or otherwise for the purpose of dealing, trading or carrying on business as a bank, to commence or continue the discounting of any notes or bills, or other securities for the payment of money or any other valuable thing, or the issuing of any notes, drafts or bills, or other securities for the payment of money or other valuable thing, or such dealing, trading or carrying on business as a bank: and every member, officer or agent of any such company or association that may so commence or continue such discounting or issuing of notes, drafts, bills or other securities, or the dealing, trading or carrying on business as a bank, shall be held and taken to be guilty of a misdemeanour, and upon conviction thereof on indictment, information or presentment, shall be liable to be fined at the discretion of the jury, in a sum not less than one hundred nor exceeding five hundred dollars. And if any such company or association, or any president, manager, cashier, or other officer or agent of such company or association, shall pay out, deliver, put in circulation, or issue any note, draft, bill or other security for the payment of money or other valuable thing, purporting to promise, order, request or stipulate the payment of money or other valuable thing, or that money or other valuable thing is payable, by or on behalf of such company or association, or any person or persons as agent or agents thereof, each member, officer and agent thereof shall be in like manner liable to the same penalty." 2 Rev. Code, ch. 208, p. 111.

By an act passed the 20th of March 1832 (Acts of 1831-2, ch. 79, p. 69; Suppl. to Rev. Code, ch. 315, p. 385.) It is enacted, "that nothing in the aforesaid act passed on the 24th of February 1816 shall be so construed as to prevent, limit or in any manner control the savings institution of Richmond, and the Franklin savings institution of said city, and other institutions of like character and purpose within the commonwealth, from receiving money on deposit, granting certificates for the same, discounting notes or other paper at legal interest, or drawing for their own funds on any bank or other place in which the same may have been deposited: provided, that nothing herein contained shall be so construed as to allow the institutions aforesaid the power of emitting or circulating any notes, drafts or bills, whether payable to order or bearer, or \*any other security for the payment of money or other valuable thing, in the name or on account or for the benefit of the said institution, or to do any other act in

virtue hereof, except such as are before herein named."

By the 3d section of the act prescribing general regulations for the incorporation of savings institutions, societies or banks, passed March 24, 1838 (Acts of 1838, ch. 108, p. 83,) it is declared that the board of directors "shall have power to regulate the manner of making and receiving deposits, the form of certificates of deposit, and the manner of transferring the same." By the 4th section, "any savings institution, society or bank shall be capable of receiving from any person or persons any de-

posit or deposits of money, and all moneys so received shall be invested in stocks or other securities at the discretion of the directors, and in the manner deemed most safe and beneficial." By the 5th section, "it shall not be lawful for any savings institution, society or bank to purchase or discount any debt or claim to become due, at a rate of discount or interest exceeding the rate of one half of one per centum for thirty days: and all contracts which may be made contrary to the foregoing provision shall be utterly null and void."—Note in Original Edition.

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2. In such case, if the defendant object that he is surprised by the new objections to the account, the court may and ought to give him time to combat them; and if he urge the privilege he would have by answer to an amended bill, to explain and defend the account in these respects, that privilege may and ought to be secured to him, by allowing him to file his affidavit containing such explanation and defence, and by giving to such affidavit the like credit and effect, as his answer containing the like manner would be entitled to. Per STANARD, J. S. C., 494

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## AFFIRMANCE.

1. An interlocutory decree directs a sale of lands to satisfy a debt, in a case where it might have been proper to decree satisfaction out of the rents and profits; but this was not a point controverted in the court below, or in any way brought to the notice of the court, and though the party had ample opportunity to apply to the court to alter the decree in that particular, he did not apply for such alteration: upon appeal to this court, HELD, the decree shall not be reversed for such cause, but affirmed, and the cause remanded, with direction to alter the decree, and direct satisfaction out of the rents and profits, if such alterations be asked, and if the debts can be satisfied out of the rents and profits within a reasonable time. Manns v. Flinn's adm'r, 93

2. Lien of judgment affirmed on lands of debtor; rights of surety in the appeal bond; and rights of allies of debtor. See Judgment No. 2, and M'Clung v. Beirne, 304, 5

## AGENT.

What purchase by agent, for his own benefit, is invalid against principal. See Fraudulent alienations No. 2, and Gibbons v. Jackson, 364

## AGREEMENT.

See Contract.

## AMENDMENT.

Proceedings after leave to amend declarations. When an order of court has been entered, granting the plaintiff leave to amend his declaration, and remanding the cause to rules, the case, after the amended declaration is filed, ought to be regularly proceeded in at the rules to an issue or office judgment, unless by consent an issue be made up in court; and if, without such proceedings at the rules, judgment be entered up in court against a defendant because he has not appeared and pleaded to the amended declaration, such judgment will be erroneous. Couch v. Fretwell's adm'r, 578

## ANNUITY.

1. At what period annuities bequeathed in expectancy on deaths of prior annuitants will become vested. See Will No. 5, and Catlett and wife v. Marshall and others, 79

Refusal of interest on arrears.

2. A testator directs his executors to set apart so much of his property, not specially bequeathed, as they may think sufficient to produce a clear annual income, by rent or interest, of 3000 dollars, which amount he desires them to pay in manner following, viz. the sum of 500 dollars annually to his sisters and niece, to be paid to each of them for and during her life. The executors fail to set apart properly as directed, and die largely indebted to the estate, and wholly insolvent. In a suit by one of the annuitants against the administrator de bonis non, she claims not only the principal which the executors failed to pay her, but interest thereon. HELD, to decree for such interest against the administrator de bonis non, and thereby diminish the estate of the residuary devisees and legatees, is erroneous. Adams's adm'r v. Adams's adm'r, 527

## ANSWER.

What the defendant may be compelled to disclose. See Discovery, and Baker v. Morris's adm'r, 284, 5

## APPEAL BOND.

- Rights of surety in appeal bond who has  
715 satisfied the judgment after affirmance. \*See  
Judgment No. 2, and  
M'Cling v. Belrne, 394, 5

## APPELLATE JURISDICTION.

1. When an appeal from decree is not the proper  
mode of redress. See Foreign attachment No. 1,  
and

- Platt v. Howland, 507  
2. What decree will be reversed though founded  
on account reported by commissioner to which  
there was no exception. See Interest No. 7, and  
Dunbar's ex'ors v. Woodcock's ex'or, 629

What will not avail in appellate court.

3. An opinion being given by the circuit court that  
the action is barred by the act of limitations, the  
opinion is excepted to, and the bill of exceptions  
setting forth the evidence contains (among other  
things) a deed which, it is alleged in the court of  
appeals, shews the action to have been brought by  
improper parties. **Held**, this point, not having been  
made in the court below, cannot be passed upon by  
the appellate court.

Rose's adm'r v. Burgess, 186

4. What objection for want of parties is untenable.  
See Parties to suits No. 3, and

Moore's adm'r v. George's adm'r, 228

5. What is no ground to reverse interlocutory  
decree for sale of land. See Affirmance No. 1, and  
Manns v. Flinn's adm'r, 93

## ASSEMBLY.

1. Privilege of members of assembly. See Legis  
lature, and

Botts v. Tabb and others, 616

2. Acts of assembly. See Statutes cited and con-  
strued.

## ASSIGNMENT.

- I. What assignment of voluntary bond and trust  
deed is valid against obligor.

1. The obligee in a bond secured by a deed of trust,  
makes a deed transferring the bond and deed of  
trust for the benefit of his creditors. Afterwards,  
at the request of the obligor, the obligee signs a  
receipt, stating, that on the day of the date thereof,  
he received the amount of the bond. The bond was  
in fact executed without consideration, and the  
receipt was in fact given without any payment.  
The creditors for whose benefit the bond was as-  
signed had no notice of its being without considera-  
tion until after the assignment; but the obligor  
knew of the assignment when he took the receipt.  
In a suit between the obligor and those claiming  
under the assignment, an injunction awarded to  
restrain the sale of the property conveyed to se-  
cure the bond, was dissolved; and the court of  
appeals affirmed the order of dissolution.

Terrell v. Imboden and others, 321

- II. What assignment is invalid for fraud of assignee.

2. See Fraudulent alienations No. 2, and  
Gibbons v. Jackson, 364

## III. Suit in equity by assignee.

3. In every case of a bill in equity asking relief  
for the plaintiff as assignee of the rights of another,  
the assignor must be made a party, and the assign-  
ment ought to be shewn and proved, though not  
denied, nor proof of it called for, in the answers;  
and the production and proof of the assignment  
can only be dispensed with by the admission thereof  
by the assignor and the parties against whom the  
relief is sought.

Corbin v. Emmerson, 663

## ASSIGNMENT OF BREACHES.

What assignment in debt on official bond of mar-  
shal is defective in substance. See Declaration No.  
4, and

Maynard's ex'x v. M'Candish and others, 116

## ASSUMPSIT.

## I. Declaration.

1. A declaration, having two counts which are  
clearly in assumpsit, has a third to the following  
effect: that the defendant employed the plaintiff  
as his agent to receive from D. G. 901 pounds of bar  
iron at 4 cents per pound, and the plaintiff accord-  
ingly received from D. G. for the defendant, the  
said quantity of bar iron, and delivered the same to  
the defendant, but the defendant afterwards  
denied that he had authorized the plaintiff to re-  
ceive the same, and also denied that the plaintiff

had delivered to him the said bar iron, and alto-  
gether refused to pay the said D. G. for the same;  
whereupon D. G. brought suit against the plaintiff,  
and recovered against him \$36. 04 cents dam-  
716 ages, the price of the \*bar iron, with interest  
from the 9th of March 1830, and \$56. 36 cents  
costs, which damages, interest and costs the plain-  
tiff paid; by reason whereof the defendant became  
liable to pay the plaintiff the same, and in consid-  
eration thereof undertook and promised to pay the  
said plaintiff the same, but has failed so to do.  
Upon a demurrer to this count, **Held**, it is in as-  
sumpsit, as well as the others, and sufficient matter  
is contained in it to maintain the action.

Hopess v. Straw, 348

2. Question whether, in Virginia, assumpsit can  
be maintained on a promissory note, without  
averring a consideration in the declaration. Per  
TUCKER, P. and PARKER, J., the action cannot be  
maintained. STANARD and CABELL, J., contra.

Jackson v. Jackson, 448

## II. Evidence.

3. When assumpsit for money had and received  
may be maintained. See Sale No. 9, and

Taylor v. Cooper, 317

4. When assumpsit for money had and received  
will not lie, for the want of privity. See Revolution-  
ary officers, and

Burton's ex'or v. Burton's adm'r, 507

5. Question upon the evidence, in an action for  
goods furnished a third person, whether or no such  
third person was responsible to the plaintiff.

Ware v. Stephenson, 155

6. What is a collateral promise, required to be  
in writing. See Contract No. 1, and S. C., 155

7. What promise of executor in valid though not  
in writing. See Executors and administrators No.  
2, and

Collins's adm'r v. Row, 114

8. Discovery of new promise, to avoid statute of  
limitations. See Discovery No. 2, and

Baker v. Morris's adm'r, 295

## ATTACHMENT.

See Foreign attachment, and  
Platt v. Howland, 507

## ATTORNEY AND CLIENT.

What communication may be proved against client

Case in which, under the particular circum-  
stances, a letter written by a mortgagee to his  
attorney, informing him that the mortgage debt  
had been paid, and requesting him to dismiss a  
suit then pending to foreclose the mortgage, was  
held to be proper evidence in favour of a subsequent  
incumbrancer, in a controversy with the executor  
of the mortgagee, who had revived the proceedings  
to foreclose; the attorney submitting to produce  
the letter, if directed by the court to do so.

Lyle v. Higginbotham, 68

## BANKS.

See Unchartered banking, and  
Commonwealth v. Horner, 700

## BASTARD.

What evidence is admissible on issue to try legiti-  
macy. See Legitimacy, and

Watkins and wife v. Carlton, 560

## BEQUEST.

See Will.

## BILL OF DISCOVERY.

See Discovery, and  
Baker v. Morris's adm'r, 284, 5

## BILL OF EXCEPTIONS.

What objection will not be passed upon by ap-  
pellate court. See Appellate jurisdiction No. 3, and  
Rose's adm'r v. Burgess, 186

## BILL OF REVIEW.

When unnecessary, to warrant introduction of  
new evidence on question of fact. See Decree No.  
5, and

Dunbar's ex'ors v. Woodcock's ex'or, 629

## BOND.

1. What assignment of voluntary bond secured by  
trust deed is valid against obligor. See Assignment  
No. 1, and

Terrell v. Imboden and others, 321

2. What assignment of breaches in debt on official  
bond of marshal is defective in substance. See  
Declaration No. 4, and

Maynard's ex'x v. M'Candish and others, 116

3. Discovery to repel presumption of payment. See Discovery No. 1, and  
 Baker v. Morris's adm'r. 364
- 717 \*4. When lapse of time is no bar to relief in equity. See Lapse of time No. 2, 3, and, S. C., 285
5. Allowance of interest beyond penalty of bond. See Lapse of time No. 4; Interest No. 2, and S. C., 285
6. What is a valid executed gift of a bond. See Gift No. 2, and  
 Dunbar's ex'ors v. Woodcock's ex'or. 629
7. Motion on forthcoming bond. See Forthcoming bond, and  
 Spencer v. Pilcher. 490
- BOUNDS BOND.**  
 Concerning subrogation of sureties in bounds bond given by principal in execution to one of several original sureties indemnified, see Principal and surety No. 3, and  
 Givens and others v. Nelson's ex'or and others. 833
- BREACH.**  
 What assignment is defective in substance. See Declaration No. 4, and  
 Maynard's ex'x v. McCandlish and others. 116
- CANCELLATION.**  
 A father by deed of gift conveys land to a son, and shortly after the son voluntarily surrenders the deed to the father to be cancelled, with design to divest the title out of himself and restore it to the father, and the deed is cancelled: HELD, the son's title is not divested by the cancellation of the deed, and the land shall be charged in equity with the debts of the son.  
 Graysons v. Richards. 57
- CERTIFICATE.**  
 1. When special verdict may be aided by clerk's certificate. See Special verdict No. 2, and  
 Pownal v. Taylor. 173
2. What is comprised in certificate of verdict on issue out of chancery. See Issue out of chancery No. 2, and  
 Watkins and wife v. Carlton. 560
- CHARGE.**  
 What is a mere charge on land, not a condition for breach of which grantor may reenter. See Conveyance No. 1, and  
 Pownal v. Taylor. 172
- CHATTELS.**  
 1. What is a valid executed gift of a bond. See Gift No. 2, and  
 Dunbar's ex'ors v. Woodcock's ex'or. 629
2. What registry of deed of trust is valid against creditors of grantor. See Registry, and  
 Bryan v. Cole &c.. 497
3. Effect of residuary bequest for life and in remainder. See Will No. 6, and  
 Dunbar's ex'ors v. Woodcock's ex'or. 623
- CHOSE IN ACTION.**  
 What is a valid executed gift of a bond. See Gift No. 2, and  
 Dunbar's ex'ors v. Woodcock's ex'or. 629
- CIRCUIT SUPERIOR COURTS.**  
 1. When judge awarding injunction cannot determine the cause.  
 1. The 41st section of the circuit superior court law, Supp. to Rev. Code, ch. 109, giving jurisdiction to each of the judges of the circuit superior courts, to award injunctions to judgments rendered or proceedings apprehended out of his own circuit, but directing that, in such case, the order for the process of injunction shall be directed to the clerk of the court of that county wherein the judgment is rendered or the apprehended proceeding is to be had, gives the judge jurisdiction only to award the injunction, not to hear and determine the cause.  
 Randolph's ex'or and others v. Tucker and another. 655
2. Therefore, where the judge of the circuit superior court of James City awarded an injunction to proceedings to be had in the county of Charlotte, and directed the order for the process of injunction, not to the clerk of the court of Charlotte, but to the clerk of the court of James City, though the defendant whose proceedings were enjoined was the judge of the court of Charlotte, yet HELD, the process, and the subsequent proceedings in the court of James City being founded on it, were without authority and erroneous. S. C., 655
- 718 \*II. Examination of jurors on voir dire.  
 1. Power of circuit courts, in trials for felony, to examine jurors on voir dire. See Jurors No. 1, and  
 Commonwealth v. Stockley. 673
- CLERK.**  
 When special verdict may be aided by clerk's certificate. See Special verdict No. 2, and  
 Pownal v. Taylor. 173
- CLIENT.**  
 See Attorney and client, and  
 Lyle v. Higginbotham. 63
- COMMISSIONER'S REPORT.**  
 What decree giving interest upon interest will be reversed, though founded on account reported by commissioner to which there was no exception. See Interest No. 7, and  
 Dunbar's ex'ors v. Woodcock's ex'or. 639
- COMMON RULE.**  
 Effect of common rule in ejectment brought by one tenant in common against another. See Ejectment No. 2, and  
 Taylor and others v. Hill. 457
- COMPANY.**  
 What corporate company is not liable to action. See Northwestern turnpike, and  
 Sayre v. Northwestern turnpike road. 454
- COMPENSATION.**  
 What deficiency in the quantity of land sold will not entitle vendee to compensation. See Vendor and vendee No. 4, and  
 Weaver v. Carter. 37
- COMPROMISE.**  
 I. What will be specifically enforced.  
 1. What agreement among heirs, to abide by a will of ancestor not duly executed, will be specifically enforced in equity. See Heirs No. 4, and  
 Lucketts v. Lucketts. 50
- II. What will not be set aside.  
 2. Articles of agreement are several times made between the same parties, each for the sale of a separate parcel of the same tract of land. The articles, on most occasions, import that a good and sufficient title is to be made by a specified time, and that the vendee is to pay when such title free of all incumbrance is made. In some of the articles it is stated, that the vendee is to pay in one month after such title is made; and on one occasion the articles, after mentioning that the money is to be paid so soon as such title is made, and after specifying the time when the title is to be made, proceed to state that if the vendee pay sooner, he is to have interest for the amount paid, and peaceable possession of the land until the obligation is complied with. By virtue of these stipulations and agreements, the vendee (although in possession and receiving the profits) claims interest on all sums paid by him before a title is made him free of incumbrance. This claim is afterwards compromised. The commissioner, and the court below, disregard the compromise as well as the articles of sale, and allow the vendee interest on his payments, only until he obtains possession. HELD, the compromise ought not to be disturbed, unless on specific allegation and proof of fraud, imposition or mistake.  
 Shugart's adm'r v. Thompson's adm'r. 494
- CONDITION.**  
 What is a mere equitable charge on land, not a condition for breach of which the grantor may reenter. See Conveyance No. 1, and  
 Pownal v. Taylor. 173
- CONDITIONAL SALE.**  
 I. What is a conditional sale, not a mortgage.  
 1. A. being in want of money, B. his friend applies to C. to lend it, which the latter refuses, but says he will advance the money upon condition that A. will let him have a particular slave at a fair value. A conversation ensues as to the value of the slave, and \$600 is fixed on as a fair price. Whereupon C. agrees that if A. will convey the slave to him, he will advance the money that is wanted, and if it is returned at Christmas with interest, he will release the slave, and if it is not returned by that time, he will make it \$600 and keep the slave. A.

being informed of this proposition, declares himself willing to comply with it, and observes that the slave is the one he preferred to sell, and that he thinks \$600 a fair price. Afterwards A. and C. go together to a scrivener, and request him to write a conditional bill of sale for the slave, which he writes accordingly, and it is thereupon executed by A. It expresses on its face that A. in consideration of \$393.89 cents, which is paid to him, has bargained and sold the slave to C. with the following conditions, to wit: if A. shall pay to C. the sum of \$393.89 cents on or before the 25th of December following, with lawful interest from the date, then the conveyance is to be void; but if A. shall fail to return the said sum and interest on or before the 25th of December, he obliges himself, upon C.'s paying him the sum of \$206.11 cents, (which makes up the \$600) to deliver to C. the slave, and make him a complete title. A. failing to make payment on or before the 25th of December, C. gets possession of the slave, and insists that the transaction is a conditional sale, which he can make absolute by paying the \$206.11 cents; whereas A. contends it is a mortgage, which he may redeem by paying the \$393.89 cents with interest. **Held**, the transaction is a conditional sale, and not a mortgage; dissentientibus TUCKER, P., and BROOKS, J.

Moss v. Green, 251

## II. Jurisdiction to decree payment by vendee.

3. A. failing in his bill to redeem, the question arises whether a court of equity has jurisdiction to make any decree as to the \$206.11 cents, which C. in his answer declared his willingness to pay. **Held**, under the circumstances, equity may put a stop to further litigation, and decree the payment of that sum with interest, but without costs. S. C., 251

## CONSENT.

1. Jurisdiction of cause docketed by consent. See Jurisdiction No. 1, and

M'Alexander v. Hairston's ex'or, 486

2. Effect of consent rule in ejectment by tenant in common against cotenant. See Ejectment No. 2, and

Taylor and others v. Hill, 457

## CONTINUANCE.

What refusal of continuance is erroneous.

1. An action of slander is commenced on the 21st of July, in a circuit court; but the judge of that court being related to one of the parties, an order is entered on the 27th of September, by consent of the parties, sending the case to the county court. On the 30th of November, a motion is made to the county court for a continuance, on the ground that the defendant had been confined to his bed by sickness for some time previous, and was still so confined, so that he could not attend to the case in person and prepare himself for trial; and it is admitted by the plaintiff's counsel that such had been and still is the situation of the defendant. But a trial being nevertheless urged, the court is divided on the motion for a continuance, and the same being overruled, a verdict and judgment are rendered against the defendant. **Held**, the county court erred in so ruling the defendant to trial, at the term next after the cause had been transferred to that court, and at which it was docketed in that court for the first time.

M'Alexander v. Hairston's ex'or, 486

2. Case in which the denial to a prisoner indicted of felony, of a continuance asked on the ground of the absence of a witness, was held error for which judgment of conviction must be reversed.

Gwakin v. Commonwealth, 687

## CONTRACT.

### I. Construction.

1. Where the defendant's undertaking is for a consideration to be received by, or articles to be supplied to a third person, if the transaction be such that a third person is responsible to the person who supplies the articles or from whom the consideration proceeds, the undertaking is collateral, and under the statute of frauds will not bind unless it be in writing.

Ware v. Stephenson, 155

2. Construction of forthcoming bond, as to the time for delivering the property. \*See Forthcoming bond No. 1, and

Spencer v. Pilcher, 490

3. What is a conditional sale, not a mortgage. See Conditional sale No. 1, and

Moss v. Green, 251

4. What circumstances will shew that a transac-

tion was an absolute sale, not a mortgage. See Sale No. 1, and

Ransone v. Frayser's ex'ors, 592  
5. What is a sale of land in gross. See Vendor and vendee No. 3, and

Weaver v. Carter, 37

6. What is a mere equitable charge on land, not a condition for breach of which the grantor may reenter. See Conveyance No. 1, and

Pownal v. Taylor, 173

7. When deed providing indemnity for surety is not available to creditor. See Principal and surety No. 3, and

Hopewell and others v. Cumberland bank, 206

8. When purchaser of mortgaged property, though evicted, is without relief against mortgagee. See Mortgages and trusts No. 7, and

Findlay & Mitchell v. Hickman, 354

### II. Validity.

9. What promise by executor need not be in writing. See Executors and administrators No. 2, and

Collins's adm'r v. Row, 114

10. What is a collateral undertaking, which must be in writing. See supra. No. 1.

11. What compromise should not be disturbed on bill to impeach a settled account. See Compromise No. 3, and

Shugart's adm'r v. Thompson's, adm'r, 484

12. What agreement among heirs will be specifically enforced. See Heirs No. 4, and

Luckett v. Lucketts, 50

13. What assignment of voluntary bond and trust deed is valid against obligor. See Assignment No. 1, and

Terrell v. Imboden and others, 321

14. What assignment is invalid for the fraud of assignee. See Fraudulent alienations No. 2, and

Gibbons v. Jackson, 364

15. What contract is void under statute against buying and selling offices. See Sheriffs No. 1, and

O'Rear's adm'r's v. Kiger, 622

16. What conveyance is operative. See Conveyance No. 2, and

Pownal v. Taylor, 173

17. What alienation of a slave is not merely voluntary. See Emancipation No. 4, and

Ruddle's ex'or v. Ben, 467

18. What registry of a deed conveying chattels in trust is valid against creditors of grantor. See Registry, and

Bryan v. Cole &c., 497

## CONTRIBUTION.

Will not be enforced among successive alienees of judgment debtor. See Judgment No. 2, and

M'Clung v. Beirne, 394, 5

## CONVERSION.

1. What direction of testator to sell estate does not entitle widow to claim as if the whole were money. See Will No. 7, and

Overton and wife v. Maben and others, 609

2. Devisee for life of property insured has no right to apply insurance money to rebuild. See Insurance No. 1, and

Haxall's ex'ors v. Shippen and wife and others, 536

## CONVEYANCE.

I. What is a mere charge, not a condition.

1. The owner of a tract of land conveys it to his nephew in fee, subject to the maintenance and support of the grantor and his sister. The deed contains a covenant by the grantee for such maintenance and support, and declares that the land is to be bound therefor, into whose hands soever it may come. But the deed does not state that it is upon condition that such maintenance and support be furnished, nor is there any clause providing for a reentry by the grantor. **Held**, the provision for maintenance and support constitutes merely a charge upon the estate, which may be enforced in equity, not a condition for breach of which the grantor can reenter as of his former legal estate.

Pownal v. Taylor, 172

II. What conveyance is operative.

2. After a deed of trust upon land is made and recorded, the land is conveyed by the grantor, and then by his alienee to another. Whereupon the first grantor removes from the land, and the last alienee removes to it. While this last alienee is residing on the land, the trustee in the deed of trust goes upon it, sells it according to the provi-



sions of the trust, and conveys it to the purchaser. \*In ejectment by the purchaser from the trustee against the purchaser under the grantor, a special verdict finds the facts before stated, but does not find that, at the time of the conveyance by the trustee, there was adverse possession. **HOLD**, the conveyance by the trustee is valid. S. C., 178

### III. Cancellation.

3. That an estate conveyed in lands will not be divested by cancellation of the deed, see Cancellation, and

Graysons v. Richards, 57

### IV. Registry.

4. What registry of a deed conveying chattels in trust is valid against creditors of grantor. See Registry, and

Bryan v. Cole, &c., 497

### CORPORATION.

What corporate company is not liable to action. See Northwestern turnpike, and

Sayre v. Northwestern turnpike road, 454

### COUNSEL AND CLIENT.

See Attorney and client, and

Lyle v. Higginbotham, 63

### COVERTURE.

Effect in accounting for delay to prosecute claim on bond. See Lapse of time No. 2, 3, and

Baker v. Morris's adm'r, 285

### CRIMINAL PROCEEDINGS.

See Indictments, informations and presentments.

### DAMAGES.

1. It seems, that in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages.

Baker v. Morris's adm'r, 285

2. Evidence in mitigation of damages in slander. See Slander No. 2, and

Lincoln v. Chrisman, 338

### DEBT.

Action against maker of promissory note payable at a specified place. See Promissory note No. 2, 3, 4, and

Armistead v. Armisteads, 512

### DEBTOR AND CREDITOR.

1. When purchaser of mortgaged property remains liable for the mortgage debt notwithstanding eviction. See Mortgages and trusts No. 7, and

Findlay & Mitchell v. Hickman, 354

2. What is no ground of delaying decree for creditor against debtor. See Decree No. 1, and

Moore's adm'r v. George's adm'r, 228

### DECEDENTS' ESTATES.

See Executors and administrators.

### DECLARATION.

1. What is not a count in tort, but a good count in assumpsit. See Assumpsit No. 1, and

Hopess v. Straw, 348

2. Whether a consideration must be averred in assumpsit on a promissory note. See Assumpsit No. 2, and

Jackson v. Jackson, 448

3. Declaration against maker of promissory note payable at a specified place. See Promissory note No. 3, 4, and

Armistead v. Armisteads, 512

### Defective assignment of breach.

4. In debt in a circuit court, upon the official bond of the marshal of the late superior court of chancery for the district, the breach assigned in the declaration is, that the chancery court having, in a suit therein pending in which the relator was defendant, made an order directing the marshal to take possession of certain slaves (averred to be the property of the relator) and hire them out until the further order of the court, the marshal accordingly took possession of the slaves, hired them out, and collected the hires, but failed to pay them over to the relator, "to whom they belonged, and who was entitled to receive them from the marshal, as would appear by reference to the record and proceedings in the said suit, remaining in the office of the circuit court." On general demurrer to the declaration, **HOLD**, the assignment of the breach is defective in substance; the title of the relator to demand

and receive the hires from the marshal not being sufficiently set forth.

Maynard's ex'r v. M'Candlish and others, 116

### Leave to amend.

5. Proceedings after leave to amend declaration.

See Amendment, and

Couch v. Fretwell's adm'r, 578

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### \*DECREE.

I. What is no ground for delaying decree.

1. The bill of a distributee, besides making the administrator and his sureties defendants, states, that the complainant has understood that the administrator, who has gone out of the commonwealth, appointed B. his agent to transact his business in this state, and that he put property or moneys into B.'s hands to satisfy his debts, but she is not sure that the fact is so, and therefore does not think it just to aver it positively. She makes him a defendant, and calls on him to state whether he has, or expects to have, any such funds, and, if any, what. B. dying, and the cause being revived against his executrix, she answers that her testator, so far from being indebted to the administrator, or having in his hands any estate wherewith to satisfy any part of the debt due to the complainant, was himself a creditor of the administrator to a very considerable amount, and that the administrator is still considerably indebted to her as executrix: that she has a lien upon certain slaves, in which the wife of the administrator has an interest at the termination of a life estate; but even this property, if it could be sold now, would be insufficient to pay the debt due to her as executrix. An account having been taken ascertaining the amount due to the plaintiff from the administrator, **HOLD**, there ought to be a decree for the same against the administrator and his sureties, without delaying the plaintiff for an account to be stated between B. and the administrator.

Moore's adm'r v. George's adm'r, 228

II. Decree subjecting lands aliened by judgment debtor.

2. How lands aliened by judgment debtor will be charged in the hands of allenees. See Judgment No. 2, and

M'Clung v. Belrne, 304, 5

### III. Decree for sale of partnership lands.

3. Decree for sale of partnership lands at instance of surviving partner, in suit against heirs of deceased partner. See Partnership, and

Pierce's adm'r &c. v. Trigg's heirs, 406, 7

### IV. What decree is not final.

4. A decree for a sum of money provides that if no property of the debtor can be found, other than that conveyed by him by a deed of trust and a mortgage, then he shall deliver up the trust and mortgage property to the marshal, to be sold to satisfy the money secured by the trust and mortgage, and then to satisfy the decree. The debtor dying, a bill of revivor and supplement is filed against his administrator, to obtain payment of the decree out of the assets in his hands. And the administrator, by his answer, relies upon the 17th, and also upon the 5th section of the statute of limitations, 1 Rev. Code, ch. 128. **HOLD**, the decree in this case is not a final decree, and if it were, is not such a one as the statutes can apply to.

Hill's ex'or v. Fox's adm'r, 587

5. An interlocutory decree in chancery, deciding a question of fact in litigation, pronounced in the progress of an account, upon exceptions to a report, or instructions to a commissioner, as to the propriety of items of debit or credit, is not such a final decree, as precludes a party from taking new evidence touching the same question of fact, without having obtained a review or rehearing of the decree, and without shewing that the new evidence had been discovered since the decree.

Dunbar's ex'ors v. Woodcock's ex'or, 639

6. Quere, what would be such a final decree as would preclude a party from filing such new evidence touching a question thereby decided, according to the chancery practice of Virginia, and the provision of the statute of March 1826, Supp. to Rev. Code, ch. 103, § 9?

S. C., 629

### V. Who is not bound by decree.

7. In general, a cestui que trust is not bound by a decree rendered against his trustees, in a chancery suit to which the cestuique trust was no party.

Collins v. Loftus & Co., 5

## VI. Affirmance and reversal.

8. What is no ground for reversing interlocutory decree for sale of land. See Affirmance No. 1, and Manns v. Flinn's adm'r. 98

9. What decree will be reversed, though founded on account reported by commissioner to which there was no exception. See Interest No. 7, 728 \*and

Dunbar's ex'ors v. Woodcock's ex'or, 629

## VII. Purchaser under decree.

10. Concerning the rights of a purchaser under a decree of sale, see Sale No. 6, 7, 8, 9, and Taylor v. Cooper, 817

## DEED.

See titles Cancellation—Conveyance—and Registry.

## DEMAND.

When demand of payment at place specified in note is unnecessary. See Promissory note No. 3, 4, and

Armistead v. Armisteads, 512

## DEMURRER.

## I. To pleading.

1. See Declaration and Indictments, informations and presentments.

## II. To evidence.

2. Upon a demurrer by the defendant to the plaintiff's evidence, the court, to ascertain what facts the evidence establishes, must look to the whole of it.

Ware v. Stephenson, 155

3. Upon such demurrer, in ascertaining the facts established by any one witness, every thing stated by him, as well on his cross examination as on his examination in chief, must be considered. Facts imperfectly stated in answer to one question may be supplied by the answer to another. And where, from one statement considered by itself, an inference may be deduced, that inference may be strengthened or repelled by the facts disclosed in another. S. C., 155

## DETINUE.

By mortgagee against purchaser under execution.

Certain persons having become the sureties of an executor in his executorial bond, a deed is made by him mortgaging slaves to them, upon condition that if he shall faithfully perform in all things his office of executor, then the deed shall be void; but the deed contains no clause providing that possession shall remain with him until default in the performance. The mortgagor, after the date of the mortgage, is in possession of the slaves for more than five years. Whereupon a creditor of his procures the slaves to be taken under execution and sold. And then, in less than five years after they are so taken, an action of detinue is brought by the mortgagees against a purchaser at the sale under the execution. HELD, 1. the action is commenced in due time; and 2. the fact of possession remaining with the mortgagor five years without demand made and pursued by process of law on the part of the mortgagees, does not make a case in which, under the statute of frauds, the property is taken to be with the possession, and liable to the creditors of the person in possession.

Rose's adm'r v. Burgess, 186

## DEVISE.

## See Will.

## DEVISEES.

1. Interest of devisees for life and in remainder, respectively, in insurance money accruing on destruction of the property devised. See Insurance No. 1, and

Haxall's ex'ors v. Shippen and wife and others, 536

2. Under the statute against fraudulent devises, an action of debt lies on an executor's bond, for a creditor claiming a debt from the executor's estate, arising from a breach of the condition by the executor in his lifetime, against the executor's devisees, to have satisfaction out of the lands devised.

Manns v. Flinn's adm'r, 93

3. Quere, whether the provision of the 17th section of the statute of limitations, 1 Rev. Code, ch. 128, is a protection to the heirs of devisees of the decedent as well as his executor or administrator? S. C., 93

## DISABILITY.

Effect of coverture in accounting for delay to

prosecute claim on bond. See Lapse of me No. 2, 8, and

Baker v. Morris's adm'r, 285

## DISCOVERY.

What discovery may be compelled.

1. In a suit in equity to enforce payment of a bond debt twenty-eight years after the right to demand it accrued, there being no remedy under the circumstances of the case but in equity, the bill, to rebut the presumption of satisfaction arising from lapse of time, calls on the defendant to answer whether the debt has been paid or not: HELD, the defendant was properly compelled to answer to that point.

Baker v. Morris's adm'r, 284

2. Where assumption is brought at law, and the statute of limitations pleaded, the plaintiff may file a bill of discovery in equity, calling on the defendant to answer whether he has not made a new promise within the term of limitation. In order to use this matter, on the trial of the action at law, in avoidance of the bar of the statute, and the defendant shall answer the allegation of the new promise on oath. S. C., 285

## DISTRIBUTEE AND DISTRIBUTION.

See Decree No. 1; Parties to suits No. 3, and Moore's adm'r v. George's adm'r, 226

## EJECTMENT.

By tenant in common against cotenant.

1. In ejectment against a tenant in common by a cotenant, if the jury return a special verdict, actual ouster must be found therein, to entitle the plaintiff to judgment.

Taylor and others v. Hill, 457

2. The necessity of finding this fact is not dispensed with by the entry made, in Virginia, when the tenant in possession is admitted defendant, that he "confesses the lease, entry and ouster in the declaration supposed, and agrees to insist on the title only, at the trial." The confession that Richard Roe ousted John Doe, is not a confession that the real defendant ousted the real plaintiff; and when this latter ouster forms a part of the plaintiff's title to recover (as it does between tenants in common), the fact of such ouster must be proved. S. C., 457

## ELEGIT.

Concerning the lien of a judgment affirmed on lands of the debtor—the rights of the surety in the appeal bond after satisfying the affirmed judgment—and the rights of the debtor's alienees, see Judgment No. 2, and

M'Clung v. Beirne, 364, 5

## EMANCIPATION.

I. What issue of freedwoman is not entitled to freedom.

1. The principle decided in Maria &c. v. Surbaugh, 2 Rand, 228, that where the mother is a slave until she attains a particular age, her children, born in the mean time, are born slaves, and continue to be so even after the mother's right to freedom accrues, again recognized and acted upon.

Crawford v. Moses, 277

2. A will contains the following clause: "It is my will and desire that after the death or marriage of my wife, all my negroes shall have their right to freedom when they arrive to lawful age or 21 years old; and if any should be born hereafter, it is my will that they shall have a right to freedom when they shall arrive to the aforesaid term of years." The testator, at his death, has a slave named Winney, who afterwards, while the widow is alive and unmarried, has a daughter named Jane. After the death of the widow, and before Jane attains the age of 21 years, she has a son named Moses. Moses, upon arriving at the age of 21, brings a suit for his freedom. HELD, he is a slave. S. C., 277

II. When emancipated slave, levied on under execution, may be discharged on habeas corpus.

3. A slave, after being emancipated, is taken by execution to satisfy the debt of a former owner, contracted before he executed a bill of sale for the slave to the person by whom the emancipation has been made: HELD, a writ of habeas corpus is the appropriate remedy; and on this writ it may be determined whether or no the bill of sale is valid against creditors. By two judges.

Ruddle's ex'or v. Ben, 467

4. The owner of a slave permits him to act for himself, paying the owner a hire. During three years that he so acts, the slave, besides paying the hire, earns \$200, of which he deposits \$75 with the owner. The owner, contemplating an eventual emancipation, makes a bill of sale, and delivers to the grantee possession of the slave, for the consideration of \$200, of which the \$75 in his hands is taken as part. The other earnings of the slave (\$125) are afterwards collected and paid over in satisfaction of the balance of the consideration money. In the transaction, there is no intent to defraud the grantor's creditors. The grantee afterwards emancipates the slave, and the slave so emancipated is taken by execution to satisfy a debt of the first owner, contracted before he executed the bill of sale. HELD, the bill of sale cannot be considered a purely voluntary one, and the slave so emancipated should, upon a habeas corpus, be discharged from custody, leaving the creditor to resort to equity to set aside the bill of sale and the instrument of emancipation, if he can properly do so, because of the inadequacy of the consideration for the bill of sale, or upon any other ground. By two judges—dissentient TUCKER, P. S. C., 407

### III. Prosecution of free negro remaining in commonwealth.

5. When no information should be ordered on presentment against a free negro remaining in the commonwealth. See Slaves, free negroes and mulattos No. 8, 4, and Commonwealth v. Pleasant, 697

### EQUITABLE JURISDICTION.

1. To decree payment by defendant adjudged a conditional vendee, on bill filed by his vendor to redeem. See Conditional sale No. 2, and Moss v. Green, 251  
2. To decree sale of infant's land. See Infant No. 1, and Pierce's adm'r &c. v. Trigg's heirs, 406  
3. To decree sale of land held as partnership stock at instance of surviving partner. See Partnership No. 1, 2, 3, and S. C., 408, 7  
4. Of circuit superior courts in cases of injunction. See Circuit superior courts No. 1, 2, and Randolph's ex'or and others v. Tucker and another, 655

### EQUITY OF REDEMPTION.

How applied to satisfy a judgment debt. See Judgment No. 2, and McClung v. Beirne, 394, 5

### EVICITION.

When purchaser of mortgaged property remains liable for the mortgage debt notwithstanding eviction. See Mortgages and trusts No. 7, and Findlay & Mitchell v. Hickman, 354

### EVIDENCE.

#### I. Competency.

1. In assumpsit for goods furnished a third person, such person is a competent witness for the plaintiff. Ware v. Stephenson, 155  
2. What evidence is admissible in slander to prove defendant's malice. See Slander No. 1, and Lincoln v. Chrisman, 338  
3. What evidence of plaintiff's character is admissible in slander. See Slander No. 2, and S. C., 338  
4. What communication by client to his attorney may be proved against the client. See Attorney and client, and Lyle v. Higginbotham, 68  
5. Effect of judgment against sheriff for deputy's default, as evidence against deputy. See Sheriffs No. 2, and Scott's adm'r v. Tankersley's ex'or, 581  
6. What evidence is admissible on issue to try legitimacy. See Legitimacy, and Watkins and wife v. Carlton, 560  
7. Admissibility of parol evidence to fill up description of legatee. See Will No. 4, and Maund's adm'r v. M'Phail, 199  
8. What decree does not preclude party from taking new evidence as to question of fact thereby decided. See Decree No. 5, and Dunbar's ex'ors v. Woodcock's ex'or, 629  
9. Quere, what is to be deemed a decree finally deciding a question of fact and precluding new evidence? See Decree No. 6, and S. C., 629  
10. When record of conviction of actual thief is

not admissible against receiver. See Receiving stolen goods, and Smith v. Commonwealth, 695

#### II. Demurrer to evidence.

11. Duty of court on demurrer to evidence. See Demurrer No. 2, 3, and Ware v. Stephenson, 155

#### III. Sufficiency.

12. The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent. Collins v. Loftus & Co., 5  
13. What evidence is insufficient to prove a loan of slaves. S. C., 5  
14. What is a sufficient resumption of the possession of slaves loaned. S. C., 5  
15. Question upon the evidence, in an action for goods furnished a third person, whether or no such third person was responsible to the plaintiff. Ware v. Stephenson, 155  
16. Proof of actual ouster necessary in ejectment brought by tenant in common against cotenant. See Ejectment, and Taylor and others v. Hill, 457  
17. Demand of payment at place specified in note not necessary to charge maker. See Promissory note No. 2, 3, 4, and Armistead v. Armisteads, 512  
18. Proof of due execution of will. See Will No. 2, 3, and Clarke and others v. Dunnivant, 13  
19. Necessity of proving assignment in suit in equity by assignee. See Assignment No. 3, and Corbin v. Emmerson, 663  
20. What promise by executor is valid though not in writing. See Executors and administrators No. 2, and Collin's adm'r v. Row, 114  
21. What is a collateral undertaking, required to be in writing. See Contract No. 1, and Ware v. Stephenson, 155  
22. What is insufficient proof of a supersedeas to judgment. See Forthcoming bond No. 2, and Spencer v. Pilcher, 490

### EXAMINING COURT.

What is a sufficient examination for forging and uttering. See Forging and uttering, and Bogart v. Commonwealth, 693

### EXCEPTIONS.

1. What objection appearing by bill of exceptions will not avail in appellate court. See Appellate jurisdiction No. 3, and Rose's adm'r v. Burgess, 186  
2. What decree will be reversed, though founded upon an account reported by commissioner to which there was no exception. See Interest No. 7, and Dunbar's ex'ors v. Woodcock's ex'or, 629

### EXECUTORS AND ADMINISTRATORS.

1. Proceeds of the sale of land held as partnership stock decreed to be paid to personal representative of deceased partner. See Partnership No. 4, and Pierce's adm'r &c. v. Trigg's heirs, 407  
2. In assumpsit against an executor in his individual character, for the price of goods sold and delivered to him for the use of his testator's widow and legatees, upon evidence being given of such sale and delivery, of a promise by the defendant to pay for the goods out of his testator's estate, and of assets sufficient for that purpose, the plaintiff may recover although the promise was not in writing. Collins's adm'r v. Row, 114  
3. What is no ground for delaying decree in suit by distributee against administrator and sureties. See Decree No. 1, and Moore's adm'r v. George's adm'r, 228  
4. What objection for want of parties in suit by distributee against administrator is untenable. See Parties to suits No. 3, and S. C., 228  
5. Judgment is recovered against A. in his lifetime; A. dies, and upon the supposition of his intestacy, administration of his estate is granted to B.; a will of A. being afterwards found and proved, the former grant of administration is revoked, and administration with the will annexed granted to C.; and suit is brought on the judgment after five years had elapsed from the grant of administration to B. but within five years from the grant of administration to the rightful administrator C.—HELD, the five years limitation prescribed by the statute 1 Rev. Code, ch. 128, § 17, began to run, not from the void grant of administration to B. but from the

qualification of C. the rightful administrator, and so the statute was not a bar to the suit.

Manns v. Flinn's adm'r, 98

6. Quere, whether the provision of the 17th section of that statute applies to judgments against a decedent in autre droit, or only to judgments against him in his own right? S. C., 98

7. What decree against decedent is not within the 5th nor the 17th section of the statute of limitations. See Decree No. 4, and

Hill's ex'or v. Fox's adm'r, 587

727 8. Under the statute against fraudulent devisees, an action of debt lies on an executor's bond, for a creditor claiming a debt from the executor's estate, arising from a breach of the condition by the executor in his lifetime, against the executor's devisees, to have satisfaction out of the lands devised.

Manns v. Flinn's adm'r, 98

#### FAMILY COMPROMISE.

When specifically enforced. See Heirs No. 4, and Lucketts v. Lucketts, 50

#### FATHER AND CHILD.

1. The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent.

Collins v. Loftus & Co., 5

2. Cancellation of deed of gift of land. See Cancellation, and Graysons v. Richards, 57

#### FELONY.

Power of court, on trial for felony, to examine jurors on voir dire. See Jurors No. 1, and Commonwealth v. Stockley, 678

#### FEME COVERT.

Effect of coverture in accounting for delay or prosecute claim on bond. See Lapse of time No. 2, 3, and

Baker v. Morris's adm'r, 285

#### FINAL DECREE.

What decree is not final. See Decree No. 4, 5, 6, and

Hill's ex'or v. Fox's adm'r, 587

Dunbar's ex'ors v. Woodcock's ex'or, 629

#### FOREIGN ATTACHMENT.

How absent debtor must proceed to obtain relief against decree.

1. In a suit in equity against an absent defendant alleged to be indebted to the plaintiff, and a home defendant having effects in his hands, the plaintiff should prove himself in a legal manner to be a creditor of the absent defendant; but if a decree be rendered without such proof, the absent defendant cannot obtain redress by appealing from the decree; he must seek it in the mode prescribed by the statute, that is, he must appear in the court which pronounced the decree, and petition to have the cause reheard.

Platt v. Howland, 507

2. Upon the absent defendant's giving security for payment of costs, he will be admitted to answer the bill; but the court will not set aside the decree so soon as the answer is filed. After issue is joined, the parties on both sides will have an opportunity of examining their witnesses, the cause will be matured for rehearing, and, upon a rehearing, such decree will be made as may be just and right.

S. C., 507

#### FORGING AND UTTERING.

A prisoner is committed for examination, is examined, and remanded by the examining court for trial, for felony in forging and uttering a promissory note purporting to be drawn by A. D. (no intention to defraud A. D. or any other person being charged): HELD, the examination is sufficient, and well warrants an indictment for forging and uttering the note with intention to defraud A. D.

Bogart v. Commonwealth, 668

#### FORTHCOMING BOND.

##### I. Construction of bond.

1. A forthcoming bond dated the 1st day of November 1834, being conditioned for the delivery of the property "on the third monday of November next," it is contended that there could be no breach of the condition until the third monday in November 1835: HELD by the court of appeals (construing the instrument according to the subject matter and the evident meaning of the parties)

that the day for the delivery of the property was the third monday of November 1834.

Spencer v. Pilcher, 490

#### II. Effect of supersedeas to original judgment.

2. A forthcoming bond being forfeited, notice is given that a motion will be made on it. After the notice, and before the term to which it is given, a supersedeas is awarded to the original judgment, and it is perfected by giving bond and security. The motion is then continued from term to term, until there is a decision affirming the original judgment. After that decision, but before a copy of it is received by the court in which the motion is pending, the motion is heard, and judgment entered against the obligors. It is objected that the court proceeded on its own unofficial information that the original judgment had been affirmed. But the only evidence in the record, to shew that a supersedeas had been awarded, is the supersedeas bond. HELD, 1. the right to move on a forthcoming bond is not suspended by a supersedeas to the original judgment; and 2, whether this be so or not, the writ of supersedeas not having been given in evidence in the court below, there is no sufficient foundation for the objection to the proceedings of that court upon the motion.

S. C., 490

#### FRANCHISE.

When application to build a mill should be refused on the ground of interference with a previously granted privilege. See Mills, and Humes v. Shugart, 332

#### FRAUDS—Statute of.

See references under title Statute of Frauds.

#### FRAUDULENT ALIENATIONS.

1. What assignment of voluntary bond and trust deed is valid against obligor. See Assignment No. 1, and

Terrell v. Imboden and others, 391

2. A vendor binds himself to convey to the vendee, in fee, a certain lot upon the payment of the purchase money. No part of the purchase money being paid, an arrangement is made by an agent of the vendor with the vendee's devisee, by which she is to have the lot during her life, and the vendor is to have the reversion. The vendor then, for value received, sells the lot to another person, to whom he executes a bond to make him a deed, with a reservation of the life estate of the devisee. After this, the agent who had made the arrangement with that devisee, procures from her an assignment to himself of the title bond originally executed to her devisor. He obtains the assignment without agreeing to give her any consideration but that already provided for her, to wit, the life estate, and he obtains it with full knowledge of the sale to the second vendee, and of his having paid the purchase money. The same agent deals also with the second vendee. He does not communicate to the second vendee the fact of the arrangement made by him, on behalf of the vendor, with the first vendee's devisee, but represents the bond to the first vendee as being still valid, and as taking from the vendor all right to convey the lot to the second vendee; and the second vendee, in ignorance or misapprehension of his rights, makes to the agent an assignment, for a pecuniary consideration, of the title bond executed to him by the vendor. HELD, 1. the arrangement made by the agent, on behalf of his principal, with the devisee of the first vendee, cannot be defeated by that agent for his own benefit, and the assignment to him by the devisee gives him no right whatever; and 2. the ignorance or misapprehension under which the assignment was made by the second vendee, having been produced in some measure by the declarations and conduct of the assignee during the negotiation, the claim under that assignment is also unsustainable.

Gibbons v. Jackson, 364

3. What alienation of a slave is not merely voluntary. See Emancipation No. 4, and

Ruddle's ex'or v. Ben, 476

4. What possession by mortgagor will not make the property liable to his creditors, as against mortgagee. See Detinue, and

Rose's adm'r v. Burgess, 186

5. What will put an end to loan and avoid the statute of frauds. See Loan No. 2, and

Collins v. Loftus & Co., 5

6. What registry of trust deed conveying personal chattels is valid against creditors of grantor. See Registry, and

Bryan v. Cole &c., 497

7. Action against devisees of executor upon his executorial bond. See Devisees No. 2, and Manns v. Flinn's adm'r, 98
- 729 \*FREEDOM—Suits for.  
See Emancipation, and Crawford v. Moses, 277  
Ruddle's ex'or v. Ben, 467
- FREE NEGROES.  
See Emancipation and Slaves, free negroes and mulattoes.
- GAMING.  
A presentment "for unlawfully playing cards at the grocery of D. and C." is defective in substance, for not alleging the grocery to be a public place, or a place of public resort.  
Roberts and another v. Commonwealth, 686
- GENERAL ASSEMBLY.  
Concerning the privilege of members of assembly, see Legislature, and  
Botts v. Tabb and others, 616
- GIFT.  
1. The evidence to sustain an alleged parol gift by a father to his daughter on her marriage, should be clear and cogent.  
Collins v. Loftus & Co., 5  
2. Testator holding a bond for a debt, bequeaths that bond inter alia to his wife for life, remainder to D. and wife, and appoints his wife and D. his executors; the legatee for life and executrix delivers this bond to her coexecutor, the remainderman D. with intent to give and transfer to him her interest in the bond as legatee, and gives him a written, but not a sealed, instrument to that effect: though there was no consideration for this gift, yet HELD, it was a valid executed gift, which passed the interest of the legatee for life to the donee.  
Dunbar's ex'ors v. Woodcock's ex'or, 629  
3. Cancellation of deed of gift of land. See Cancellation, and  
Graysons v. Richards, 57
- GRANTOR AND GRANTEE.  
See Cancellation—Conveyance—Vendor and vendee.
- GUARANTEE.  
1. What is a collateral undertaking, required to be in writing. See Contract No. 1, and  
Ware v. Stephenson, 155  
2. Question upon the evidence, in an action for goods furnished a third person, whether or no such third person was responsible to the plaintiff.  
S. C., 155
- HABEAS CORPUS.  
When emancipated slave, levied on for debt of former owner, may be discharged on habeas corpus. See Emancipation No. 3, 4, and  
Ruddle's ex'or v. Ben, 467
- HEIRS.  
1. Right of surviving partner to dispose of partnership lands as against heirs of deceased partner. See Partnership No. 1, and  
Pierce's adm'r & c. v. Trigg's heirs, 406  
2. What decree for sale of partnership lands is binding, and how far, on infant heirs of deceased partner. See Partnership No. 2, 3, 4, and  
S. C., 406, 7  
3. Quere, whether the provision of the 17th section of the statute of limitations, 1 Rev. Code, ch. 128, is a protection to the heirs or devisees of the decedent as well as his executor or administrator?  
Manns v. Flinn's adm'r, 92  
What agreement among heirs will be specifically enforced.  
4. A testator makes two successive wills, both evincing the intention to give each of his children, nine in number, land of 200 acres in quantity, or to the value of 5000 dollars, estimating the land at 25 dollars per acre, and both giving to two sons, who had only about 177 acres each, legacies of 500 dollars, to make their land equal to that of his other children. These wills he cancels, and afterwards makes a third, similar to the former wills as to the devisees of land, but omitting the equalizing provision in favour of the two sons; and these two sons are named the executors. One of them offers the last will for probat, but it is rejected, because unattested by witnesses: whereupon the heirs execute an agreement among themselves, to abide by the  
730 will so offered and rejected, in the division
- of the estate. Afterwards the two sons who were named executors refuse to perform the agreement, alleging that they entered into it without having ever read the last will, and under the mistaken belief that it contained the equalizing provision in their favour. But specific execution decreed in equity; there being no sufficient proof, either that the omission of the legacies made their lands unequal in value to those of the other children, or that they executed the agreement in ignorance and under mistake as they alleged; and it being apparent that if they did execute it under those circumstances, it was their own gross negligence to do so.  
Lucketts v. Lucketts, 50
- HUSBAND AND WIFE.  
Interest of husband of devisee in remainder, in insurance money received by tenant for life on destruction of the property devised. See Insurance No. 1, and  
Haxall's ex'ors v. Shippen and wife and others, 536
- ILLEGAL BANKING.  
See Unchartered banking, and Commonwealth v. Horner, 700
- INCORPORATED COMPANY.  
What company is not liable to action. See Northwestern turnpike, and  
Sayre v. Northwestern turnpike road, 454
- INDEMNITY.  
1. When deed providing indemnity for surety is not available to creditor. See Principal and surety No. 2, and  
Hopewell and others v. Cumberland bank, 306  
2. Concerning subrogation of sureties in bounds bond given by principal in execution to one of several original sureties indemnified, see Principal and surety No. 3, and  
Givens and others v. Nelson's ex'or and others, 383
- INDICTMENTS, INFORMATIONS AND PRESENTMENTS.  
1. What examination for forging and uttering is sufficient and warrants the indictment. See Forging and uttering, and  
Bogart v. Commonwealth, 698  
2. When no information should be ordered on presentment against free negro for remaining in the commonwealth. See Slaves & c. No. 3, 4, and  
Commonwealth v. Pleasant, 697  
3. How a party harbouring or employing a free negro contrary to law may be prosecuted, and what allegation of the offence is sufficient. See Slaves & c. No. 5, 6, and  
Fisher v. Commonwealth, 673  
4. Prosecution for unchartered banking. See Unchartered banking, and  
Commonwealth v. Horner, 700  
5. The omission to write the title or profession of the prosecutor at the foot of an information or indictment, is no ground of exception, either by motion to quash or plea in abatement.  
Commonwealth v. Dever, 685  
6. A presentment "for unlawfully playing cards at the grocery of D. and C." is defective in substance, for not alleging the grocery to be a public place, or a place of public resort.  
Roberts and another v. Commonwealth, 68  
7. What is a sufficient information for perjury committed by a juror on his voir dire.  
Commonwealth v. Stockley, 678  
8. Case in which the denial to a prisoner indicted of felony, of a continuance asked on the ground of the absence of a witness, was held error for which judgment of conviction must be reversed.  
Gwatkin v. Commonwealth, 687  
9. Power of court, on trial for felony, to examine jurors on voir dire. See Jurors No. 1, and  
Commonwealth v. Stockley, 678  
10. What receiver of stolen goods is a principal felon. See Receiving stolen goods, and  
Smith v. Commonwealth, 696
- INFANT.  
1. The question whether there exists in the courts of chancery of Virginia, in any other cases than those in which the statute gives it, power to decree the sale of an infant's real estate upon the ground that it will be for his advantage, examined by  
TUCKER, P.  
Pierce's adm'r & c. v. Trigg's heirs, 406

- 731 \*2. What sale of partnership lands is binding on infant heirs of deceased partner. See Partnership No. 2, 3, and S. C. 403, 7  
 3. Mode of relief to such infant heirs where sale was made subject to incumbrances. See Partnership No. 4, and S. C., 407

## INJUNCTION.

When judge awarding injunction has no jurisdiction to hear and determine the cause. See Circuit superior courts No. 1, 2, and Randolph's ex'or and others v. Tucker and another, 655

## INSOLVENT.

## I. What is land belonging to insolvent.

1. A father by deed of gift conveys land to a son, and shortly after the son voluntarily surrenders the deed to the father to be cancelled, with design to divest the title out of himself and restore it to the father, and the deed is cancelled: HELD, the son's title is not divested by the cancellation of the deed, and the land shall be charged in equity with the debts of the son.

Graysons v. Richards, 57

## II. What creditors may charge such land in equity.

2. In such case, a creditor having obtained a judgment against the son subsequent to the cancellation of the deed, under which the son has taken the oath of insolvency, is not only entitled to satisfaction of his judgment out of the land as still the property of the son, but he may also claim satisfaction out of it of a simple contract debt which the son owes him; and other creditors of the son, who have not recovered judgments against him, coming in at the same time, shall be entreated to claim satisfaction of the debts due them out of the same land. S. C., 57

## INSURANCE.

## I. Rights of devisees for life and in remainder of insured premises, in case of destruction by fire.

1. Testator, having insured his dwelling house against loss by fire, by a covenant of assurance to himself, his heirs and assigns, devises the same tenement and the farm on which he lived, to his wife for life, remainder to his two daughters in fee; the house is burnt down during the life of the wife; she receives the insurance money, and, without the concurrence of the devisees in remainder, expends it in the building of a new house on the premises; and then dies, leaving the new house standing, which devolves with the farm to the devisees in remainder, who are then both femes covert, and they and their husbands both survive the tenant for life: HELD,

That neither the covenant of insurance, though to the assured, his heirs and assigns, nor the testator's will, worked any special destination of the insurance money to the purpose of reinstating the premises. That the tenant for life had a right to receive the insurance money; but when received, it was mere personal estate, of which she had a right to the use for life, and her daughters to the remainder; and upon the marriage of the daughters, the marital rights of their husbands attached to it, as to any other personality to which their wives were entitled in remainder.

That the tenant for life had no right to convert the insurance money into real estate, by applying it to the building of a new house without the consent of the remaindermen. That, therefore, at the death of the tenant for life, the husbands of the devisees in remainder had a right to call for the whole insurance money, without any deduction for the value of the new house put on the premises by the tenant for life and left standing at her death.

Haxall's ex'ors v. Shippen and wife and others, 536

## II. Motion by Mutual assurance society.

2. What is part of the record on motion by M. A. society against assured, and what recovery is erroneous. See Mutual assurance society, and Skipwith &c. v. M. A. Society, 502

## INTEREST.

1. Interest allowed in equity beyond penalty of bond. See Lapse of time No. 4, and Baker v. Morris's adm'r, 285

733 \*2. It seems, that in an action of debt on a bond at law, the surplus interest beyond the penalty may be given in the form of damages. S. C., 285

3. Where surety in appeal bond has satisfied the

judgment affirmed, how far interest is to be allowed as a lien on debtor's land. See Judgment No. 2, and M'Clung v. Beltrne, 304, 5

4. What compromise between vendor and vendee as to allowance of interest upon payments should not be disturbed. See Compromise No. 2, and Shugart's adm'r v. Thompson's adm'r, 434

5. When interest will not be allowed on arrears of annuity given by will. See Annuity No. 2, and Adams's adm'r v. Adams's adm'r, 527

When interest upon interest cannot be claimed.

6. A debtor owing a debt consisting of principal and interest, it is agreed between him and his creditor, that he shall in the first place pay off the principal, and that the interest may for a time remain unpaid. The creditor, having received money from the debtor, applies it in satisfaction of the principal. Afterwards many years elapse without payment of the interest. HELD, the creditor is only entitled to the interest due at the time the principal was paid, and not to interest on that interest: there having been no agreement to pay interest on interest.

Pindall's ex'x &c. v. Bank of Marietta, 481

7. A commissioner's report shows a balance due from the defendant, consisting entirely of interest found due on an account never before settled, and states, that that balance of interest is to bear interest from a remote day: there is no exception to the report; and the court decrees the balance with interest accordingly: HELD, the decree was erroneous in giving interest upon the interest from a remote day: interest ought to be allowed only from the date of the final decree.

Dunbar's ex'ors v. Woodcock's ex'or, 629

## INTERLOCUTORY DECREE.

1. What decree is not final. See Decree No. 4, 5, 6, and Hill's ex'or v. Fox's adm'r, 587

Dunbar's ex'ors v. Woodcock's ex'or, 629

2. What is no ground for reversing interlocutory decree. See Affirmance No. 1, and Manns v. Flinn's adm'r,

## ISSUE OUT OF CHANCERY.

## I. Order directing issue.

1. A court of chancery directs issues of fact to be tried at law, without evidence regularly taken before the court, touching the facts to which the issues relate: but there was evidence, which, if regular, would have rendered the order for the issues proper: HELD, that if the appellate court should set aside the issues, for being, in the actual state of the case, improperly ordered, it should, under such circumstances, remand the cause to the court of chancery, where the evidence may be regularly taken, and thereupon the issues ordered anew.

Watkins and wife v. Carlton, 550

## II. What is comprised in certificate of verdict.

2. Upon a trial at law of issues out of chancery, exceptions are filed to opinions of the court, and made part of the record: the court of law certifies the verdict, but it does not expressly certify, nor is it asked to certify, the exceptions: HELD, all the proceedings upon the trial of the issues, spread upon the record thereof, constitute part of the certificate of the verdict, and with it become part of the chancery record. S. C., 550

## JOINT ACTION.

1. When proceedings to revive after death of one of several plaintiffs are improper. See Scire facias, and

Rose's adm'r v. Burgess, 186

2. What recovery is erroneous for misjoinder of defendants. See Mutual assurance society, and Skipwith &c. v. M. A. society, 503

## JUDGMENT.

## I. Effect as evidence.

1. Effect of judgment against sheriff for deputy's default, as evidence against deputy. See Sheriffs No. 2, and

Scott's adm'r v. Tankersley's ex'or, 581

733 \*II. Lien of judgment affirmed on lands of debtor; rights of surety in appeal bond; and rights of debtor's alienees.

2. A judgment was rendered the 8th of May 1838, for 148 dollars 63 cents damages, with interest and costs, and on the same day an appeal was allowed. The judgment being affirmed, damages were recovered against the appellant for retarding the

execution, and also costs in the appellate court. A fieri facias being than issued and returned nulla bona, the surety in the appeal bond paid \$62 dollars 64 cents in satisfaction of the judgment, and, within a year after the affirmance, filed a bill to charge real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance. **Held.**

1. The surety is to be substituted in the place of the judgment creditor, and to have the benefit of his lien.
2. The real estate aliened by the debtor between the date of the original judgment and the date of the judgment of affirmance, whether owned by him at the date of the original judgment or acquired afterwards, is subject to the lien.
3. The lien is not only for the damages, interest and costs recovered by the original judgment, but also for the damages and costs to which the creditor became entitled by the judgment of affirmance.
4. In adjusting the equities between the several alienees, the court will not compel them to contribute pro rata, but will first subject the land last aliened by the debtor, and if that be insufficient, then the land aliened next before the last, and so on.
5. If, however, any parcel of land had been conveyed in trust to secure a debt, and another parcel conveyed afterwards absolutely, the equity of redemption in the land conveyed in trust will be subjected before the land conveyed absolutely.
6. If none of the parties ask an enquiry to ascertain whether the rents and profits will pay the debt in a reasonable time, there may be a decree for the sale of the property.
7. In selling an equity of redemption, the sale will be out and out—not of a moiety only, but the whole; and as between lands aliened, the whole of the tract aliened last will be sold before any part of the tract aliened first; the sales stopping when the debt has been satisfied, or when lands have been sold equal to half the aggregate value of the whole lands.
8. In ascertaining the amount to be raised by a sale of the property, interest is not to be allowed on the sum of \$62 dollars 64 cents paid by the surety, but only on the original sum of 148 dollars 68 cents.

**STANARD, J.**, dissented on the 3d point, and also on the 4th, and such of the others as conflict with *Beverley v. Brooke et al.*, 2 Leigh 426. The other two judges disapproved that case, and treated it as not a binding authority.

*McClung v. Beirne*, 394, 5

### III. Limitation of suit on judgment.

3. Concerning the limitation of suit on judgment against a decedent, see *Executors and administrators No. 5, 6*, and

*Manns v. Flinn's adm'r*, 98

### JURISDICTION.

#### I. Of cause docketed by consent.

1. Parties may, by consent, make up the pleadings and issue in a case, and have it docketed in any court having jurisdiction to try such a case; and on the parties appearing before the court in which a case may be so docketed, and making no objection to the regularity of the docketing of it, that court may exercise jurisdiction over the case; and an objection to the jurisdiction of the court, made for the first time after the trial of the case and judgment therein, cannot be sustained. Per **STANARD, J.**

*McAlexander v. Hairston's ex'or*, 469

#### II. Of injunction causes.

2. When judge of a circuit court awarding injunction has no jurisdiction to hear and determine the cause. See *Circuit superior courts No. 1, 2*, and *Randolph's ex'or and other v. Tucker and another*, 655

#### III. General equitable jurisdiction.

3. Jurisdiction to decree payment by defendant adjudged a conditional vendee, on bill filed by his vendor to redeem. See *Conditional sale No. 2*, and *Moss v. Green*, 251
4. To decree sale of infant's land. See *Infant No. 1*, and

*Pierce's adm'r &c. v. Trigg's heirs*, 406  
734 To decree sale of land held as partnership \*stock, at instance of surviving partner. See *Partnership No. 1, 2, 3*, and

S. C., 406, 7

### JURORS.

#### I. Examination on voir dire.

1. A circuit court has the right and power, on the

trial of an indictment for felony, to compel a ventreman or bystander called to serve as a juror on the trial, to be sworn on his voir dire, and to answer proper questions touching his fitness as a juror in the particular case.

*Commonwealth v. Stockley*, 678

### II. Information for perjury.

2. What is a sufficient information for perjury committed by a juror on his voir dire. S. C., 678

### LACHES.

1. See *Heirs No. 4*, and *Lucketts v. Lucketts*, 50
2. See *Lapse of time*.

### LAND.

1. When and how far to be deemed partnership stock subject to control of surviving partner. See *Partnership*, and

*Pierce's adm'r &c. v. Trigg's heirs*, 406, 7

2. Concerning the conversion of land into money, see *Insurance No. 1*, *Will No. 7*, and

*Haxall's ex'ors v. Shippen and others*, 186

*Overton and wife v. Maben and wife and others*, 409

3. What is a mere charge on land, not a condition for breach of which the grantor may reenter. See *Conveyance No. 1*, and

*Pownal v. Taylor*, 173

4. What conveyance of land is valid and operative. See *Conveyance No. 2*, and S. C., 173

5. Cancellation of deed of gift of land. See *Cancellation*, and

*Graysons v. Richards*, 57

6. Lien of judgment affirmed on lands of debtor; rights of surety in the appeal bond; and rights of debtor's alienees. See *Judgment No. 2*, and

*McClung v. Beirne*, 394, 5

7. What is no ground to reverse interlocutory decree for sale of land. See *Affirmance No. 1*, and

*Manns v. Flinn's adm'r*, 98

8. Rights of purchaser under decree. See *Sale No. 6, 7, 8, 9*, and

*Taylor v. Cooper*, 317

9. See *Vendor and vendee No. 3, 4*, and

*Weaver v. Carter*, 37

### LAPSE OF TIME.

#### I. Discovery to repel presumption of payment.

1. See *Discovery No. 1*, and *Baker v. Morris's adm'r*, 364

#### II. When no bar of relief to bond creditor.

2. Testator bequeaths his daughter "all debts due him at his death from his several sons, by bonds, notes or other writings," among which is a bond from his son J. B. whom he appoints one of his executors; this bond is delivered in 1807 by the executors to the legatee, then sole; in 1808 she marries S. who dies in 1819; and in 1820 she marries M. and dies in 1833; the son and executor J. B. early and constantly denies his liability to pay the debt, and this is known to the legatee, and to both her husbands during her coverture; but no suit is ever brought or demand made on the bond till 1835, when a suit in equity is brought by M. as administrator of his deceased wife, against the obligor, to compel payment of the bond; in which the obligor is unable to shew any exemption from his liability to pay the debt: **Held**, upon the circumstances of the case, accounting for the long delay to prosecute the claim, the plaintiff is entitled to relief notwithstanding the delay.

*Baker v. Morris's adm'r*, 225

3. In such case, the fact of the legatee having been under the disability of coverture during so great a portion of the time, is a circumstance to account for and excuse the delay. S. C., 225

#### III. Extent of such relief.

4. Full interest is given on the bond, though it exceed the penalty. S. C., 225

### LARCENY.

- What receiver of stolen goods is a principal felon. See *Receiving stolen goods*, and *Smith v. Commonwealth*, 696

735

### \*LEGACY AND LEGATEE.

1. Admissibility of parol evidence to fill up description of legatee. See *Will No. 4*, and

*Maund's adm'r v. M'Phail*, 199

2. When annuities bequeathed in expectancy upon deaths of prior annuitants will become vested. See *Will No. 5*, and

*Catlett and wife v. Marshall and others*, 79



3. Effect of residuary bequest for life and in remainder. See Will No. 6, and  
Dunbar's ex'ors v. Woodcock's ex'or. 626
4. When interest will not be allowed on arrears of annuity given by will. See Annuity No. 2, and  
Adams's adm'r v. Adams's adm'r, 527

## LEGISLATURE.

## Privilege of members.

A member of assembly, by bill in equity, obtains an injunction, before the session of the assembly, to stay proceedings on an execution at law against his property; on a motion to dissolve the injunction, made during the session of the assembly, he objects that his privilege ought to prevent the court from any action in the case at that time; the court overrules the objection: *HOLD*, the objection was properly overruled.

Botts v. Tabb and others, 616

## LEGITIMACY.

## Evidence on issue to try legitimacy.

J. C. and S. his wife being both white persons, a child is born of the wife during their wedlock and cohabitation; upon the trial of an issue whether this child is the legitimate child of the husband, evidence that the child is a mulatto, and that in the course of nature a white man and white woman cannot procreate a mulatto, is admissible and proper.

Watkins and wife v. Carlton, 560

## LIEN.

1. Of vendor, for purchase money. See Mortgages and trusts No. 3, and  
Beverley v. Ellis & Allan and others, 1
2. Of judgment affirmed, on lands aliened by debtor. See Judgment No. 2, and  
McClung v. Belrne, 364, 5

## LIFE ESTATE.

1. Interest of residuary legatee for life. See Will No. 6, and  
Dunbar's ex'ors v. Woodcock's ex'or, 626
2. Interest of devisee for life of premises insured, in the insurance money, in case of destruction of the premises by fire. See Insurance No. 1, and  
Haxall's ex'ors v. Shippen and wife and others, 536

## LIMITATION OF SUITS.

1. What action by mortgagee against a purchaser under execution against mortgagor, is brought in due time. See Detinue, and  
Rose's adm'r v. Burgess, 186
2. Discovery of a new promise within the period of limitation may be compelled in equity. See Discovery No. 2, and  
Baker v. Morris's adm'r, 285
3. Limitation of suit on judgment against a decedent. See Executors and administrators No. 5, 6, and  
Manns v. Flinn's adm'r, 93
4. What decree is not within the 5th or 17th section of the statute of limitations. See Decree No. 4, and  
Hill's ex'or v. Fox's adm'r, 587
5. When lapse of time is no bar of relief in equity to bond creditor. See Lapse of time No. 2, 3, and  
Baker v. Morris's adm'r, 285

## LOAN.

1. What evidence is insufficient to prove a loan of slaves.  
Collins v. Loftus & Co., 5
2. According to the settled construction of the clause in the statute of frauds, concerning loans, a resumption of possession by the lender, or the recording a deed or will granting away the property to another within the five years, avoids the operation of the statute and puts an end to the loan. S. C., 5
3. What is a sufficient resumption of the possession of slaves loaned. S. C., 5
4. What possession by mortgagor will not render the property liable to his creditors, as against mortgagee. See Detinue, and  
Rose's adm'r v. Burgess, 186

## MAKER.

- Presentment and demand at the place specified in note are unnecessary to charge the maker. See Promissory note No. 2, 3, 4, and  
Armistead v. Armisteads, 512

## MARSHAL.

What assignment of breaches in debt on official

bond of marshal is defective in substance. See Declarations No. 4, and  
Maynard's ex'x v. M'Candlish and others, 116

## MILLS.

When leave to build a mill should be refused.

1. After a county court has granted leave to one applicant to build a mill, if application be made by another to build a mill lower down upon the same stream, and the party who first obtained leave shew that the dam for the second mill would be several feet higher than the fall between the two millseats, and would, if built, destroy the privilege previously granted to him, the court, in the exercise of a sound discretion, ought to refuse the second application.

Humes v. Shugart, 332

2. Though the leave first given to build a mill be granted while a prior application to build lower down upon the same stream is pending, yet if the order granting this privilege remain in full force, unreversed and not appealed from, and it be shewn that the privilege so granted would be destroyed by allowing the other, that other ought not to be granted. S. C., 332

## MISJOINDER.

What recovery is erroneous for misjoinder of defendants. See Mutual assurance society, and  
Skipwith & c. v. M. A. Society, 502

## MONEY.

1. When testator's direction to sell estate does not entitle widow to claim as if the whole were money. See Will No. 7, and  
Overton and wife v. Mabey and others, 609
2. Interest of devisees for life and in remainder, in insurance money accruing upon destruction of the premises devised. See Insurance No. 1, and  
Haxall's ex'ors v. Shippen and wife and others, 536

## MONEY HAD AND RECEIVED.

1. When assumpsit for money had and received will lie. See Sale No. 9, and  
Taylor v. Cooper, 317
2. When assumpsit will not lie, for the want of privity. See Revolutionary officers, and  
Burton's ex'or v. Burton's adm'r, 597

## MORTGAGES AND TRUSTS.

## I. What is a sale, not a mortgage.

1. See Conditional sale No. 1, and  
Moss v. Green, 251
2. See Sale No. 1, and  
Ransone v. Frayser's ex'ors, 592

II. Trust deed by vendee subject to vendor's lien.

3. Though the title under a deed of trust will be subordinate to that under a prior deed of bargain and sale from the same party, for the same land, duly recorded, yet if it appear that anterior to the deed of trust there was a resale by the bargainee to the bargainor, of which there is proper evidence in writing, equity will hold that the land passes by the deed of trust, subject only to the lien for the purchase money due upon the resale, and thus the rights of the parties will depend upon whether such purchase money has been paid or not.  
Beverley v. Ellis & Allan and others, 1

## III. Registry of trust deed.

4. What registry of deed of trust conveying personal chattels is valid against creditors of grantor. See Registry and  
Bryan v. Cole & c., 497

## IV. Conveyance by trustee.

5. What conveyance by a trustee is valid and operative to pass the land. See Conveyance No. 2, and  
Pownal v. Taylor, 173

## V. Assignment by cestui.

6. What assignment by the obligee of a voluntary bond secured by deed of trust is valid against the obligor. See Assignment No. 1, and  
Terrell v. Imboden and others, 321

VI. When purchaser of mortgaged property, though evicted, is without relief against mortgagee.

7. A negro man being conveyed by deeds of trust to secure debts amounting to more than his value, the grantor sells him, and the purchaser pays to one of the cestuaries trust part of the purchase money, and executes to the other his obligation for the residue, payable some months afterwards. The grantor makes to the purchaser a



bill of sale of the negro as a slave, and therein warrants and defends the title to him against the claims of all persons whatsoever. The cestuis que trust do not join in the bill of sale or warranty, but, by the arrangement, their liens on the negro are relinquished to the purchaser, and the payment made by him to one of the cestuis que trust, and the obligation executed by him to the other, discharge the grantor's debt to them pro tanto. It turns out that the negro so purchased is a free man; and judgment being obtained at law against the purchaser upon his obligation, an injunction is awarded him. **Held**, the purchaser can have no relief against the cestuis que trust, and the injunction is therefore dissolved, and the bill dismissed.

Findlay & Mitchell v. Hickman, 854

#### VII. Detinue by mortgagee.

8. What possession by mortgagor does not make the property liable to his creditors, as against mortgagee. See Detinue, and  
Rose's adm'r v. Burgess, 186

#### MOTION.

1. On forthcoming bond. See Forthcoming bond, and  
Spencer v. Pilcher, 490  
2. By Mutual assurance society against assured. See Mutual assurance society, and  
Skipwith &c. v. M. A. Society, 502  
3. By sheriff against deputy. See Sheriffs No. 2, 3, and  
Scott's adm'r v. Tankersley's ex'or, 581

#### MULTIPLICITY OF SUITS.

Equitable jurisdiction to decree payment by defendant adjudged a conditional vendee, on bill filed by his vendor to redeem. See Conditional sale No. 2, and  
Moss v. Green, 251

#### MUTUAL ASSURANCE SOCIETY.

##### Motion against assured.

The mutual assurance society move for judgment against two defendants, on a notice which is made part of the record, and shews that the motion is for quotas due the society per declarations numbered 1044, 778 and 1946. The defendants acknowledge legal notice of the motion, and the same is continued until the next term. At a subsequent term the plaintiffs obtain a judgment; the defendants "now failing to appear." The declarations of assurance referred to in the notice are filed by the plaintiffs, and copied by the clerk as part of the record for the appellate court. They shew that by the judgment, quotas which accrued after the property was insured by two persons, are recovered jointly against one of those persons and a former owner of the property. **Held**, 1. that the declarations of assurance constitute part of the record; and 2. that the judgment is thereby ascertained to be erroneous.

Skipwith &c. v. Mutual assurance society, 502

#### NEGOTIABLE NOTE.

When demand of payment at the place specified in the note is unnecessary. See Promissory note No. 2, 3, 4, and  
Armistead v. Armisteads, 512

#### NEW PROMISE.

Discovery of new promise within the period of limitation may be enforced in equity. See Discovery No. 2, and  
Baker v. Morris's adm'r, 286

#### NORTHWESTERN TURNPIKE.

An action will not lie against the president and directors of the northwestern turnpike road; the company being composed exclusively of officers of the government, having no personal interest in it, or in its concerns, and only acting as the organ of the commonwealth in effecting a great public improvement.

Sayre v. Northwestern turnpike road, 454

#### NOTE.

1. Declaration in assumpsit on a promissory note. See Assumpsit No. 2, and  
Jackson v. Jackson, 448

2. When demand of payment at place specified in note is unnecessary. See Promissory note No. 2, 3, 4, and  
Armistead v. Armisteads, 512

#### NOTICE.

Protection to purchaser without notice. See Purchaser No. 2, and  
Pierce's adm'r &c. v. Trigg's heirs, 407

#### NUISANCE.

When leave to build a mill should be refused on the ground of interference with privilege before granted to another. See Mills, and  
Humes v. Shugart, 332

#### OFFICERS.

1. What contract is void under the statute against buying and selling offices. See Sheriffs No. 1, and O'Rear's adm'r v. Kliger, 623  
2. What assignment of breaches in declaration on official bond of marshal is defective. See Declaration No. 4, and  
Maynard's ex'x v. McCandlish and others, 116

#### OUSTER.

Proof of actual ouster required, to maintain ejectment by tenant in common against cotenant. See Ejectment, and  
Taylor and others v. Hill, 457

#### PARENT AND CHILD.

See Cancellation—Gift No. 1,—and  
Graysons v. Richards, 57  
Collins v. Loftus & Co., 5

#### PAROL EVIDENCE.

Admissibility to fill up description of legatee. See Will No. 4, and  
Maud's adm'r v. M'Phail, 199

#### PARTIES TO SUITS.

1. In general, a cestui que trust is not bound by a decree rendered against his trustees, in a chancery suit to which the cestui que trust was no party.  
Collins v. Loftus & Co., 5

2. Necessity of making assignor a party to suit in equity by assignee. See Assignment No. 3, and  
Corbin v. Emmerson, 663

What objection for want of parties is untenable.

3. Eight years after the death of an intestate who had no child, his widow files a bill in equity to recover her moiety of his personal estate, without making any other distributee a party. The statement in the bill is, that to the other moiety the decedent's brother G. became entitled, he being his only relation by consanguinity in the United States, (for the decedent was a native of Ireland,) and the complainant has understood that the administrator fully satisfied and paid off the said G. his share of the estate, after which the said G. left this country, and either died, or, if living, it is not known in what part of the world he resides. The sureties of the administrator, in their answer to the bill, do not controvert this statement, nor is it objected that the necessary parties are not made, until after a decree in favour of the widow against the administrator and his sureties, when the decree is appealed from, and the objection made for the first time in the court of appeals. **Held**, the statement in the bill respecting the next of kin must be taken as true, and the objection is therefore untenable.

Moore's adm'r v. George's adm'r, 228

#### PARTNERSHIP.

I. When lands are to be deemed partnership stock, subject to control of surviving partner.

1. Where land is purchased by two partners for partnership purposes with partnership funds, and is used as a part of the stock in trade, a court of equity deems such land partnership property; and though, if the conveyance has been made to both partners, there will, upon the death of one, pass to his heirs a legal title, yet the whole beneficial interest devolves upon the survivor, and he may sue the heirs, compel a sale, and dispose of the proceeds as he would dispose of the personal estate of the firm. So  
739 held by **TUCKER, P.** and **CABELL, J.**—dissentiente **PARKER, J.**  
Pierce's adm'r &c. v. Trigg's heirs, 406

II. What decree for sale of partnership lands is binding on infant heirs of deceased partner.

2. A bill by a surviving partner against the heirs of a deceased partner, seeks a sale of lands purchased by the two partners, upon the ground that such sale will be for the benefit of all interested in the property; and a decree is accordingly made for the sale, reserving liberty to the heirs, who are infants, to shew cause against it within a certain time after they come of age. After the sale has been made and confirmed, and the purchasers under the decree have sold again, the infants attain full age, come forward within the time limited, and shew cause by an answer to the first bill, and by a

cross bill. The fact that the land was originally purchased for partnership purposes with partnership funds, though not the ground of the original decree, and not sufficiently appearing at that time, is now clearly ascertained from the bill, answers and cross bill. **Held**, that as this fact, if it had appeared to the court which made the decree of sale, would have been sufficient to authorize that decree, the same ought not now to be set aside. By **TUCKER, P.**, and **CABELL, J.**—dissentiente **PARKER, J.** S. C., 406

3. Upon a bill by a surviving partner against the infant heirs of a deceased partner, for the sale of partnership land, a decree for the sale being made, after the infants come of age they shew for cause against the decree, that the surviving partner was largely indebted to the firm. Per **TUCKER, P.**—the fact does not appear, and if it had appeared at the date of the decree, it could not have arrested the sale, but would only have arrested the funds. S. C., 407

**III. How relief will be given where such sale was made subject to incumbrances.**

4. A sale being made, under a decree, of partnership lands, the title to a moiety whereof was in the infant children of the deceased partner, they, upon coming of age, under the liberty reserved to them, shew cause against the decree, and seek to set the sale aside. This the court refuses to do. But inasmuch as the sale was made subject to the claims to dower of one widow who had no title thereto, and of another who does not appear ever to have asserted a title, and as thereby the property may have been sold for less than it would have brought if sold free of incumbrances, **Held**, that proceedings should be instituted to ascertain the true value of the property at the date of the sale, if the same had been sold free of all incumbrances, on the credit allowed by the decree; and that one half the excess, if any, over and above the price for which it was then sold, be decreed to be paid into court to the credit of the personal representative of the deceased partner, and if not paid by a short day, that it be made chargeable upon the property. S. C., 407

#### PAUPER SUITS.

See Emancipation.

#### PAYMENT.

1. How presumption of payment may be rebutted. See *Discovery No. 1*; *Lapse of time No. 2, 3, and Baker v. Morris's adm'r*, 284, 5
2. Effect of the application of payments to principal instead of interest. See *Interest No. 6, and Pindall's ex'r &c. v. Bank of Marletta*, 481

#### PENALTY.

Allowance of interest beyond penalty of bond. See *Lapse of time No. 4*; *Interest No. 2, and Baker v. Morris's adm'r*, 285

#### PENSIONERS.

What is money belonging to the widow, not the executor, of deceased revolutionary officer. See *Revolutionary officers, and Burton's ex'r v. Burton's adm'r*, 507

#### PERJURY.

What is a sufficient information for perjury committed by a juror on his voir dire. *Commonwealth v. Stockley*, 678

#### PERSONALTY.

1. When testator's direction to sell estate does not entitle widow to claim \*as if the whole were money. See *Will No. 7, and Overton and wife v. Maben and others*, 600
2. When insurance money accruing for real property destroyed is to be deemed personal estate. See *Insurance No. 1, and Haxall's ex'ors v. Shippen and wife and others*, 536
3. Construction and effect of residuary bequest for life and in remainder. See *Will No. 6, and Dunbar's ex'ors v. Woodcock's ex'r*, 628
4. What registry of deed of trust conveying personal chattels is valid against creditors of grantor. See *Registry, and Bryan v. Cole &c.*, 497

#### PLEADING.

##### I. Declaration.

1. What count is not in tort, but a good count in assumpsit. See *Assumpsit No. 1, and Hoppes v. Straw*, 348
2. Whether declaration in assumpsit on promise

sory note must aver a consideration? See *Assumpsit No. 2, and*

- Jackson v. Jackson*, 448
3. Declaration against maker of note payable at a specified place. See *Promissory note No. 3, 4, and Armistead v. Armisteads*, 512
4. What assignment of breach in action on official bond of marshal is defective. See *Declaration No. 4, and*

*Maynard's ex'x v. M'Candlish and others*, 116

##### II. Indictments &c.

5. What is no ground of motion to quash or plea in abatement. See *Prosecutor, and Commonwealth v. Dever*, 685
6. What indictment for harbouring and employing a free negro is sufficient. *Fisher v. Commonwealth*, 673
7. What is a sufficient information for perjury committed by a juror on his voir dire. *Commonwealth v. Stockley*, 678
8. What presentment for gaming is bad in substance. See *Gaming, and Roberts and another v. Commonwealth*, 686

##### III. Admission in pleading.

9. What statement in bill in chancery must be taken as admitted. See *Parties to suits No. 3, and Moore's adm'r v. George's adm'r*, 238

#### POSSESSION.

1. What possession by mortgagee will not render the property liable to his creditors, as against mortgagee. See *Detinue, and Rose's adm'r v. Burgess*, 186
2. What is a sufficient resumption of the possession of slaves loaned. *Collins v. Loftus & Co.*, 5
3. What possession of land will not prevent the operation of trustee's conveyance. See *Conveyance No. 3, and Pownall v. Taylor*, 173

#### PRACTICE IN ACTIONS AT LAW.

1. Jurisdiction of cause docketed by consent. See *Jurisdiction No. 1, and M'Alexander v. Hairston's ex'or*, 486
2. Proceedings where cause is remanded to rules for amended declaration. See *Amendment, and Couch v. Fretwell's adm'r*, 578
3. When revival after death of one of several plaintiffs is improper. See *Scire facias, and Rose's adm'r v. Burgess*, 186
4. What refusal of continuance is erroneous. See *Continuance No. 1, and M'Alexander v. Hairston's ex'or*, 486
5. Effect of common rule in ejectment by tenant in common against cotenant. See *Ejectment No. 2, and Taylor and others v. Hill*, 457
6. Effect of supersedeas to original judgment, on the right to move upon forthcoming bond. See *Forthcoming bond No. 2, and Spencer v. Pilcher*, 490
7. What objection will not avail in appellate court, though appearing by bill of exceptions. See *Appellate jurisdiction No. 3, and Rose's adm'r v. Burgess*, 186

#### PRACTICE IN CRIMINAL CAUSES.

See *Indictments, informations and presentments*.

#### PRACTICE IN SUITS IN EQUITY.

1. On bill to impeach settled account. See *Account No. 1, 2, and Shugart's adm'r v. Thompson's adm'r*, 434
2. What is no ground of delaying decree for creditor against debtor. See *Decree No. 1, and Moore's adm'r v. George's adm'r*, 228
3. What objection for want of parties is untenable. See *Parties to suits No. 3, and S. C.*, 228
4. In general, a cestui que trust is not bound by a decree rendered against his trustees, in a chancery suit to which the cestui que trust was no party. *Collins v. Loftus & Co.*, 5
5. Propriety of order directing issue at law. See *Issue out of chancery No. 1, and Watkins and wife v. Carlton*, 560
6. What is comprised in certificate of verdict on issue out of chancery. See *Issue out of chancery No. 2, and S. C.*, 560
7. What decree does not preclude new evidence on a question of fact thereby decided. See *Decree No. 5, and Dunbar's ex'ors v. Woodcock's ex'or*, 629

8. What discovery may be compelled in equity. See Discovery, and Baker v. Morris's adm'r. 384, 5
9. How absent debtor must proceed to obtain relief against decree in foreign attachment. See Foreign attachment, and Platt v. Howland. 507
10. Mode of relief where sale made subject to incumbrances is not set aside. See Partnership No. 4, and Pierce's adm'r & c. v. Trigg's heirs. 407
11. What is no ground to reverse interlocutory decree for sale of land. See Affirmance No. 1, and Manns v. Flinn's adm'r. 98
12. What decree will be reversed though founded on an account reported by commissioner to which there was no exception. See Interest No. 7, and Dunbar's ex'ors v. Woodcock's ex'or. 630

## PRESENTATION.

When demand of payment at place specified in note is unnecessary. See Promissory note No. 3, 4, and

Armistead v. Armisteads. 512

## PRESENTMENTS.

See Indictments & c.

## PRESUMPTION.

1. What discovery may be compelled in order to rebut presumption of payment. See Discovery No. 1, and Baker v. Morris's adm'r. 384

2. Circumstances to account for delay in prosecuting claim on bond. See Lapse of time No. 2, 3, and S. C., 285

## PRINCIPAL AND ACCESSORY.

What receiver of stolen goods is a principal felon, not an accessory. See Receiving stolen goods, and Smith v. Commonwealth. 695

## PRINCIPAL AND AGENT.

What purchase by agent, for his own benefit, will not be sustained against principal. See Fraudulent alienations No. 2, and Gibbons v. Jackson. 364

## PRINCIPAL AND SURETY.

## I. Decree against debtor and sureties.

1. What is no ground of delaying decree for creditor against debtor and sureties. See Decree No. 1, and Moore's adm'r v. George's adm'r. 338

## II. When indemnity provided for surety will not avail creditor.

2. Several persons being bound as sureties for M. in bonds, and others being indorsers of notes for his accommodation at different banks, which notes had come to maturity and been protested for non-payment, M. by deed of trust mortgages property to be sold and applied to the indemnification of each and all of the sureties and indorsers, without preference of any over the others, in case they should sustain loss by reason of their suretieships and indorsements; the indorsers of a note held by one of the banks are discharged from liability by the laches of the bank or otherwise, so that the indorsers of this note are never damaged: while other sureties and indorsers are damaged: upon a bill in equity filed by this bank for participation in the trust fund with the sureties and indorsers who had sustained damage. HELD, the bank could only claim to be subrogated to the rights of the indorsers of the note which it held; and these having sustained no damage, and so having no claim to participate in the trust fund themselves, therefore the bank has no claim to participate in it.

Hopewell and others v. Cumberland bank. 306

## III. Application of fund provided for sureties, where one of them has further security.

3. The principal in a bond, to indemnify his sureties therein, assigns a claim to a trustee, in 743 trust that he "shall collect the amount and apply the proceeds to the discharge of the bond. Before this claim is collected, suit is brought upon the bond, and the sureties contribute ratably to its payment. One of the sureties obtains a decree against the principal for what he pays, and upon this decree sues out a ca. sa. which being executed on the principal, he enters into a bounds bond with sureties, and afterwards breaks the condition, whereby the sureties in that bond become liable. The claim assigned to the trustee being afterwards collected by him, the court of chancery

allows the sureties in the bounds bond to participate in this trust fund, in the event of their having made payment. HELD by the court of appeals, that this is erroneous; that the surety who obtained the security of the bounds bond, was bound to proceed thereon against the sureties in the same, and could only come upon the trust fund for any deficiency in his recovery from them; and that the sureties in the bounds bond could have no right to resort to the trust fund for their reimbursement, except to the extent of any surplus that might remain after the full indemnification of the original sureties.

Givens and others v. Nelson's ex'or and others. 383

## IV. Surety in appeal bond.

4. Rights of surety in appeal bond who has satisfied the judgment after affirmance. See Judgment No. 2, and M'Clung v. Beirne. 394, 5

## PRIVILEGE.

1. Of a member of assembly. See Legislature, and Botts v. Tabb and others. 616

2. When leave to build a mill should be refused on the ground of interference with a subsisting privilege. See Mills, and Humes v. Shugart. 332

## PRIVILEGED COMMUNICATION.

See Attorney and client, and Lyle v. Higginbotham. 68

## PROBAT.

See Will No. 1, 2, 3, and Rochelle v. Rochelle. 125

Clarke and others v. Dunnavant. 13

## PROMISE.

See Assumpsit.

## PROMISSORY NOTE.

## I. Declaration in assumpsit.

1. Whether a consideration must be averred in assumpsit on a promissory note? See Assumpsit No. 2, and Jackson v. Jackson. 448

## II. When demand at place specified is unnecessary.

2. The decision of the house of lords in Rowe v. Young, 2 Brod. & Bing. 166, 6 Eng. Com. Law Rep. 58-2 Bligh 391, examined and disproved.

Armistead v. Armisteads. 512

3. In debt against the makers of a promissory note (made in Virginia) negotiable and payable at the United States branch bank at Washington city, the first count of the declaration, after describing the note, averred that the same was duly presented at the bank, and payment there required. At the trial, there being no proof of a demand of payment at the bank, the circuit court instructed the jury that the plaintiff could not recover on this count. The second count of the same declaration merely set forth the note, without any averment of presentment at the place; and the defendants having demurred thereto, the circuit court sustained the demurrer. HELD, the circuit court erred in sustaining the demurrer, and also in its instruction to the jury. S. C., 512

4. This decision does not embrace the case of a note or obligation payable, in terms, on demand at a particular place, without specification of time, or payable, in terms, on demand at a particular place, after the lapse of a specified time. In such cases, it would probably be held that there is no default of the maker or acceptor until such demand be made, and consequently that no action would accrue to the payee until such demand should be made. Per STANARD, J. S. C., 513

## PROSECUTOR.

The omission to write the title or profession of the prosecutor at the foot of an information or indictment, is no ground of exception, either by motion to quash or plea in abatement. Commonwealth v. Dever. 665

## \*PURCHASER.

## I. Fraudulent purchase.

1. What purchase is invalid for the fraud of the purchaser. See Fraudulent alienations No. 2, and Gibbons v. Jackson. 364

## II. Protection to purchaser without notice.

2. A sale being made under a decree, the deed from the commissioner to the purchaser recites the de-

cree. and the cause in which it was made, and also the fact of the purchase money not being payable at the time of making the deed. The proceedings in that cause shew, that when the court confirmed the sale by the commissioner, it directed the bond to be filed subject to the future order of the court, but instead of retaining the title to the land until the purchase money should be paid, it directed the commissioner to convey the land to the purchaser. The proceedings do not shew that any order was ever made by the court for delivering up the bond; but the fact appears to be that the clerk, without such order, delivered it up, on a receipt being filed for the amount thereof. This receipt was given by a person in his own right, as to part, and in right of certain infants for whom he was guardian, as to the residue. When the infants come of age, their guardian and his sureties are insolvent. The infants allege that though the receipt was given, no money was in fact paid, and for their proportion of the purchase money they seek to charge the property in the hands of a defendant who obtained title from the person to whom the commissioner conveyed the property. The defendant claims to be a purchaser for valuable consideration without notice; and there is no proof that if the money had not been paid, the defendant knew that fact when he purchased. **Held** by two judges, that the defendant is not responsible for the purchase money. *Pierce's adm'r &c. v. Trigg's heirs*, 407

### III. Purchaser of mortgaged property.

3. When purchaser of mortgaged property is without relief against mortgagee notwithstanding eviction. See *Mortgages and trusts No. 7*, and *Findlay & Mitchell v. Hickman*, 354

### IV. Purchasers from judgment debtor.

4. How lands aliened by judgment debtor to several and successive purchasers will be subjected in equity to the debt. See *Judgment No. 2*, and *McClung v. Beirne*, 394, 5

### V. Purchaser under decree.

5. Rights of a purchaser under decree of sale. See *Sale No. 6, 7, 8, 9*, and *Taylor v. Cooper*, 317

### VI. Refusal of compensation.

6. What deficiency in the quantity of land purchased by survey will not entitle the purchaser to compensation. See *Vendor and vendee No. 4*, and *Weaver v. Carter*, 37

### REALTY.

When insurance money accruing for real property destroyed is to be deemed personal estate. See *Insurance No. 1*, and

*Haxall's ex'ors v. Shippen and wife and others*, 536

### RECEIVING STOLEN GOODS.

Under the statute of March 15, 1832 (Supp. to Rev Code, ch. 187, § 10,) a white person, free negro or mulatto, knowingly receiving stolen goods from a slave, free negro or mulatto, is a principal felon, not an accessory, and so the record of conviction of the actual thief is not admissible evidence against him.

*Smith v. Commonwealth*, 606

### RECORD.

1. What is part of record on motion of the mutual assurance society against assured. See *Mutual assurance society*, and

*Skipwith &c. v. M. A. Society*, 503

2. What is comprised in certificate of verdict on issue out of chancery. See *Issue out of chancery No. 2*, and

*Watkins and wife v. Carlton*, 560

3. Registry of deed. See next title.

### REGISTRY.

Of deed conveying personal chattels.

744 A deed of trust conveying personal \*chattels is recorded in the court of the county in which the property is at the time of making the deed. Afterwards the grantor, who has the property in possession, is permitted to remove with the same out of that county, and there is a failure, for more than twelve months after such removal, to cause the deed to be delivered to the clerk of the court of the county into which the grantor has so removed. Whereupon an action is brought against the grantor by one of his creditors. The deed is then delivered to the clerk of the court of the county into which the grantor has removed, and

is there recorded, before an execution against the grantor's chattels is delivered to the sheriff, and indeed before the grantor's creditor obtains judgment. **Held**, the deed is valid against the creditor.

*Bryan v. Cole &c.*, 407

### REHEARING.

1. What defendant must proceed by petition for rehearing, and not by appeal. See *Foreign attachment No. 1*, and

*Platt v. Howland*, 507

2. When unnecessary to obtain rehearing, in order to warrant introduction of new evidence on a question of fact. See *Decree No. 5*, and

*Dunbar's ex'ors v. Woodcock's ex'or*, 629

### RELEASE.

Mortgagee's release to purchaser of mortgaged property does not imply a warranty of the title. See *Mortgages and trusts No. 7*, and

*Findlay & Mitchell v. Hickman*, 354

### REMAINDER.

1. Effect of a bequest of the residuum of personality in remainder after a life estate. See *Will No. 6*, and

*Dunbar's ex'ors v. Woodcock's ex'or*, 628

2. Interest of devisees in remainder after a life estate, in insurance money accruing upon destruction of the premises devised. See *Insurance No. 1*, and

*Haxall's ex'ors v. Shippen and wife and others*, 536

### RENTS AND PROFITS.

1. When decree providing for satisfaction of debt by a sale of land, and not out of the rents and profits, is proper. See *Judgment No. 2*; *Affirmance No. 1*, and

*McClung v. Beirne*, 394, 5

*Manns v. Filinn's adm'r*, 93

2. From what period a purchaser under decree is entitled to the rent. See *Sale No. 8*, and

*Taylor v. Cooper*, 317

### RESIDUARY BEQUEST.

Effect of a bequest of the residuum of personality to one for life, with remainder to another. See *Will No. 6*, and

*Dunbar's ex'ors v. Woodcock's ex'or*, 628

### REVIEW.

When unnecessary to obtain review, to warrant introduction of new evidence on question of fact. See *Decree No. 5*, and

*Dunbar's ex'ors v. Woodcock's ex'or*, 629

### REVIVAL OF SUIT.

When improper.

Pending an action of detinue at the suit of four plaintiffs, one of them dies, and a scire facias is awarded to revive the action in name of his executor: **Held**, the scire facias was improvidently awarded.

*Rose's adm'r v. Burgess*, 186

### REVOCATION.

What is only a partial revocation of devise. See *Will No. 8*, and

*Dawson v. Dawson's ex'or and others*, 602

### REVOLUTIONARY OFFICERS.

What is money belonging to officer's widow.

The executor of the deceased officer, and his widow, prefer conflicting claims at the treasury of the U. States, for the arrears of pay accrued to the officer during his life, under the act of congress of May 15, 1828, "for the relief of certain surviving officers and soldiers of the revolution:" the officers of the treasury reject the claim of the executor, and pay the money to the widow. **Held**, even if the payment to the widow was wrong, the executor cannot maintain an action for the money 745 against her, as money had \*and received by her to his use, there being no privity between them; his remedy is against the treasury.

But the executor of the officer has no right to claim of the treasury such arrears of pay accrued to his testator during his life.

*Burton's ex'or v. Burton's adm'r*, 597

### RULES IN CLERK'S OFFICE.

Proceedings where cause is remanded to rules for amended declaration to be filed. See *Amendment*, and

*Couch v. Fretwell's adm'r*, 578

## SALE.

## I. What is a sale, not a mortgage.

1. Upon a bill in chancery representing an absolute bill of sale of slaves as in fact a mortgage or pawn to secure payment of money lent, the case was, according to the plaintiff's pretensions, that while he was to retain possession of the property, there was no time appointed for payment of the money, nor any stipulation for payment of interest, nor any bond or note taken for the debt, so that the borrower had time during his whole life to pay the money: HELD, such circumstances, added to the absolute form of the written contract, would alone suffice to shew that a mortgage was not intended.

Ransone v. Frayser's ex'ors, 593

2. See Conditional sale No. 1, and Moss v. Green, 251

## II. Validity of contract.

3. What sale is invalid against vendor, for the fraud of vendee. See Fraudulent alienations No. 2, and

Gibbons v. Jackson, 364

4. What contract is void under statute against buying and selling offices. See Sheriffs No. 1, and O'Rear's adm'r &c. v. Kiger, 623

5. Protection to purchaser without notice. See Purchaser No. 2, and

Pierce's adm'r &c. v. Trigg's heirs, 407

## III. Rights of purchaser under decree.

6. Where a sale is made under a decree, if, before it is confirmed, the value of the property be materially increased or diminished, the purchaser, under the english practice, has neither the benefit in the one case, nor the burthen in the other: per TUCKER, P.

Taylor v. Cooper, 317

7. After the sale is confirmed, the confirmation relates back to the sale, and the purchaser is entitled to every thing he would have been entitled to, had the confirmation and conveyance been contemporaneous with the sale. S. C., 317

8. On the 30th of October 1834, a decree was made for the sale of a tract of land, on a credit of six, twelve and eighteen months. Before the decree, there had been a contract to rent the land, and pursuant to that contract a lease was made for a year, commencing the 25th of December 1834 and ending the 25th of December 1835. During this year, to wit, on the 10th of January 1835, sale was made under the decree. That sale being confirmed and a conveyance executed to the purchaser, HELD, the purchaser must be considered complete owner from the date of the sale, and entitled to the rent which became due afterwards. S. C., 317

9. In such case, if the rent has been paid to the representative of the former owner, the purchaser may recover it from him by an action of assumpsit for money had and received. S. C., 317

## IV. Decree for the sale of land.

10. What decree for the sale of partnership lands is binding, and how far, on the heirs of deceased partner. See Partnership, and

Pierce's adm'r &c. v. Trigg's heirs, 406, 7

11. Decree subjecting lands aliened by judgment debtor. See Judgment No. 2, and

M'Clung v. Beirne, 394, 5

12. What is no ground to reverse interlocutory decree for the sale of land to satisfy a debt. See Affirmance No. 1, and

Manns v. Flinn's adm'r, 93

## V. Sale and purchase by survey.

13. What deficiency in the quantity of land sold by survey will not entitle the purchaser to compensation. See Vendor and vendee No. 4, and Weaver v. Carter, 87

## SAVINGS INSTITUTIONS.

See Unchartered banking, and Commonwealth v. Horner, 700

## \*SCIRE FACIAS.

Pending an action of detinue at the suit of four plaintiffs, one of them dies, and a scire facias is awarded to revive the action in the name of his executor: HELD, the scire facias was improvidently awarded.

Rose's adm'r v. Burgess, 186

## SHERIFFS.

## I. What contract for deputation of office is void.

1. O.R. a justice of the peace, expecting to be appointed to the shrievalty of his county at a future

time, covenants, for a sum in gross to be paid him by K. to appoint K. his deputy of the whole office, when and in case he himself shall be appointed sheriff in the order in which he stands on the list of justices for the county; he is afterwards so appointed; and then refuses to appoint K. his deputy according to the covenant: in an action by K. against O.R. for breach of the covenant, HELD, the contract was contrary to the statute against buying and selling offices, and therefore void.

O'Rear's adm'r's v. Kiger, 623

## II. Motion by sheriff against deputy.

2. A decree is rendered against the administrator of a sheriff, for the default of the sheriff's deputy in not returning an execution; and thereupon a motion is made by the administrator of the sheriff against the executor of the deputy. At the hearing of the motion, evidence is offered to shew that the motion against the sheriff's administrator was not within ten years from the return day of the execution. But it appearing that the executor of the deputy had notice from the administrator of the sheriff to defend the motion against the said administrator, and promised to attend to it, HELD, the sheriff's administrator is entitled to judgment against the deputy's executor.

Scott's adm'r v. Tankersley's ex'or, 581

3. The decree against the sheriff's administrator being for \$76. 6. 7. with interest on \$45. 11. from the 19th of May 1827, till paid, and 22 dollars, and the same being satisfied by the payment of \$33 dollars 44 cents on the 19th of May 1830, the sheriff's administrator, on his motion against the deputy's executor, will not obtain a judgment for the \$23 dollars 44 cents with interest from the 19th of May 1830, but merely for the amount of the decree against him, to wit, the \$76. 6. 7. with interest on \$45. 11. from the 19th of May 1827, and 22 dollars. Accord. Stowers adm'r of Bragg v. Smith's ex'r, 5 Munf. 401, and Jacobs v. Hill and others, 2 Leigh 393.

S. C., 581

## SLANDER.

## I. Evidence to prove defendant's malice.

1. In an action for slander, in which the pleas were not guilty and not guilty within one year, the plaintiff, after proving that the words in the declaration mentioned were spoken by the defendant within a year prior to the institution of the suit, offered evidence to prove the speaking by the defendant of the same and like words more than a year before the suit was instituted, and, on some occasions, several years prior thereto: HELD, the evidence so offered was admissible for the purpose of shewing the defendant's malice towards the plaintiff.

Lincoln v. Chrisman, 338

## II. Evidence of plaintiff's character.

2. In an action for slander in imputing perjury to the plaintiff, after the plaintiff had proved that the defendant had spoken the words mentioned in the declaration, he asked a witness introduced by him for the purpose, what was his the plaintiff's general character, when on oath and when not on oath, as a man of truth? and the witness answered the question favourably to the plaintiff. The defendant's counsel then, in cross-examining the witness, asked him what was the plaintiff's general moral character? and the plaintiff objected to the question. HELD, the question ought to be answered, because it was asked on a cross-examination, and also because the answer might furnish evidence in mitigation of damages. S. C., 338

## SLAVES, FREE NEGROES AND MULATTOES.

1. What issue of a freedwoman is not \*entitled to freedom. See Emancipation No. 1, 2, and

Crawford v. Moses, 277

2. When emancipated slave levied on for debt of former owner may be discharged on habeas corpus. See Emancipation No. 3, 4, and

Ruddle's ex'or v. Ben, 467

3. A slave born in this state, having been removed therefrom, and in 1798 brought back thereto, brings a suit in 1828 to recover her freedom, to which, by the judgment of the court of appeals rendered in 1833, she is held entitled, because imported in contravention of the statute of 1793, 1 Old Rev. Code, ch. 103, § 2. In 1840, a presentment is made against her, as a person emancipated since the first day of May 1806, and unlawfully remaining in the commonwealth more than twelve months after her title to freedom had accrued and after she had attained the age of twenty-one years: HELD, no information ought to be ordered to be filed upon the presentment.

Commonwealth v. Pleasant, 607

4. Quere, whether a person of colour so obtaining freedom is at liberty to remain in the commonwealth? S. C., 697
5. Under the statute 1 Rev. Code, ch. 75, § 5, an indictment for employing or harbouring a free negro or mulatto, contrary to the statute Id. ch. 111, § 75, is a regular proceeding. Fisher v. Commonwealth, 673
6. What is a sufficient indictment for such offence. S. C., 673
7. What receiver from a slave, free negro or mulatto is a principal felon. See Receiving stolen goods, and Smith v. Commonwealth, 695

## SPECIALTY.

1. Discovery to repel presumption of payment. See Discovery No. 1, and Baker v. Morris's adm'r, 284
2. When lapse of time is no bar to relief in equity. See Lapse of time No. 2, 3, and S. C., 285

## SPECIAL VERDICT.

- I. In ejectment by tenant in common against cotenant.

1. See Ejectment, and Taylor and others v. Hill, 457

## II. When aided by clerk's certificate.

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## SPECIFIC EXECUTION.

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3. Same chapter, § 108, p. 216 of 1 R. C. declaring what depositions may be read at the hearing of a chancery cause, cited. Dunbar's ex'ors v. Woodcock's ex'or, 648

4. Supp. to R. C. ch. 108, § 9, p. 132, allowing depositions to be taken without any order of court, from the filing of the bill until the final hearing, construed—and quære as to further construction? S. C., 629

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6. Supp. to R. C. ch. 109, § 38, p. 151, allowing suit in chancery to be brought in circuit superior court of county or corporation wherein either of the defendants may reside, cited. S. C., 661

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8. Same chapter, § 68, p. 161, authorizing examination of a party upon interrogatories in action at law, cited.

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9. Ch. 75, § 5, p. 265 of 1 R. C. declaring what offences may be presented by grand juries in circuit courts, construed. Fisher v. Commonwealth, 673

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10. Ch. 96, § 20, p. 358 of 1 R. C. authorizing courts of chancery, in certain cases, to direct sale of lands descended where any one of the heirs is an infant, cited. Pierce's adm'r & c. v. Trigg's heirs, 419

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13. Same chapter, § 11, p. 364 of 1 R. C. concerning the registry of deeds conveying personal chattels, cited and construed. Bryan v. Cole & c., 497, 499

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15. Ch. 101, § 1, p. 372 of 1 R. C. declaring certain promises not binding unless made in writing, construed. Collins's adm'r v. Row, 114

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21. Same chapter, § 35, p. 383 of 1 R. C. prescribing the form of administrator's bond, cited. Manns v. Flinn's adm'r, 99

22. Same chapter, § 47, p. 387 of 1 R. C. directing executors and administrators \*to sell decedent's perishable goods, cited. Dunbar's ex'ors v. Woodcock's ex'or, 645

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29. Same chapter, § 54, providing that emancipated slaves shall be liable to execution for debt of owner contracted before emancipation, cited.

Ruddle's ex'or v. Beu, 473, 6

30. Same chapter, § 61, p. 436 of 1 R. C. declaring that emancipated slaves remaining in the commonwealth more than twelve months after their right to freedom accrued shall forfeit such right, cited.

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32. Statute of 1792, 1 Old Rev. Code, ch. 103, § 2, p. 186 of Pleasants's ed. declaring that slaves thereafter brought into the commonwealth should be free, cited.

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33. Ch. 111, § 74, p. 440 of 1 R. C. requiring free negroes to have their certificates registered in the counties where they reside, cited.

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34. Same chapter, § 75, imposing a penalty for employing or harbouring a free negro going at large or hiring himself out contrary to law, construed.

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36. Ch. 123, § 4, p. 488 of 1 R. C. prescribing limitation of the action of detinue, cited.

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38. Same chapter, § 17, p. 492 of 1 R. C. limiting debt or scire facias against personal representative on judgment against decedent, construed.

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40. Ch. 148, § 1, p. 571 of 1 R. C. defining and punishing perjury, cited and construed.

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42. Same chapter, § 65, p. 614 of 1 R. C. prescribing the mode of proceeding on presentment in circuit court where penalty exceeds not twenty dollars, cited.

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43. Acts of 1831-2, ch. 22, Supp. to Rev. Code, ch. 187, § 10, p. 248, enacting that certain receivers of stolen goods shall be adjudged guilty of larceny, cited and construed.

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#### XV. Banking companies.

750 44. Ch. 208, § 1, p. 111 of 2 R. C. for suppression of unchartered banking, cited and construed.

Commonwealth v. Horner, 700, 709

45. Acts of 1831-2, ch. 79, p. 69, Supp. to Rev. Code, ch. 315, p. 385, authorizing savings institutions to receive money on deposit and to discount notes or other paper, cited.

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46. Acts of 1838, ch. 108, § 3, 4, 5, p. 83, 84, prescribing general regulations for savings institutions, societies or banks to be thereafter incorporated, cited.

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3. In general, a cestui que trust is not bound by a decree rendered against his trustees, in a chancery suit to which the cestui que trust was no party.

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4. See Mortgages and trusts.

#### UNCHARTERED BANKING.

What acts of an incorporated savings institution will amount to an illegal issuing and circulating of securities for the payment of money, in a county other than that wherein the institution is located, so that a member of the institution may be prosecuted in such other county, as for a misdemeanour, under the statute of February 24, 1816, 2 Rev. Code, ch. 208, § 1.

Commonwealth v. Horner, 700

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I. Construction of contract.

1. What is an absolute sale, not a mortgage. See Sale No. 1, and

Ransone v. Frayser's ex'ors, 592

2. What is not a mortgage but a conditional sale. See Conditional sale No. 1, and

Moss v. Green, 251

3. By written articles, A. agrees to sell and B. to purchase a tract of land, "bounded as expressed in the survey made by C. K. and estimated by the said C. K. at 1022½ acres;" for which B. is to pay 25568 dollars 75 cents. This price is the exact result of the specified number of acres at 25 dollars per acre. Yet HELD, upon the evidence, that the contract was for the sale and purchase of the land in gross, and not by the acre.

Weaver v. Carter, 87

II. Allowance for inaccuracy of survey.

4. After a sale and purchase of land by the acre, a survey made shewing 995 acres, and the contract executed by conveyance and payment according to the survey, a bill is filed alleging the quantity of the land to be but 974 acres, and another survey being made, the quantity appears thereby to be a few acres less than 995. HELD, nevertheless, that equity will not decree compensation to the vendee; some allowance being reasonable for the inaccuracy inherent in the process of surveying.

Weaver v. Carter, 87



## III. Lien for purchase money.

5. See Mortgages and trusts No. 3, and  
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## IV. Validity of contract.

6. What agreement between vendor and vendee as to allowance of interest on payments should not be disturbed. See Compromise No. 2, and Shugart's adm'r v. Thompson's adm'r, 484  
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## V. Purchaser of mortgaged property.

9. When purchaser of mortgaged property is without relief against mortgagee notwithstanding eviction. See Mortgages and trusts No. 7, and Findlay & Mitchell v. Hickman, 354

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10. How lands aliened by judgment debtor will be subjected in equity to satisfaction of the judgment. See Judgment No. 2, and  
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1. Power of court, on trial for felony, to examine jurors on voir dire. See Jurors No. 1, and Commonwealth v. Stockley, 678  
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## WARRANTY.

- When an evicted purchaser of mortgaged slave has no claim against the mortgagee on the ground of implied warranty of title. See Mortgages and trusts No. 7, and  
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## WIDOW.

- What direction of testator to sell estate does not entitle widow to claim as if the whole were money. See Will No. 7, and  
Overton and wife v. Maben and others, 609

## WILL.

- I. What instrument will be rejected by probate court.

1. Before the statute of March 4, 1835 went into operation, a decedent, being attended in his last illness by a scrivener whom he had requested to write his will, told him that he did not wish him to write the will at that time, but desired him to make a memorandum by which it should thereafter be prepared. The scrivener accordingly, under the direction of the decedent, wrote down in pencil, on a small piece of paper, a memorandum in the following terms: "To Mrs. Rochelle in fee. Emeline and child Charlotte, Phoebe, Washington, Tine and Lizza, all my beds and furniture, carriage and harness. All loaned during widowhood, real and personal. Discretionary with ex'or, for good reason, to sell negro, Mary Frances, Martha Eliza to be educated and clothed. At the death of Mrs. Rochelle having no child by me, the whole to my brother's children (horse Bullet to Jno. Turner) the plantation and hands to remain as at present. Harry and Jerry to be kept at the carpenter's trade. My lands to belong to John and Wm. and girls to receive more negroes." This memorandum, when concluded, was read to the decedent, who looked over and examined the same, and said it was right. The scrivener then left him, promising to return on the third day, but was accidentally detained until the

fourth; and when he got back, the decedent was dead. On the failure of the scrivener to return at the appointed time, the decedent mentioned to another person that he had given him the heads of his will, and expressed great anxiety for his arrival, saying that if he would come and fix his business, he would die perfectly satisfied; that his will was not all the business he wanted with him. The memorandum being offered for probate as a will of personality HELD, such probate should be refused.

Rochelle v. Rochelle,

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## II. Proof by attesting witnesses.

2. Though the attesting witnesses to a will have forgotten whether material requisitions of the statute were observed in the execution and attestation, or not, compliance with those requisitions may nevertheless be properly inferred by the court of probate, from the circumstances of the case. Clarke and others v. Dunnivant, 18

3. A will more than eight years old, attested by three witnesses, being offered for probate, one of the witnesses proves, that being casually present at the testator's house on a particular occasion, which he minutely describes, the will was produced, read to the testator (who, it appeared, could neither read nor write), signed for him by the witness, and acknowledged by him as his will in the witness's presence, who thereupon subscribed as attesting witness in the presence of the testator. The other witnesses prove merely their own signatures, and that they would not have subscribed unless they had been requested by the testator and had thought that all things were regular; having forgotten all the circumstances of their attestation, except that they were present at the testator's house on the occasion described by the first witness; and one of them states, that if requested by the testator to attest his will, he would have done so, whether the testator were present or not at the time he subscribed his name; while the other admits, that he does not know in what manner the law requires a will to be witnessed. HELD, the proof of due execution of the will is sufficient to admit it to record.

S. C., 13

## III. Parol evidence to explain will.

4. An inhabitant of Norfolk having, by his will, given all his negroes "to the agent of the new colonization society in Africa," to do as he pleases with them, parol evidence is admitted to fill up the description of the person intended by the testator; and it appearing by the evidence, that the society meant is the American colonization society for settling free persons of colour in Africa, that J. M. is the agent, residing in Norfolk, of that society, and that he is the person intended, a decree made, declaring him entitled to the slaves, and the increase of the females since the testator's death. Maund's adm'r v. M'Phail, 199

## IV. Vesting of legacies given in remainder.

5. A testator, having bequeathed annuities for life to his three nieces, Frances, Sybella and Ann, and charged them upon his real estate, devises, that upon the death of Frances, her annuity be given and continued to the second child of B. F. during his or her natural life; that upon the death of Sybella, her annuity be given and continued to the third child of B. F. during his or her natural life; and that upon the death of Ann, her annuity be given and continued to the fourth child of B. F. during his or her natural life. At the date of the will, B. F. is a widower, with five children, of whom the four eldest are known to the testator, the second and third being sons, and the fourth a daughter; and all of these five children survive the testator. By a second marriage, contracted in the testator's lifetime, B. F. has another child; who, being the fourth child at the decease of the annuitant Ann, claims the annuity. HELD, the annuities in expectancy vested at the death of the testator, in those children of B. F. who were then the second, third and fourth, and were not contingent until the deaths of the prior annuitants.

Catlett and wife v. Marshall and others, 79

## V. Interest of residuary legatees for life and in remainder.

6. Testator, a Virginia farmer, gives the residuum of his estate, real and personal, to his wife for life, and after her death, gives the same, as well the land as all the other property remaining at her decease, to D. and wife, who are not of kin to him, appoints his wife and D. his executors, and directs that his estate shall not be appraised; the residuum consists of land including the farm on which testator lived, slaves and live stock thereon, furniture and



farming utensils, crops of grain on hand, money and debts due; the testator's wife takes and holds in kind, during her life, the slaves, live stock, furniture and farming utensils, and she takes the whole of the crops on hand, and appropriates them to her own use; in a controversy after her death, between her executor and the remaindermen, *Held*.

1. That the will gave the legatee for life no absolute power of disposal of any part of the personal property, and as to all of it the limitation over in remainder was good and effectual.

2. That as to the crops of grain left by the testator on hand, the legatee for life was entitled to so much as was necessary for consumption in her family and on the farm for the year ensuing the testator's death, but her estate, after her death, was accountable to the remaindermen for the proceeds or value of the surplus thereof, which in the ordinary course of business was intended for market.

3. That, in this case, the legatee was entitled to enjoy the personal chattels in kind; That as to work horses, farming utensils and the like, such as were forthcoming at her death to be returned in kind, though worn and impaired, were to be handed over to the remaindermen in their then state; such as died or were entirely worn out, were not to be charged to the estate of the legatee for life; her estate was to be charged with the principal of what she had sold, unless other articles of the same kind were substituted; and such as, from circumstances, might reasonably be presumed to be dead or worn out, should not be charged to her estate; And that as to brood mares, flocks of sheep and the like, the legatee for life was bound to keep them up in kind, and her estate was accountable for them accordingly, unless destroyed or impaired by casualty.

*Dunbar's ex'ors v. Woodcock's ex'or.* 628

VI. What is no conversion of estate as regards widow.

7. Testator, having provided that his debts should be paid out of the first moneys collected from his outstanding debts, and then that his real estate, his slaves and his furniture should be sold, and the proceeds applied, along with the first collections from his outstanding debts, to the discharge of his debts, bequeaths to his wife a specific legacy. "In addition to what the law allows her." *Held*, the widow is entitled to the portion which the law allowed her, of the testator's estate, real and personal, as it stood at the testator's death, not to such portion as the law would have allowed her if the whole estate had been money.

*Overton and wife v. Maben and others.* 609  
754 \*VII. Effect of devise for support of slaves till emancipated.

8. Testator directs all his slaves to be emancipated and sent to a country where slavery is not tolerated. If within twelve months they shall elect to be emancipated on those terms, otherwise to be sold; and then, after sundry bequests, gives all the residuum of his estate, including a parcel of land called Belle Air, to charitable uses; afterwards, by a codicil, he gives the Belle Air estate to B. D. for the support and maintenance of the slaves thereon; *Held*, the devise of the Belle Air estate to B. D. only created a trust for the support and maintenance of the slaves thereon, till they should be emancipated or sold; the devisee's interest was commensurate with and limited by the purpose of the trust, and was determined by the emancipation or sale of the slaves; and the codicil was a revocation of the devise of Belle Air contained in the will only pro tanto; yet the trustee was not accountable for any surplus of profits beyond the expense of supporting and maintaining the slaves.

*Dawson v. Dawson's ex'or and others.* 602

VIII. What issue of freedwoman is not free.

9. See Emancipation No. 2, and

*Crawford v. Moses.* 277

IX. When annuity will not carry interest.

10. See Annuity No. 2, and

*Adams's adm'r v. Adams's adm'r.* 527

X. What devise and bequest is void for uncertainty of beneficiaries.

11. A testator, by the 16th clause of his will, desires that the balance of his estate be used by his executors for the purpose of erecting three seminaries of learning. Two of them are directed to be on particular tracts of land owned by the testator, and the other on a tract to be procured near a particular place. Then the clause proceeds as follows: "Said tracts of land, as also the one to be procured, to forever remain for the use and benefit of the said seminaries of learning. Said seminaries to be called by such names as my executors may think proper, and to be calculated for about thirty students, and the necessary buildings for teachers, which I suppose may be erected for about 10000 dollars each. Should my estate fall short, the improvements to be in proportion to it; should it produce more, the overplus to be for the benefit of the said seminaries, in equal proportions, to be used for the education of such youth as is not able to pay teacher's fees." After a suggestion as to the course of education to be adopted at the schools, the clause concludes with these words: "At any of said seminaries, my relations to be admitted as students, free of tuition fees." *Held*, the devise and bequest are too indefinite and uncertain as to the beneficiaries, and are, for that cause, void.

*Literary fund v. Dawson and others.* 147

XI. What devise and bequest for a charitable use is valid.

12. The 17th clause of the will is as follows: "Should my executors fail to carry into effect said 16th devise for seminaries of learning (which I hope and trust they will not) then the real and personal estate devised for said objects to be used by my executors in constituting a part of the literary fund of the state of Virginia, and two thirds of the interest on it to be used by the school commissioners for the county of Albemarle, in the same way the school fund allotted for the said county is used. The other one third of the interest on it to be appropriated and used by the school commissioners for the county of Nelson, in the same way. And from time to time as the legislature may think advisable, the principal may be used for like objects, for the benefit of the said counties, in same proportions as the interest is directed to be used. An act of assembly for said object, supposed can be obtained." The devise and bequest in this clause being adjudged by the circuit court to be void, that decree reversed by the court of appeals, and the bill dismissed as to the president and directors of the literary fund; but without prejudice to the rights of the parties, or to their assertion of them hereafter, in the event of a failure to procure the necessary act of assembly within the period limited.

*S. C.* 147

755 \*XII. Agreement to abide by informal will.

13. What agreement among heirs, to abide by a will of ancestor not duly executed, will be specifically enforced in equity. See *Heirs No. 4*, and *Lucketts v. Lucketts*, 50

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In assumpsit for goods furnished a third person, such person is a competent witness for the plaintiff.  
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REPORTS OF CASES

ARGUED AND DETERMINED  
IN THE

COURT OF APPEALS,

AND IN THE

GENERAL COURT,

OF

VIRGINIA.

---

BY BENJAMIN WATKINS LEIGH.

**VOLUME XI.**

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Entered according to the act of congress, this sixth day of December  
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**JUDGES**  
OF THE  
**COURT OF APPEALS**  
DURING THE TIME OF THESE REPORTS.

---

HENRY SAINT GEORGE TUCKER, PRESIDENT.  
FRANCIS T. BROOKE.                      WILLIAM H. CABELL.  
RICHARD E. PARKER.\*                  ROBERT STANARD.  
JOHN J. ALLEN.†

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*Attorney General:* SIDNEY S. BAXTER.

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\*Judge PARKER died the 10th of September 1840.

†Appointed December 14, 1840, *vice* RICHARD E. PARKER deceased.

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**JUDGES**  
OF THE  
**GENERAL COURT**  
DURING THE TIME OF THESE REPORTS.

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DANIEL SMITH.	EDWIN S. DUNCAN.
FLEMING SAUNDERS.	JOSEPH L. FRY.
LEWIS SUMMERS.	JOHN B. CLOPTON.
ABEL P. UPSHUR.	RICHARD H. BAKER.
RICHARD H. FIELD.	JOHN B. CHRISTIAN.
JOHN T. LOMAX.	ISAAC R. DOUGLASS.
JOHN SCOTT.	PHILIP N. NICHOLAS.
WILLIAM LEIGH.	DANIEL A. WILSON.
LUCAS P. THOMPSON.	EDWARD JOHNSTON.*
BENJAMIN ESTILL.	JAMES H. GHOLSON.†
JAMES E. BROWN.	JOHN ROBERTSON.‡

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\*Appointed January 21, 1841, *vice* JOHN J. ALLEN, promoted to the court of appeals.

†Appointed March 18, 1841, *vice* JOHN Y. MASON resigned.

‡Appointed, March 18, 1841, additional judge of the twenty-first judicial circuit, by the style of "judge of the chancery side of the circuit superior court of law and chancery for the county of Henrico and city of Richmond." This judicial office was created by an act of assembly passed March 18, 1841, entitled "an act creating a circuit superior court of chancery in the twenty-first judicial circuit, and for other purposes," (Acts of 1840-41, ch. 48, p. 65,) the third section of which provided that "the additional judge of the twenty-first judicial circuit shall be a judge of the general court." By an act passed March 28, 1842, (Acts of 1841-2, ch. 70, § 1, p. 44,) it was provided "that the circuit superior court of chancery for the city of Richmond and county of Henrico shall be hereafter called and styled the superior court of chancery for the Richmond circuit."

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# CASES

ARGUED AND DETERMINED IN THE

## Supreme Court of Appeals of Virginia.

**Tunstall & al. v. Pollard's Adm'r.**

March, 1840, Richmond.

**Executors and Administrators—Foreign Executor—Liability Where He Brings Assets in State.\***—An ex'or having taken probat of testator's will and letters testamentary in England, and collected the assets of testator's estate there, and brought them with him to Virginia, but having never qualified as ex'or in Virginia, is liable to be sued by the legatees in the court of chancery of Virginia, for an account of his administration, and for the legacies that remain unpaid.†

**Same—Same—Liability of.**—An english ex'or collects the assets of testator's estate in England, brings them with him to Virginia, and dies here in 1807, indebted to testator's estate, without having qualified in Virginia; the debt he owed his testator's estate is entitled, in the administration of his own estate, to priority over all his other debts.

**Same—Deceased Executor—Debts Due to Testator's Estate—Preference—Statute.**—The statute of 1705, ch. 33, § 13, giving preference to debts due from deceased ex'ors to their testator's estates, in the administration of the estates of such ex'ors, was not repealed by the statute of 1748, ch. 4, § 13, notwithstanding the general repealing

2 \*clause therein contained, or by the statute of 1785, ch. 61, § 50, or by the revised statute of 1792, in pari materia; those statutes subsequent to that of 1705, containing nothing inconsistent with it, and being only cumulative.

**Same—Limitation of Actions—Duty to Plead Statute.**—The 17th sections of the statute of limitations,

\***Executors and Administrators—Foreign Executors—Liability Where He Brings Assets in Virginia.**—For the proposition laid down in the first headnote of the principal case, that where a foreign executor brings the assets of the estate in Virginia he is liable to be sued by the legatees, (even though he has not qualified in this state) in the court of chancery of Virginia, for an account of his administration, and for the legacies that remain unpaid, the principal case is cited and approved in the following cases: *Dickinson v. Hoomes*, 8 Gratt. 414, 417, 419; *Andrews v. Avory*, 14 Gratt. 240; *Moses v. Hart*, 25 Gratt. 809; *Rinker v. Streitt*, 33 Gratt. 666; *Davis v. Morriss*, 76 Va. 29; *Fugate v. Moore*, 86 Va. 1048, 11 S. E. Rep. 1063; *Clendenen v. Conrad*, 91 Va. 419, 21 S. E. Rep. 818; *Portsmouth Gas Co. v. Sanford*, 97 Va. 123, 33 S. E. Rep. 516; *Leach v. Buckner*, 19 W. Va. 46; *Hooper v. Hooper*, 29 W. Va. 289, 1 S. E. Rep. 290; *Hooper v. Hooper*, 32 W. Va. 526, 9 S. E. Rep. 938; *Oney v. Ferguson*, 41 W. Va. 571, 23 S. E. Rep. 711. See also, *Powell v. Stratton*, 11 Gratt. 792.

The proposition for which the principal case is cited in the above cases is one of the exceptions to the general rule. For the general rule, see *foot-note* to *Andrews v. Avory*, 14 Gratt. 229. See monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

†See *Vaughan & al. v. Northup adm'r &c.*, 15 Peters 1, and *Craddock v. Turner's adm'r*, 6 Leigh 116.

providing that debt or scire facias on judgments against decedents in their lifetime, shall not be brought against their representatives, after the expiration of five years from the qualification of a representative, and that such judgments shall, after the expiration of five years, be deemed to be paid and discharged, is a bar to debt or scire facias on such judgments against an adm'r of the deceased debtor, though no assets of the debtor's estate came to the hands of the representative within five years after his qualification; and the adm'r is bound to plead the statute to actions of the judgment creditors, in favour of other creditors prosecuting claims to which the limitation does not apply.

**Same—Same—Same.**—And it seems, the representative is bound to plead that statute in all cases to which it applies to protect the decedent's estate, for the benefit of other creditors, or of legatees or distributees, of the decedent.

In May 1780, Camm Garlick of King William county, made and published his will and testament, whereby he devised and bequeathed his real and personal estate in Virginia, to and among his wife Mary, and his three children, Samuel, Sarah and Mary Camm Garlick, and appointed his brothers, Samuel and John Garlick, his executors; and shortly after making this will, he went to England on a visit to his paternal uncle, Edward Garlick, who resided near Bristol. His uncle died soon after his arrival in England, and by his last will and testament bequeathed to him a large legacy, consisting chiefly, it appeared, of moneys due to that testator. Whereupon, in December 1781, Camm Garlick, then remaining in England, made an additional will and testament, for the purpose of disposing of the property which he had lately acquired under his uncle's will; whereby he confirmed the will he had made in Virginia; and, out of the legacy bequeathed to him by his uncle, he bequeathed an annuity of £50. sterling to his wife for life, and £500. to Benjamin Pollard, \*£2500. to his son Samuel, and

3 £1500. to each of his daughters Sarah and Mary Camm; and appointed Benjamin Pollard and Thomas Hall executors of this his will made in England, and guardians

‡**Same—Limitation of Actions—Duty to Plead Statute.**—In *Woodyard v. Polsley*, 14 W. Va. 222, it is said: "It is indeed the duty of the personal representative to rely upon the statute of limitations in behalf of the legatees and distributees and also to protect creditors. *Tunstall et al. v. Pollard's Adm'r*, 11 Leigh 1." See also, citing the principal case for this proposition, *Seig v. Acord*, 21 Gratt. 369; *Smith v. Pattie*, 81 Va. 663; *Radford v. Fowikes*, 85 Va. 849, 8 S. E. Rep. 817. See monographic *note* on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

of his three children, till such time as the moneys he thereby bequeathed to them could be paid to the persons whom he had, by his will made in Virginia, appointed their guardians, (meaning, no doubt, Samuel and John Garlick, whom he had appointed executors of his Virginia will, though not, as he supposed, guardians of his children). Immediately after making and publishing this will in England, the testator Camm Garlick went to Portugal, where he died in 1782. Pollard and Hall joined in proving the english will in the prerogative court of Canterbury, and procured joint letters testamentary; but Pollard alone collected the english assets of the testator's estate, or at least far the greater part of them, and in 1783 came to Virginia, bringing with him the assets of the estate which he had collected in England. Samuel and John Garlick, the executors named in the Virginia will, proved that will together with an authenticated copy of the english will, in the county court of King William, in March 1784, and qualified as executors. Pollard paid to John and Samuel Garlick, a large portion of the assets of their common testator, which he had collected in England and brought with him to Virginia, and they made some payments to the legatees on account of the legacies bequeathed to them: but it did not appear, either that Pollard paid over to the Virginia executors all the english assets which he had received, or that they paid over all the money they received from Pollard to the legatees.

Leonard Tunstall and Mary Camm his wife who was one of the daughters and legatees of the testator Camm Garlick, in 1799, exhibited a bill in the high court of chancery of Virginia, against the

4 Virginia executors \*Samuel and John Garlick, and the english executor Pollard, setting forth the two wills of the testator, and the qualification of Pollard as executor in England, and of Samuel and John Garlick as executors in Virginia; charging each and all of the executors with waste, and appropriation to their own use, of the assets of their testator's estate, which they ought to have applied to the payment of the legacies, a large portion of which, they alleged, yet remained due; and praying accounts of the administration of the defendants respectively, and a decree for the balance of the legacies yet due. Upon the division of the high court of chancery into district courts, in January 1802, this suit was transferred to the district court of chancery of Williamsburg. And there Benjamin Gaines and Sarah his wife, who was the other daughter of the testator Camm Garlick, Samuel his son, and Mary his widow, exhibited a like bill against the same parties, praying the like relief. The Virginia executors Samuel and John Garlick, in their answers to these bills, said, that no settlement had ever been made, between them and the defendant Pollard, who had had the management of that part of the estate which was in England, or, between them and the legatees, of their own accounts of administration. And the english executor Pollard said, that he had, out of the assets

received by him in England, discharged a large amount of debt due from the testator's estate to creditors in that country, made several payments to the legatees, and paid over large sums of money to the Virginia executors, and they had paid large sums to the plaintiffs on account of their legacies, so that the balance due from him, if any, was trivial; but he admitted, that the accounts remained to be settled; and he made no objection to his liability to render an account of his administration before this court. Some of the plaintiffs and all of the defendants died pending the suits, and the proceedings were revived for

5 and \*against their representatives, so that the causes stood in the names of Mary Camm Tunstall, plaintiff in the first suit, and Sarah Gaines, the administratrix of Samuel the son of the testator, and the administrator of Mary the widow, plaintiffs in the second suit, against Benjamin Pollard administrator of the executor Pollard, the administrator of the executor John Garlick, the administrator de bonis non of the executor Samuel Garlick, and the administrator of his first administrator, defendants in both suits.

Of the several accounts ordered and taken in these suits, it is only necessary to state here the result of the account of the english executor Pollard's administration of his testator Camm Garlick's estate, taken in 1820, long after the executor's death; by which it appeared, that he was indebted to the estate for a balance of 8984 dollars with interest from the 31st December 1800. But there was some evidence in the cause to shew, that he had made large payments to the Virginia executors, which appeared not to have been credited to him in the account. No account was taken of Benjamin Pollard the younger's administration of Pollard the executor's estate, it being agreed that Pollard the executor died utterly insolvent.

Upon the hearing in November 1820, a decree was entered, by consent of the parties, that the administrator of the executor John Garlick should, out of the assets of that executor's estate in his hands, pay to Mary Camm Tunstall, the plaintiff in the first suit, the sum of 5169 dollars, and to Sarah Gaines one of the plaintiffs in the second suit, 4393 dollars, with interest on both sums from the 1st of January 1801; and that the administrator of the first administrator of the executor Samuel Garlick, (it being admitted that he had assets in his hands) should pay to Mrs. Tunstall the sum of 1696 dollars, and the same sum to Mrs. Gaines, with interest from the 1st January 1801—That Samuel the

6 \*son, and Mary the widow of the testator Camm Garlick, appearing to have received all they were entitled to, the bill in the second suit, so far as it prayed relief for them, should be dismissed—And that both bills should be dismissed as to Pollard the younger, the administrator of Pollard the english executor of Camm Garlick.

The foregoing history of the proceedings in the former suits is necessary to an accurate understanding of the controversy in this suit, which grew out of them.

Mary Tunstall and Sarah Gaines, in September 1822, exhibited a bill, in the superior court of chancery of Williamsburg, against Benjamin Pollard as the administrator and sole heir of the elder Pollard executor of Camm Garlick, and the representatives of the executors John and Samuel Garlick, and other parties; wherein they represented, that the decree in the former suits against the representatives of John and Samuel Garlick, was rendered for moneys due from them respectively on account of their own executorial transactions, and on account of the deficiency of Pollard the english executor of their testator; that having sued out executions on their decree against the representative of John Garlick, they had obtained satisfaction of only a small part of their claim on the decree against him, and encountered impediments to further proceedings, which it required the aid of the court to remove; but when these impediments should be removed, the estate of John Garlick would still be inadequate to satisfy the decree. And as to the defendant Pollard, the bill suggested, that he was in possession of real estate inherited from his father Pollard the executor of Camm Garlick, of which they prayed a discovery and account, and that the same should be subjected to the debt which his ancestor owed to the estate of Camm Garlick.

This bill was, in the sequel, dismissed, on the motion of the plaintiffs, as to all the defendants except Pollard.

7 \*Pollard filed his answer in January 1825, in which he said, that he and his sister Margaret the wife of George Loyall were the heirs at law of his father, but that they held no real estate derived from him, by gift, devise or descent, he having, in fact, left no property whatever at his death, which then came to the hands of the defendant. But he said, that since the commencement of this suit, namely, in August 1824, some assets had come to his hands as administrator of his father, on account of a claim, which he had presented, under the treaty of February 1819 between the U. States and Spain, for a loss sustained in 1796; which assets, however, he had fully administered, by applying the same in satisfaction of debts due upon judgments recovered against his intestate in his lifetime; debts, he insisted, of superior dignity to the debts claimed by the plaintiffs; for the debts they claimed were, in their nature, only simple contract debts of his intestate, since he had qualified as executor of Camm Garlick in England, and his executorial bond given there did not stand on the same footing as an executor's bond given in Virginia, nor were the debts of the executor of the same dignity.

In 1827, the plaintiffs filed a supplemental bill in which they made Loyall and wife parties defendants, and charged, that Benjamin Pollard the elder, in May 1799, made a conveyance and settlement of real estate to the use of his wife, which upon her death had come to the hands of Benjamin Pollard the younger and Loyall and wife; that the conveyance and settlement were voluntary, fraudulent and void, as to creditors of Pol-

lard the elder; and that these lands ought to be held subject to the plaintiffs' claims. And they called upon the defendant Pollard to render an account of the assets of his intestate's estate which he had received since the commencement of the suit (amounting, they alleged, to about 11000 dollars) and to state the judgments against

8 his intestate in payment of which he had \*disbursed those assets, and all the circumstances attending those payments made by him. They insisted, that the debt due to them from the intestate, being a debt due from him as an executor, was of higher dignity than any debts due upon judgments against him: that those judgments having been rendered against the intestate in his lifetime, and he having died in 1807, and there having been no proceedings upon them for some eighteen years after the qualification of the administrator, there could not have existed any valid claim upon them, and if the administrator applied the assets to the satisfaction of them, such payments were merely voluntary on his part, and a waste of the assets: that the administrator had sought to effect a compromise of the judgments, and to get releases or transfers of them on payment of a small part of their nominal amount, and then to use them as a protection of the assets to the whole nominal amount of the judgments; thus making a trivial sacrifice to claims which could never have been enforced if he had resisted them, in order to protect the residue of the assets from the claims of the plaintiffs and other creditors of his intestate.

As to the defendants Loyall and wife, the bill was taken pro confesso. The defendant Pollard put in an answer, in which he referred to the decree in the former suits of November 1820, entered by consent of the plaintiffs, whereby it was decreed, that the debt due from his intestate as executor of Camm Garlick should be paid by the representatives of the other executors John and Samuel Garlick, and the bills as to him were finally dismissed. He said, that the conveyance of real property made by his father to his wife was founded on an antenuptial agreement, and so was a conveyance for valuable consideration, and this defendant and his sister Mrs. Loyall held the property under a devise from the wife who was the bona fide owner of it; and that, moreover, his intestate

9 being in custody at the \*suit of one William Coker in 1804, took the benefit of the statute for the relief of insolvent debtors, and surrendered in his schedule all interest he had or might have in the very property which he had before conveyed to his wife. And as to the other allegations of the bill, he said, that the sum he had received as administrator of his father upon his claim under the treaty with Spain, was 10310 dollars. That one of the judgments which he had discharged out of those assets, was a judgment recovered by Margaret Kearnes against his father in his lifetime, upon which suit was brought against him as administrator, in September 1824, immediately after his receipt of the assets; knowing it to be a debt of the

highest dignity, and presuming he should be obliged to pay it, he advised his brother in law George Loyall to purchase the claim; Loyall purchased it for 1000 dollars; it was prosecuted to judgment, and execution sued out, upon which he paid Royall the full amount, 2552 dollars, in April 1825. That the other judgment was the judgment of William Coker against his intestate, upon which a suit was brought by Mr. Wickham, in 1824, against this defendant, in the circuit court of the U. States held at Richmond; he advised another relation, William Loyall, to purchase this claim from Mr. Wickham: William Loyall purchased it accordingly, for 5400 dollars, which he paid to Mr. Wickham; Coker's suit was prosecuted to judgment; and the defendant paid the full amount, 6894 dollars, to William Loyall, in June 1825. He insisted, that the debt claimed by the plaintiffs was only a simple contract debt of his intestate; and then he stated, that he held two bonds executed by his intestate to James Caton deceased, for £500. sterling each, the whole of which, with interest from December 1796, was still due; and that the defendant was the executor of Caton, and had a right to retain the amount of these

10 \*debts out of the assets of his intestate, in preference to the debt claimed by the plaintiffs.

The facts stated in the answer were put in issue by a general replication.

It appeared, that Pollard the intestate of the defendant Pollard died in 1807. Administration of his estate, it seemed, was first committed to the serjeant of Norfolk borough; it did not appear when. The accounts of the defendant Pollard's administration shewed, that the administration was granted him to in May 1812.

The judgment of Margaret Kearnes against Pollard the intestate was recovered in November 1802, and the suit upon it against Pollard the administrator, was brought in September 1824, and judgment recovered against him by default in April 1825.

Of the judgment stated in the answer to have been recovered by William Coker against Pollard the intestate, of the proceedings by which he was discharged from custody at the suit of Coker in 1804 as an insolvent debtor, and of the judgment recovered by Coker against Pollard the administrator, no evidence appeared by the record to have been exhibited.

It appeared, that the full amounts due upon Kearnes's and Coker's judgments were paid by the defendant Pollard, as stated in his answer.

The bonds of Pollard the defendant's intestate to Caton, for £500. sterling each, which the defendant said in his answer, he held as the executor of Caton, did not appear to have been exhibited.

The accounts of the defendant Pollard's administration of his intestate's estate having been referred to a commissioner, it appeared by the report, that if the administrator was entitled to credit for the sums he had paid in satisfaction of Kearnes's and Coker's judgments, he had fully administered the assets he had received;

11 \*if not, he was indebted to the estate

in a balance of 7768 dollars, with interest from the 18th June 1825.

The cause was transferred, first, to the superior court of chancery of Richmond, and finally to the circuit superior court for Henrico and Richmond; where, upon a hearing in 1837, the bill was dismissed. Upon the petition of the plaintiffs, this court allowed them an appeal.

The cause was argued here (very elaborately and ably) by Brooke for the appellants, and R. T. Daniel for the appellee Pollard.

I. The present suit being founded on the proceedings in the former suits of the plaintiffs against John and Samuel Garlick the Virginia executors, and Benjamin Pollard the english executor, of Camm Garlick; and the object of this suit being to recover from the administrator of the english executor, the balance of 8984 dollars, appearing, by the account of his administration taken in the former suits, to be due from him to the estate of his testator; the first question was, whether Pollard, the english executor, who took probat in England, but never qualified in Virginia, was liable to be sued by the legatees of the testator in the court of chancery of Virginia, for an account of the english assets, which he received in England and brought with him to Virginia, and for the balance due from him on that account to his testator's legatees? The authorities cited at the bar on this point, and the arguments of the counsel on both sides, are fully stated in the opinion of the court.

II. The next question was, whether Pollard the administrator of Pollard the english executor, was justified in applying the assets of his intestate's estate to the payment of the debts due on the judgments of Kearnes and of Coker against his intestate, in preference to the debt due to the plaintiffs?

12 \*Brooke contended, that the administrator's application of the assets to the satisfaction of those judgments, was a devastavit.

For, in the first place, he said, the debt due by Pollard the elder to the estate of his testator Camm Garlick, was a debt of higher dignity than the debts due on the judgments against him, or any other proper debt of his own. He referred to the statute of 1748, ch. 4, § 13, 5 Hen. Stat. at large, p. 453, which provided, "that when any guardian, or person chargeable with the estate of any orphan, or with the estate of a person deceased, to him committed by any court of record in this colony, shall die so chargeable, the executors and administrators of such person so dying shall be compellable to pay and satisfy, out of the estate of their testator or intestate, so much as shall appear due to the estate of such orphan, or person deceased, before any other or proper debt whatsoever of such testator or intestate;" and to the statute of 1785, ch. 61, § 50, 12 Hen. Stat. at large, p. 152; which provided, that "the executors or administrators of a guardian, of a committee, or of any other person who shall have been chargeable with or accountable for the estate of a ward, an idiot or a lunatic, or the estate of a dead person, committed to

their testator or intestate by a court of record, shall pay so much as shall be due from their testator or intestate, to the ward, idiot or lunatic, or to the legatees or persons entitled to distribution, before any proper debt of their testator or intestate; which provision was re-enacted, in the same words, by the revised statutes of 1792 and of 1819, Rev. Code of 1792, ch. 90, § 53; 1 Rev. Code of 1819, ch. 104, § 60, p. 389. And he argued, that the words in those statutes, giving priority to debts due from fiduciaries to whom the estates were "committed by a court of record," were referrible only to cases of administrators, guardians and committees of idiots or lunatics, to whom the estates were

13 committed "by a court of record, not to the case of executors, who derived their authority from the will, and to whom the estates were not committed by the court; and that, therefore, in all cases of debts due from a decedent in an executorial character, whether they arose out of his transactions before or after probat, or whether he was a foreign or a Virginia executor, and if a foreign executor, whether he ever qualified in Virginia or not, such debts were preferred, in the administration of the executor's estate, to all proper debts of his own. But if this was not the fair construction of the statute of 1748 and the subsequent statutes on the subject, it was clear, that the prior statute of 1705, ch. 33, § 13; 3 Hen. Stat. at large, p. 375, gave preference, in the administration of an executor's estate, to the debts due from him to his testator's estate, in all cases whatever, without distinction; for that statute provided, in general terms, that "when any person shall be chargeable as executor or administrator, or otherwise, with the estate of any person deceased, or with any orphan's estate, and shall die so chargeable, the estate of such person so dying shall be liable to pay and satisfy such other deceased person's or orphan's estate, before any other debt whatsoever." Under this statute, if the executor contracted a debt to his testator's estate and died without ever taking probat, or if a foreign executor contracted such a debt, and then came to Virginia, and died here so indebted, such debt was entitled to priority over all other debts, in the administration of the executor's estate by his representatives in this country. And the statute of 1705 was not repealed by the statute of 1748, or the subsequent statutes in pari materia; for the provisions of the latter statutes contained nothing inconsistent with the provision of the statute of 1705, but only extended the same principle of priority to other cases.

Indeed, the statute of 1705 was never 14 repealed until the statute of \*March 1819, "providing for the republication of the laws," 1 Rev. Code, ch. 1, § 9, p. 16, repealed all statutes of a general nature, which should not be published in the new code thereby directed; with a saving, however, in favour of all rights already acquired under the general statutes so repealed.

2ndly, He insisted, that there was no valid existing claim on the judgments of Kearnes and Coker against Pollard the

elder, which could have been enforced against his administrator. For, some twelve years had elapsed since the qualification of Pollard the younger as administrator of Pollard the elder, and no proceedings had ever been had on the judgments since the intestate's death. The statute, 1 Rev. Code, ch. 128, § 17, p. 492, not only made five years from the qualification of the administrator, a bar to debt or scire facias against him upon the judgments, but it provided further, that "all such judgments after the expiration of five years, upon which no proceedings shall have been had, shall be deemed to have been paid and discharged." The remedy of the judgment creditors was barred, and, by intendment of law, the judgments were satisfied. The statute gave the administrator, in this case, a conclusive defence against the claims; but instead of availing himself of it, he suggested to his relations that they should purchase them, in order that the assets he had received might be applied to the payment of them: it was, indeed, by his collusion with the assignees of the judgments, that the debts were recovered against him. He was bound to set up the defence; he would have been bound to set it up for the benefit of the distributees of his intestate; much more was he bound to make the defence for the benefit of creditors, and especially of creditors who (as he knew) were, at the very time he made the payments, prosecuting their claim.

15 \*Daniel contended, 1st, that the debt claimed by the plaintiffs from the estate of Benjamin Pollard the elder, was of no higher dignity than a simple contract debt. He was appointed by Camm Garlick executor of his english will only, and in respect only of his english estate; he took probat of the english will in the prerogative court of Canterbury, and the letters testamentary granted to him by that court authorized him to collect and administer the english assets, according to his testator's english will. Neither could he have taken probat in Virginia; since that, if allowed, would have constituted him executor of both the will made in Virginia and that made in England, whereas the testator only appointed him executor of the latter. Accordingly, probat of both wills was, by the court of probat of Virginia, very properly granted to the Virginia executors, as to whom both instruments constituted their testator's last will and testament. The estate of the testator Camm Garlick was never committed to Pollard, the english executor, by a court of record of Virginia, or by any court of record. Then, adverting to the provisions of the statutes of 1748, ch. 4, § 13, and of 1785, ch. 61, § 50, he said, those statutes gave no preference, in the administration of Pollard the english executor's estate, to the debt he owed Camm Garlick's estate, because Garlick's estate was never committed to him by a court of record, as those statutes required it should have been, in order to entitle the debt to such preference; unless the criticism of the appellants' counsel was just, that the words "committed by a court of record" were referrible only to grants of administration, and appoint-



ments of guardians and committees of idiots &c. by courts of record, and could not fairly be applied to the case of an executor, to whom the estate was committed by the testator's will, not by the court of probat. Now, he said, it was true, in one sense,

that an executor's authority and title were derived from the \*will, and there were many acts that he might do, and others which he might initiate, before probat; but the authority of the will itself, from which the executor derived his authority, could only be ascertained and co. summated by the probat; nor could the executor prosecute any claim to judgment or decree, till he proved the will and obtained letters testamentary; and in Virginia, probat and letters testamentary could only be granted by a court of record. In Virginia, then, the estate of a testator might as properly be said to be committed to the executor by a court of record, as the estate of an intestate, of a ward, or of an idiot, to an administrator, guardian or committee. And it was so far from being true that the words of these statutes, confining the provision of cases in which the estates were "committed by a court of record," were inapplicable to the case of executors, that, obviously, those words could have no effect upon the case of any of the fiduciaries mentioned but executors: for the office of executor existed, and many important rights belonging to it might be exercised, before probat of the will and qualification of the executor, that is, before the estate was committed to him by a court of record; but administrators, guardians, committees of idiots &c. could have no existence but by such commitment of the estates to them. He insisted, that the statute of 1705, ch. 33, § 13, was repealed by the statute of 1748, for the latter statute reenacted, in substance, the provisions of the former, with the single addition, that the estate should have been "committed by a court of record." If this addition, made by the statute of 1748, was only declaratory of the meaning of the statute of 1705, it was immaterial whether the one was repealed by the other or not; and if it rendered the provision of the later statute inconsistent with that of the older, the later repealed the older. He referred to the repealing clause of the statute of 1748

17 —"all and every other act \*and acts, clause and clauses, heretofore made, for or concerning any matter or thing within the purview of this act, shall be and are hereby repealed." The purview of a statute meant the body or enacting part of it; 12 Co. 20. It could hardly be doubted, that the 13th section of the statute of 1705 was for and concerning the same matter and thing provided for in the 13th section of the statute of 1748. And it was plain from the case of *Proudfit v. Murray*, 1 Call 394, that a similar repealing clause in the revised statute of 1792 concerning bills of exchange (1 Rev. Code of 1792, ch. 77; *Pleasant's* ed. p. 113,) would have been held to repeal the statute of 1748, ch. 33, on the same subject (6 Hen. Stat. at large p. 85,) but for a very peculiar provision of another statute passed at the same session of 1792. He remarked further, that there

had been many general revisals of the statute laws of Virginia; that the general laws of 1748 were the work of one of those revisals, and the statute of 1748, ch. 4, was one of the revised statutes; and that the whole purpose of such revisals would be defeated, if every former statute on the same subjects were considered in force without a special repealing clause. The general repealing clause to be found in the revised statutes, was adopted in place of a special enumeration and repeal of former laws on the same subjects. But supposing the statute of 1705, ch. 33, § 13, giving preference, in the administration of the estate of a deceased executor, administrator or guardian, to the debt which he owed to the estate of his testator, intestate or ward, had never been repealed, yet the provision must be held applicable only to executors, administrators or guardians, to whom letters testamentary, administration or wardship, should be granted by the courts of Virginia. The appointment and qualification of such fiduciaries, were always, in Virginia, proceedings in a court of record, and so their representatives might reasonably be held bound to take

18 \*notice of such proceedings; but it would have been most unreasonable to hold the representative of an executor bound to take notice, at his peril, of his transactions in that character, transactions in pais, when he had never qualified at all; and much more unreasonable to hold the representatives of decedents in this country, bound to take notice that they had qualified as executors in a foreign country. The representative of a man dying in Virginia, could with no reason be required to search the proceedings of the ecclesiastical courts of England, and of the similar authorities of every nation of the civilized world, in order to discover whether he had ever qualified abroad as executor of another, and to ascertain the state of his administration accounts, before he should proceed to administer the decedent's own estate. The duties of an english executor, the nature of the liabilities he incurred, the rank of any debt to his testator's estate arising out of his administration, and, after his death, the duty of his representative, in the administration of his estate, in respect of such a debt, must be determined by the law of England, though the english executor died in Virginia. Now, he said, the ecclesiastical courts of England (which were the courts of probat) were not courts of record, 3 Blacks. Comm. 67, so that a debt contracted, in the course of administration, by an executor who took letters testamentary there, was nowise a debt of record. And an executor qualifying there, was never required to give bond for his due administration, as was shewn by *Green, J., in Jones v. Hobson*, 2 Rand. 488, and therefore such a debt was not a specialty debt. He concluded, that the debt claimed by the plaintiff in this cause, of the estate of Benjamin Pollard the elder, the english executor of Camm Garlick, could not rank higher than a simple contract debt.

2ndly, As to the objection, that the application of the assets of Benjamin Pollard

the elder's estate, by his administrator \*Benjamin the younger, to the satisfaction of the judgments of Kearnes and Coker against his intestate in his lifetime, were voluntary payments, made by the administrator in his own wrong, and so, in regard to the claim of the plaintiffs, a devastavit; he said, the objection was founded entirely upon the provisions of the 17th section of the statute of limitations. And he contended, that so far as the statute limited the remedy against the representatives of deceased debtors, upon judgments recovered against the debtors in their lifetime, to five years after the qualification of the representative, it was a mere statute of limitations; and that, as a general rule, an executor or administrator was not bound to take advantage of the statute of limitations against a claim otherwise well founded. 2 Wms. on Ex'ors 1110; Ram on Assets, 448-450. He admitted there might be exceptions to the rule; but this case was not one of them. Here, the administrator knew, that his intestate was insolvent at the time the judgments were recovered against him, continued insolvent during the rest of his life, and left no estate at his death, out of which any part of the debts due upon the judgments could have been paid: that, until his receipt of the money upon his claim under the treaty with Spain, in 1824, there were no assets of his testator's estate which could have been applied to satisfy the judgments: that, therefore, the debts claimed upon them, notwithstanding their antiquity, were justly due. A plea of the statute of limitations against such claims, under such circumstances, would have been an unconscientious defence on the part of the administrator. He was not bound to plead the statute against judgment creditors, whose claims he knew to be just, for the benefit of creditors at large, whose claims were yet older than the judgments, and were, in truth, very questionable. With respect to the provision of the latter part of the 17th section of the statute,

20 that "all such \*judgments, after the expiration of five years" (from the qualification of a representative of the deceased judgment debtor) "upon which no proceedings shall have been had, shall be deemed to have been paid and discharged;" he remarked, 1. that this provision, however peculiar, was still in the nature of a limitation upon the remedy, and at most only auxiliary to the limitation just before provided; and the administrator was no more bound, under the circumstances of this case, to plead it against the judgment creditors, than he was bound to plead the previous provision of the same section against them. 2. That notwithstanding the generality of the words, they ought, in just construction, to be restrained to cases where the representative of the debtor received assets at the time of his qualification, which he might have applied to the satisfaction of the judgments if the claims upon them had been timely prosecuted, and could not be extended to cases, like the present, in which the representative received no assets whatsoever at the time of qualification, nor for many

years afterwards, and in which the judgment creditors prosecuted their claims against him promptly after the assets came to his hands. 3. That the provision was obviously intended, not to protect the estate of the deceased debtor from a just debt, but to protect the representative, personally, from claims on judgments against his testator or intestate, the assertion of which was delayed till such a time that he might fairly be supposed to have administered the assets in his hands, without any actual knowledge of the judgments, in the payment of debts of inferior dignity, or even in payments to legatees or distributees: that the representative alone was entitled to avail himself of the protection, and he, therefore, had a right to waive it: that the reason on which the protection was provided for him, had no application to the circumstances of the present case, and the

21 protection ought not to be extended "beyond the reason on which it was founded. And 4. that the provision, that the judgments should "be deemed to be paid or discharged," strong as the language was, must, in all reason, admit of one exception; the exception, namely, of cases, in which it clearly appeared, that the judgments were not satisfied by the decedent in his lifetime, and could not have been paid and discharged by his representative, since he had no assets to satisfy them. The statute could not have intended to require the courts to deem judgments paid and discharged, which could not possibly have been paid and discharged. As to the imputation that the judgments in the suits of Kearnes and Coker against the administrator upon their judgments against his intestate, were recovered by his collusion; he said, it was true, that after the suits had been brought by the judgment creditors against the administrator, he suggested to his relatives the purchase of the claims, and that the judgments upon them were entered by default. But he himself reaped no benefit from the purchase made by his relatives. And, considering that an executor or administrator, in equity as well as at law, may prefer one creditor to another in equal degree, and after an action brought by one creditor, may confess judgment to another, and so give him preference, 3 Bac. Abr. Ex'ors and Adm'rs, L. 2, p. 83; Waring v. Danvers, 1 P. Wms. 295, the voluntary preference which the administrator gave to the judgment creditors of his intestate, and to their assignees, and his suffering judgments by default in their suits against him, could not be regarded as collusion on his part, of which the plaintiffs in this case could justly complain.

III. Daniel made other objections to the plaintiffs' claim to relief in this suit. 1st, That as the bills of the plaintiffs in the former suits, had been, with their consent, dismissed in 1820 as to the administrator of

Pollard the english executor, and 22 the plaintiffs had taken \*a decree for the whole balance claimed of the english executor against the representatives of the Virginia executors, with their consent, both parties thereby admitting, that the english executor had accounted for and paid over to the Virginia executors

the assets he had received; the dismissal of the bills in the former suits was a bar to the present suit against the administrator of the english executor. 2ndly, That the evidence in the former suits shewed, that the english executor had paid large sums of money to the Virginia executors, which were not credited to him in the account settled long after his death by the commissioner, and which, if credited, would have reduced the balance to a very trivial sum, if not wholly extinguished it. He entered into an examination of the evidence to prove that this was the true state of the case. And then he argued, that the english executor, in his answer in the former suits, having alleged that he had paid over to the Virginia executors, almost all, if not quite all, the money he had received, and declared his readiness to render his account; and the Virginia executors not having controverted that allegation, but only declared that the account was not yet settled; the plaintiffs might and ought to have called the english executor to a settlement of his accounts in his lifetime. Their suits were brought in 1799; he died in 1807; they never called his administrator to account till 1820; and then, not for the purpose of charging him, but in order to ascertain the extent of the Virginia executors' liability. Thus, for some seven or eight years after the plaintiffs commenced their former suits, they neglected during the english executor's life to prosecute their claims against him with effect, and thirteen years after his death dismissed those suits against his administrator: and if that dismissal was not a positive bar to their present suit, the assertion of their claims against the administrator now, should be regarded as a stale

23 \*demand, which ought not to be entertained. It was impossible, that the accounts of the english executor's administration could now be fairly settled; in particular, no discovery could now be had from the Virginia executors of the moneys paid by him to them. Parks &c. v. Rucker, 5 Leigh 149; Carr's adm'r &c. v. Chapman's legatees, Id. 164; Hayes et al. v. Goode et al., 7 Leigh 453. The account reported in the former suits, shewing a balance of 8894 dollars due from the executor, ought not to be taken as evidence of the debt, because the plaintiffs having abandoned all claim against the administrator, and asked no decree upon the account, he had no motive to contest or examine its correctness, and the court did not and could not pass any opinion upon it.

Brooke said, in reply, that the account of the executor Pollard's administration of his testator Camm Garlick's estate, taken in the former suits and reported in 1820, was taken upon notice to his administrator, who was a regular party to the proceedings: he took no exception to it then: he made no objection to it in his pleadings in this suit: it was too late to except to it now. And he maintained, that the dismissal of the bills in the former suits as to Pollard's administrator, was not an abandonment of the claim against Pollard's estate, but a dismissal of the claim against the administrator personally, because he had

no assets; and such a dismissal could not bar the plaintiffs' claim against the estate of the debtor when assets came to the hands of his administrator to pay it. As to the objection, that this was a stale demand; the plaintiffs had been prosecuting their claim for more than forty years, hitherto without effect indeed, but that was not their fault; their proceedings having been only suspended for about two years, during which they knew of no property that could be subjected to the payment of it.

24 \*TUCKER, P. This cause has been argued with great ability, and some interesting questions have been presented, which require a fuller discussion than I could wish. I shall proceed to examine them as concisely as I can, without advertising to the facts farther than necessary for the proper understanding of the principles decided.

I shall dismiss the objection to the antiquity of the claim, with the remark that it was put in suit forty years ago, and has been in a course of prosecution ever since, with the exception of an interval of two years subsequent to the dismissal of the bills in the former suits as to Pollard's administrator. That was not a dismissal on the merits: it was owing to the hopeless insolvency of Pollard's estate, and the expectation of making the debt due the plaintiffs out of the other defendants. Therefore, it did not operate as a bar; nor can it be regarded either as an abandonment of the claim, or as a blameable laches in the prosecution of it. The suit was renewed against Pollard's administrator, as soon as the fortuitous recovery of the spanish claim placed his intestate's estate in a situation to pay, and it has ever since been pursued with proper diligence. There is, then, no ground for the objection that the demand is stale, or that the dismissal of the former suits in 1820 is a bar to the further prosecution of the claim.

The next question which arises in the cause is, whether Benjamin Pollard the executor of Camm Garlick, is liable to the suit of the plaintiffs in Virginia, he having only proved the will and obtained letters testamentary from the prerogative court of Canterbury in England? Under his authority as executor, he received assets in England to a large amount, which he brought to this country, and wasted; and the suit is brought, not by creditors of Camm Garlick, but by the legatees under his will, demanding a settlement of the executorial account, and a decree for

25 the balance which may be \*found to be due them. The answer of the executor was filed in the former suits: he set up no pretence of the existence of debts in England, or of any danger to him in paying over the funds in his hands, or of any conflict between the laws of England and those of Virginia in relation to the disposition of the assets; nor did he object to the jurisdiction of the courts of Virginia, or to their authority and power to call him to account. The whole of this matter seems to have been an afterthought of others; and it might, therefore, well be questioned, whether, if such a defence would ever have

been a good one, it is now available. But as the general question is deeply interesting, and has been ably argued before the court in this and a former case, Pugh's ex'or v. Jones, 6 Leigh 299, I prefer to rest the judgment here upon it, rather than upon the particular circumstances appearing in this record.

I am of opinion, that an executor who has qualified and received assets in a foreign country, and has brought them into this jurisdiction, is liable to be sued and to be compelled to account here, although he never has qualified as executor in Virginia, and although he may have received no assets here. I am moreover of opinion, that if suable at all, he is not to be sued as executor de son tort, which he cannot be if he be appointed executor by the testator; the intimation given by me in Pugh's ex'or v. Jones, of a contrary opinion on this point, I am now satisfied, is erroneous.

In the examination of this question, we shall best proceed by advancing towards the ultimate conclusion step by step. There are certain truths bearing a relation to the question, that cannot be controverted. Thus, it is well established in England, that an executor may be sued before probat, provided he has intermeddled with the assets. Toll. Law Ex'ors 49. And this doctrine is admitted to prevail in Virginia, even by those who regard the validity of the disposition of the as-

26 sets \*as depending upon a qualification prior or subsequent to such disposition. Munroe v. James, 4 Munf. 199. In such case, too, of intermeddling, as it is a rightful act, it is obvious, that the party is not suable as executor de son tort, which supposes a tortious intermeddling. If, therefore, Pollard had been appointed executor in Virginia, and received Virginia assets, he would have been liable to be sued, even though he had not qualified. It is also equally clear, I think, that though the will was made in England, yet an executor appointed in Virginia and receiving Virginia assets, might be sued here before qualification. And so if the executor was appointed in England, and came to Virginia, without having qualified, and received assets in Virginia, he might be sued here. If Pollard, then, cannot be sued here, it must be either because the assets were foreign assets, or because by qualifying abroad he has bound himself to account there, and there only. It cannot be, that he is protected by the circumstance that the assets were foreign assets: for, having been brought here, they have become Virginia assets, and must be accounted for here, unless by a foreign qualification an exclusive control over them is vested in the foreign jurisdiction. It has been well settled, ever since Dowdale's case, 6 Co. 47, that an executor in England receiving assets from abroad, is liable to account for them in England; see Ram on Assets 235; 1 Crompt. & Jerv. 157, 370. And it has never been doubted, I think, that if an executor in Virginia receives from London the proceeds of a crop of tobacco sold there, he must account for them in the settlement of his accounts before our own tribunals. So that, upon the whole, it would seem the

only question is, whether, by qualification in a foreign court, so exclusive a control over the foreign assets is vested in the foreign jurisdiction, that our own courts cannot compel a settlement of the account of such assets, and payment  
27 \*of the balance due, although both the executor and the assets are brought within our jurisdiction?

Let us look into this question, first upon the ground of reason and convenience, and then upon authority.

First, as to the reason of the thing. The argument against our jurisdiction is, that the foreign assets received under a foreign administration, must be administered according to the foreign law: that the executor is bound so to administer them; and if he is held accountable here as well as there, there may be a conflict between the two jurisdictions which would be mischievous to him. The premises do not justify the conclusion. Grant that the foreign assets, though brought here, are to be administered according to foreign law; this does not prove that our courts cannot take cognizance of the case. It only proves that in deciding it, we must be governed by the law of the country where administration was granted. That we must be so governed, I have no question. Where the sovereignty having jurisdiction over person and property has exercised its powers and committed the goods of a decedent to the executor, and bound him to account for them according to its laws, every other sovereignty is, under the sacred obligations of justice, to respect that lawful exercise of authority. It is not true, in this sense, that "a grant of administration in a foreign court is not taken notice of in our courts of justice." Toll. Law Ex'ors 108. That doctrine is to be understood, as merely affirming that our courts admit not the authority of a foreign administrator to recover the assets within our own jurisdiction. They must respect the grant of administration in a foreign state, in so far as relates to the assets within its power. This is the effect of the case of Jauncey v. Sealey, 1 Vern. 397. There an english administrator filed a bill for discovery of assets against a neapolitan administrator; there were no assets in England; the  
28 foreign administrator \*pleaded in bar of the discovery, that there was no estate but at Naples, and the plea was allowed: the court thus recognizing the foreign grant of administration as it respected the foreign assets.

But though it be admitted, that the courts of this country must respect the grant of administration abroad, so far as to govern themselves by the law of the foreign jurisdiction in the administration of the assets, the question remains, whether they can take cognizance of the case? It is objected, that it may be difficult to ascertain the law of the foreign state. How, it is asked, (2 Mass. Rep. 387,) shall we ascertain the laws of Indostan in relation to administrations, when one has died and left assets there? I answer, precisely as you would ascertain it if a contract were made there. Thus, the laws of China have been ascertained in english courts, in relation to the rate of

interest. And nothing is more common than the obligation of looking into the laws of other countries, for the purpose of settling controversies arising on contracts made there, or titles to real estate within their sovereignty. Thus, in the case of *Long v. Colston*, Gilm. 98, the law of England as to the mode of transferring the rights of a feme covert in an english estate, came directly in question; and so, in numerous other cases, foreign laws respecting trade have become the subjects of inquiry and adjudication in our courts. *Livingston v. Maryland Ins. Co.*, 6 Cranch 274; *Church v. Hubbard*, 2 Cranch 236. It is unnecessary to multiply authorities upon this point. Admit the right to sue, and there can be no question of the power and the duty of our courts, in a suit against a foreign executor, who has administered abroad and comes into this country, to inquire into and to respect the law of the foreign country in relation to the administration of the foreign assets. Whatever of difficulty or inconvenience may be fancied to exist in the execution of

29 this duty, it weighs \*little in the balance, in comparison with the burden which would be imposed upon creditors and distributees, by refusing cognizance of their cases here, though the person and the property are both in our power, and sending them to sue in a foreign country from which the executor has absconded, with the whole of the assets in his pocket. How shall they sue him there, when he is not within the jurisdiction? How shall they reach the assets there, when he has eloiigned them? Will it be said his sureties may be sued? Admit it, if he has any: when they discharge the demand, and become creditors, where shall they sue? Upon the principles assumed, they could not sue him here, and thus would be utterly without remedy. To such consequences are we led by the unnecessary adoption of the principle, that an absconding executor who has eloiigned or wasted his testator's estate, can only be sued in the jurisdiction where he proved the will. If this be so, an executor who takes probat in the district of Columbia, has only to reduce the assets into money and remove with them into Virginia or Maryland, and he is safe from all further pursuit. I cannot think so. If he comes here from a foreign jurisdiction, bringing with him the assets, or having wasted them, he ought, upon every principle of justice and convenience, to be made amenable to our jurisdiction, and compelled to account with creditors, legatees and distributees, for the foreign assets which he holds or has converted.

It is said, indeed, that peradventure there might be a conflict between the decisions of the foreign court and ours, and that between the two the executor might suffer. I think not. While this court would be bound in its decision to conform to the law of the forum which granted administration, the foreign court, on its part, would consider the party protected for what he is compelled to do by us. No court, it  
30 must be presumed, \*could ever charge an executor with a devastavit, because he has paid a debt decreed in in-

vitum by a foreign tribunal, although the domestic forum may consider the decree erroneous. This appears to be admitted in the case of *Davis v. Estey*, 8 Pick. R. 475, cited for the appellee, and is abundantly supported by the most respectable authorities. Thus, in a contest between an attaching creditor abroad and the assignees of a bankrupt in England (whose rights, according to the english doctrine, cover all his property wherever found) it is declared, that if the former has obtained a judgment, however incorrectly upon principle, that judgment shall protect him. *Story's Conf. of Laws* 345. And to this effect is the elaborate opinion of lord Loughborough in *Sill v. Worswick*, 1 H. Blacks. 693. But if the creditor, who recovers effects to which the assignees are entitled, will be protected, a fortiori will the protection be extended to him, who has been compelled to pay to that creditor the funds to which another has a better title. Accordingly, we find the principle distinctly laid down by chancellor Kent in *Holmes v. Remsen*, 4 Johns. Ch. Rep. 460, 467, 468. In that case, a debt had been paid in England to the assignees of Mullett, a bankrupt, under a judgment of the lord mayor's court of London; previous thereto, trustees for the creditors of Mullett had been appointed under the laws of New York, who thereby became entitled to his whole estate; and they brought suit in New York against the executors of Mullett's debtor, who had paid the debt in London. "The question now is," said chancellor Kent, "whether the recovery of the debt is not a conclusive bar to the claim set up by the bill? In my opinion, the question cannot admit of a moment's doubt"—"If money be duly attached in the hands of a party, and he has paid it pursuant to the judgment of a competent foreign court, I am to presume omnia rite acta: and it may be laid down as a  
31 clear principle of justice, that \*a person compelled by a competent jurisdiction to pay a debt once, shall not be compelled to pay it over again"—"Which of the parties would have the better title to the debt, if it were still unpaid, may be one question: but, certainly, when the title of the assignees and the trustees is equally valid under the laws of their respective countries, the debt is well paid to the party that uses the best diligence and first recovers it." It would seem, then, that there would be no danger to the executor, even if our tribunals did not admit that the assets under a foreign administration must be administered according to the law of that forum by which administration was granted. But when we on our part defer to english law, and the english courts defer to our judgments, it is impossible he should suffer.

Upon the whole, then, it appears, that in subjecting the executor to suit who has brought the assets into this jurisdiction, no mischief will arise; while the contrary doctrine will protect an executor (who quits the country where he administered and comes over to this country with the assets) from all claim whatsoever. If he cannot be sued here, he can be sued nowhere;

since the foreign court can have no longer power over him when his person and his effects are both beyond its reach. The reason of the thing, then, is clearly with the right to sue.

How is it on authority? It is admitted, without qualification, that a foreign administrator has no right to sue. And it seems to be supposed, that the exemption from liability to suit is the correlative of this proposition. By no means. Our courts do not, indeed, recognize the right of the foreign administrator to withdraw the assets from this jurisdiction. It is clear, that as a matter of right, the power of a foreign jurisdiction does not extend over the assets which are beyond it, and that, of course, a grant of administration by it,

32 cannot give a right or title to the administrator over assets beyond \*the territory of the government which grants it. Moreover, as matter of policy and of duty to our own citizens, the withdrawal of the assets should not be permitted, to the prejudice of creditors in our own country; who might thereby be compelled to seek their remedy in the domicile of the foreign executor, and there perhaps meet with obstructions and inequalities in the enforcement of their rights from the peculiarities of the local laws: Story's Conf. of Laws, p. 421, 422. But these considerations have no bearing against the suability of the executor. So far from it, they would demand, that the foreign executor who comes here with the assets should be held liable to the action of creditors for their debts, or of legatees for what is due them. If it is the duty of every sovereignty to provide for the security of its own people, it is as much bound to enforce justice in their behalf from an executor who is within its jurisdiction, and has also within it the assets out of which they have a right to payment, as it is to prevent a foreign administrator from recovering and withdrawing the assets which are within its power. It is obvious, therefore, that so far from the power to sue and the liability to be sued being correlative, they are rather antagonizing; as the same reasons which forbid the first, very strongly sustain the last. Hence, it becomes unnecessary to examine any of the adjudications, except those which are supposed to deny the suability of a foreign executor. Of these there is not one, I conceive, which establishes the proposition.

In his treatise on the conflict of laws, after laying down (in page 422,) in the strongest terms that "no suit can be brought by or against any foreign executor or administrator in the courts of this country in virtue of his foreign letters testamentary or of administration," justice Story, in a subsequent passage (page 431,) states, less broadly, that "there are authorities which

33 indicate, that a foreign executor is not liable to be sued here as \*such."

Let us then see what are these authorities which are referred to by this learned jurist, whose research leaves no room to doubt, that he has collected all the cases which bear upon the question.

The first of the cases referred to is that of *Selectmen of Boston v. Boylston*, 2 Mass.

R. 384, which certainly establishes no such proposition as is contended for. To say nothing of the fact that it was the case of an administrator, whose sole power is derived from the court of probat, instead of that of an executor, whose powers are derived from the will, it is sufficient to observe, that the case was expressly decided upon a particular statute of Massachusetts, which provides for the grant of administration (in the case of a will that has been proved in a foreign state) "of the testator's estate lying in that state, and for the settlement of the said estate." Now, the proceeding there was not a suit against the administrator, either at law or in equity, but a citation, calling upon him to settle his accounts; and the court decided, that as a court of probat under that statute (whose powers are more limited than those of a court of chancery, 1 Mason 420,) it had authority only to settle the account of the estate lying within that commonwealth. This was as obviously right as it was clearly no decision of the question before us. It by no means proves, that the plaintiff's demand (which, as in our case, was for a legacy, in relation to which the laws of the two countries are in unison) could not have been enforced in a court of equity, or that a creditor by specialty could not have sued and recovered at law, unless the defendant could have shewn a full administration, or debts of superior dignity according to the english law.

The next case referred to by judge Story, is that of *Goodwin v. Jones*, 3 Mass. R. 514, but as the question there was as to the power of an administrator to sue,

34 \*and not as to his suability, it cannot bear upon the question here.

The next case is *Davis v. Estey*, 8 Pick. R. 475. That case was debt on a note, against an administrator who first qualified in Vermont, where the assets were more than exhausted by Vermont creditors. He afterwards qualified in Massachusetts, and was sued there. The Massachusetts assets were sufficient to pay the plaintiff; but he only claimed to be entitled to a pro rata dividend out of the whole property in both states; and so the court decided. I am at a loss to perceive what influence this case can have upon the question before us; for it is plain, that as the foreign assets were insolvent, no question could arise as to the power to reach them; and as to the administrator, there could be no question as to his suability in respect of the Massachusetts assets, he having qualified in that state as well as in Vermont.

The case of *Dawes v. Head*, 3 Pick. R. 128, 143, was determined, avowedly, without touching the questions in relation to the administration of foreign assets, which are pronounced to be of a novel and delicate nature. The case however is very much like that of *Davis v. Estey*, and is liable to the same remarks.

Lastly, in *Doolittle v. Lewis*, 7 Johns. Ch. Rep. 45, 47, though chancellor Kent states, broadly, that a foreign executor cannot sue or defend, yet the remark was altogether extrajudicial; and the same may very truly be said of the case of *Morrell v. Dickey*, 1 Johns. Ch. Rep. 153, to which the

learned judge refers. It is observable too, that in this last case there is no intimation that a foreign executor cannot be sued.

Besides the foregoing cases, which are all that are cited by judge Story in the passage last referred to, there are a few others which it may be proper to notice. Thus, in the case of *Richards v. Dutch*, 8 Mass. R. 506, it was decided, that "legatees, who claim only from the bounty of the testator, must resort to the country of \*the testator, where the will was proved originally, and by the laws of which his effects are to be distributed, to obtain the bounty they claim;" and the same doctrine seems to have prevailed in *Dawes v. Boylston*, 9 Mass. R. 337. These decisions appears to me unreasonable and extravagant, and they are rejected by judge Story himself in the case of *Harvey v. Richards*, 1 Mason 381, 420, 421. They are opposed, too, by the decisions in other states (*Guier v. O'Daniel*, 1 Binn. 349, in note) and by the english cases collected by the court in *Harvey v. Richards*. It would be unreasonable, indeed, that a legatee should be compelled to go aboard to get payment out of assets that are here, in the hands of an administrator who has duly qualified in our courts, and is within our jurisdiction.

In *Jauncey v. Sealey*, 1 Vern. 397, the plaintiff as administrator of J. S. who died at Naples, brought his bill for a discovery of the intestate's personal estate, against the executor who qualified in Naples, but was then in England. There were no assets except assets in Naples, and it does not appear that they were brought over to England. The plea of these matters was held a bar to the discovery. *Scrimshire v. Scrimshire*, 2 Hagg. 420, (as cited, Conf. of Laws 432,) is to the same effect. Those cases, I presume, were rightly decided: 1. Because the plaintiff claiming the discovery, was neither creditor nor legatee nor distributee. He was the home administrator, seeking an account of assets in another country, from the foreign administrator then in England. What right had he to demand those assets, which had been lawfully committed to the foreign administrator by the jurisdiction within whose power the assets had been, and still continued? That administrator, according to my view of the subject, might have been liable to the action of creditors and legatees, since as administrator he was bound to pay the debts and legacies all over the world, but

36 he was \*in no wise bound to pass over the foreign assets to another representative of the estate, for the purpose of being administered by him. 1 Mason 423. 2dly. Because the assets were neapolitan assets, and were still within the power of that forum which had granted the administration. To have decreed that the foreign executor, then in England, should deliver over to an english administrator the goods which were in Naples, would have been to require what might have been impossible, and was contrary to his duty; and if the delivery could not be decreed, the plaintiff could derive no benefit from, nor have any title to, a discovery.

The last case I shall advert to, is *Newby's*

*adm'r v. Moore's ex'ors*, 1 Dowl. & Ry. 35, 16 Eng. C. L. R. 15. The testator's widow, who administered in India, remitted the effects to an agent in England. A creditor administered in England, and as administrator brought assumpsit against the agent of the administratrix, for the money in his hands. The court held, that the foreign administratrix was entitled to all the assets which the testator left in India, and that the english administrator could not recover them from the agent. This case, then, concurs with the preceding, and the remarks already made as to them, fully apply to it.

Upon a full review of the whole subject, I am of opinion, that justice, convenience and necessity require a recognition of the right to sue an executor who has qualified abroad, if he comes within this jurisdiction bringing the assets with him; and no authority sustains the contrary proposition. Whether he would be liable to suit here, if the assets still remained abroad, it is not necessary in this case to determine.

I have occupied so much time on this novel and important topic, that I must content myself with a very succinct notice of some others. The next point of importance refers to the dignity of this debt. And

37 here it is to be observed, that this inquiry depends upon \*Virginia statutes, not upon english law. Benjamin Pollard the elder was indebted to the estate of Camm Garlick, and upon his death Benjamin Pollard the younger administered on his estate, and became liable to pay his debts according to the dignity prescribed by the Virginia law. If then, by our law, the debt due from the estate of Pollard the executor to the estate of Camm Garlick his testator, was a debt entitled to preference, it can be of no importance whether it would be so regarded by english law or not.

By the act of 1705, ch. 33, § 13, it is very clear, that the debt of an executor to his testator's estate is of the first dignity, though he has never qualified. We do not consider that act as repealed by any subsequent act, until it was repealed by the provision of the act of March 1819 "providing for the republication of the laws," 1 Rev. Code, ch. 1, § 9, p. 16. We all consider the acts of 1748, ch. 4, § 13, of 1785, ch. 61, § 50, and the revised act of 1792, as cumulative; and instead of designing to narrow the provision which gave preference to the payment of these demands against fiduciaries, they were intended to extend it, and to embrace cases not within the act of 1705; such as the cases of committees of lunatics, sheriffs committees of intestates' estates, and the curators of the property of deceased persons &c. With this view of the matter, we are of opinion, that this was a debt of the highest dignity.

But we think the payment of the two judgments of Kearnes and Coker by Pollard the administrator, were payments in his own wrong. There is no doubt that those judgments, which were of very ancient date, were fully within the operation of the statute 1 Rev. Code, ch. 128, § 17, by which not only was all remedy upon them against the administrator barred by the lapse of five years from his qualification without



any proceedings had upon them, but  
38 it is provided that they "shall be deemed" (that is, taken, held, considered) "to have been paid and discharged." This provision is much stronger than any clause of the english statute of limitations, and seems to me to make it the duty of executors to plead the statute. It has, indeed, been repeatedly observed in England, that an executor is not bound to plead the statute there. But this doctrine seems of late to have been seriously and very properly shaken, at least in the extent to which it had been carried. Thus, in *M'Culloch v. Dawes*, 9 Dowl. & Ryl. 40, 22 Eng. C. L. R. 385, where the testator had incurred a debt in 1796 and died in 1804, and suit was brought in 1826, Bayley, J., observed, that "executors are bound, if possible, to resist such a claim: they have no right to waive any legal defence to such an action; and if they did, and were to pay a debt against the recovery of which there was any legal bar, they would render themselves liable over to those who were interested in the testator's property." This, though an obiter dictum, is the dictum of a most distinguished judge, and is entitled to the more consideration, as all the opinions on the other side are founded on an incidental remark of lord Hardwicke in *Norton v. Frecker*, 1 Atk. 526. In a late case, too, in equity, it has been decided by lord Brougham, that when a suit in equity is brought convening the executor and all the creditors of the estate for the purpose of distribution and administration of the assets, in the master's office, any party interested, whether creditor, executor or volunteer, may insist upon the objection. *Shewn v. Vanderhorst*, 1 Russ. & Myl. 347; 4 Cond. Eng. Ch. R. 458. In New York too, it has been decided that an executor cannot be allowed in his accounts a charge for retaining a debt barred by the statute at the testator's death, on the ground that it is no longer a debt. *Rogers v. Rogers*, 3 Wend. 503. *Matthews on Ex'ors* 137, lays down the doctrine also as it was decided by lord Brougham, though he quotes  
39 \**Burke v. Jones*, 2 Ves. & Beam. 275.

These cases shew, that it is by no means a settled rule elsewhere, that an executor may of his own will, and against the interest or express direction of the parties interested, saddle the estate with a debt which he might successfully have resisted. Still less can such a principle prevail in relation to cases within the 17th section of our statute of limitations, which declares that every judgment against a testator, upon which no proceedings shall have been had within five years from the executor's qualification, shall be "deemed to have been paid and discharged." Under this clause, I incline to think an executor is always bound to make this defence, unless it be waived by those who are interested: but be that as it may, I am satisfied, that there may be cases in which it would be his duty; and in the case under consideration I do not think he had a right, while the plaintiffs were in full pursuit of their demands, to take away from them the advantage they had acquired. The debts

which had precedence of theirs were now barred by the statute, and "deemed to have been paid and discharged;" and it was a violation of their rights, to give new life and vigour and precedence to demands, which, but for the collusion of the administrator, could no longer be a barrier to their recovery. For I presume, that to the plea of debts of superior dignity, the creditor plaintiff may well reply that those debts are barred by the statute and deemed to be satisfied and paid.

In this view of the case, it is unnecessary to inquire into the alleged fraud and collusion in the payment of these judgments, the circumstances of which, to say the least, are very suspicious. Nor is it necessary to examine the other questions in the cause. It remains but to observe, that in reversing the decree, the cause must go back for further proceedings, since it does not appear whether any and what  
40 payments have been \*made by the representatives of John and Samuel Garlick. This inquiry must be made in the court below.

CABELL and BROOKE, J., concurred. It was understood that PARKER, J., dissented, but his ill state of health prevented him from giving the reasons of his opinion.

The decree entered in the court of appeals was as follows:

"The court is of opinion that Benjamin Pollard the executor of Camm Garlick deceased and who qualified as such in the prerogative court in England, was properly amenable to the process of the courts of this commonwealth, at the suit of those interested in the estate, he having removed hither with the foreign assets, which, as it appears, he afterwards wasted and eloiigned. And the court is further of opinion that the payments made by Benjamin Pollard administrator of Benjamin Pollard deceased, executor as aforesaid, of the two judgments of Kearnes and Coker, were improperly allowed to the said administrator in the settlement of the administration account, as against the plaintiffs' claim: that the debt of Camm Garlick's executor, Benjamin Pollard, to the estate of the said Garlick, was a debt of superior dignity to the said judgments; but that if it were not so originally, it ought not now to yield to them, as they were barred by lapse of time, and by the provisions of the statute are presumed to have been paid and satisfied: that they ought therefore to have been resisted by the administrator, and might have been successfully resisted by relying on the seventeenth section of the statute of limitations: that the plaintiffs, as creditors, had a right to insist on the objection of the statute against those judgments (15 Ves. 498,) and that the administrator was bound to make it under the circumstances of this case, instead of making payment to  
41 the prejudice of \*creditors whose demand was in a full course of prosecution and was not liable to the objection of the statute. The court is therefore of opinion that the decree of the said circuit superior court is erroneous in dismissing the bill of the appellants. Therefore"



Decree reversed with costs, and cause remanded to the circuit court, to be finally proceeded in pursuant to the principles of the foregoing opinion and decree.

It was alleged by the administrator Pollard, in his answer, that his intestate took the benefit of the laws for the relief of insolvent debtors, and was discharged from custody, at the suit of Coker, in 1804; but no evidence of such proceeding was exhibited, and the fact nowise appeared by the record, that he was discharged as an insolvent. If evidence of such a proceeding had been adduced, it would have been a question of very different consideration, whether the 17th section of the statute of limitations would have been a bar to the action of Coker against the administrator of Pollard, upon his judgment against the intestate in his lifetime? But the point was not considered by the court, or made at the bar, probably because it was thought that it was not presented by the record. If the intestate Pollard took the benefit of the laws of Virginia for the relief of insolvents, in a state court, and was discharged from custody at the suit of Coker, the laws of Virginia vested all the estate of the insolvent debtor, for such interest as he had therein and might lawfully depart withal, in the sheriff for the benefit of the creditor at whose suit he was in custody; and the creditor might, at any time afterwards, have sued out a scire facias to have execution against any estate the insolvent debtor thereafter acquired or was possessed of. 1 Rev. Code of 1792, ch. 151, § 30-42, Pleas. ed. p. 808; 1 Rev. Code of 1819, ch. 134, § 31, 2, 3, 4, 5, p. 586-8. If he took the benefit of the laws of the U. States for the relief of insolvents, in a federal court (and if there was any such proceeding, it probably occurred there), the act of congress of January 6, 1800, 8 Bior. 301, provides, that any person imprisoned on process of execution, issuing from any court of the U. States, in civil actions, may take the oath of insolvency thereby prescribed; and, thereupon, "the debtor shall be discharged from his imprisonment on such judgment, and shall not be liable to be imprisoned again for the said debt, but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate which may then, or at any time afterwards, belong to the debtor."—Note in Original Edition.

## 42 \*The Tuckahoe Canal Company

v.

## The Tuckahoe and James River Rail Road Company.

March, 1840, Richmond.

(Absent PARKER and STANARD, J.)

**Canal and Railroad Companies\*—What Grant of Charter Does Not Create a Monopoly.**—A monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; to give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself

from granting charters for rival and competing works.

**Same—Same.**—Therefore, where the legislature granted a charter to a company to construct a navigable canal along the valley of a stream, and in consideration of the work to take the profits, without any provision against the exercise of power to charter other and rival companies, the legislature was nowise restrained from chartering a company to construct a rail road along the same valley, though the rail road shall afford the same public accommodation as the canal, and may in effect impair or annihilate its profits.

**Same—Power of Junior Company to Cross an Elder—Liability for Damages.**—A navigable canal being constructed by a chartered company along the valley of a stream, a company is afterwards chartered to construct a rail road along the same valley; if the terminal given for the rail road be such that it may cross the canal, the rail road company is authorized to lay out its road so as to cross the canal; but in such case, the rail road must be so constructed as nowise to obstruct or impair the navigation, the rail road company being liable to the canal company for all damages which may result therefrom.

**Same—Power of Railroad Company to Condemn Land of Canal Company.**†—The general rail road law of 1836-7, ch. 118, authorizes a rail road company to have condemned for its use, lands which a chartered canal company has acquired for its canal, as well as lands of individuals; and if the canal company has only acquired a right of way in the lands occupied by the canal, the rail road company may have the lands condemned for its use, as the lands of the original proprietor, subject to such right of way.

**Same—When Proceeding of Railroad Company Cannot Be Enjoined.**‡—By the 18th section of the general rail road law, the court of chancery is deprived of jurisdiction to enjoin a rail road company from proceeding to prosecute its work at its peril, upon the application of an elder canal company, whose canal the road is projected to cross; the rail road company not thereby transcending its authority. \*and the injury if any to the canal company being such as may be adequately compensated in damages.

†**Same—Power of Condemnation.**—As to the right of a railroad or canal company to condemn land for its use, the principal case is cited in *Spencer v. Railroad Co.*, 23 W. Va. 410, 420; *B. & O. R. Co. v. P. W. & Ky. R. Co.*, 17 W. Va. 853; *Upper Appomattox Co. v. Hardings*, 11 Gratt. 4; *Alexandria & Fredericksburg R. Co. v. A. & W. R. Co.*, 75 Va. 787.

‡**Same—Condemnation—When Proceeding of Railroad Company Cannot Be Enjoined.**—It is not competent for the court of chancery to award an injunction to stay the proceedings of a railroad or canal company in the prosecution of its work of any kind, unless it be manifest, both that it is transcending its authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages; the two circumstances must concur to warrant a court in awarding such process. *James River & Kanawha Co. v. Anderson*, 12 Leigh 314 (308), citing *Tuckahoe Canal Co. v. Tuckahoe & James River R. Co.*, 11 Leigh 42. See citing the principal case for this proposition *N. & W. R. Co. v. Smoot*, 81 Va. 504; *Board of Supervisors v. Gorrell*, 20 Gratt. 514. See generally, monographic note on "Eminent Domain" appended to *James River & Kanawha Co. v. Thompson*, 3 Gratt. 270.

\***Canal and Railroad Companies—Right of State to Control.**—In *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 413, it is said that the legislature of this state in the case of ferries has never in any instance attempted to surrender its power over the subject, citing *Tuckahoe Canal Co. v. Tuckahoe & James River R. Co.*, 11 Leigh 42; *Somerville v. Wimbish*, 7 Gratt. 206. See also, citing the principal case, *Roper v. McWhorter*, 77 Va. 218.

Tuckahoe Creek is a small tributary of James River, into which it falls about ten miles above the city of Richmond. It is the dividing line, from its source to its mouth, between the counties of Henrico on the east, and Goochland on the west of the stream, the general direction of its course being from north to south; and it passes through a body of coal lands lying in both those counties, in which coal mines have been opened and worked, for many years, by several proprietors.

By an act passed on the 1st March 1827, the general assembly authorized six managers to open books for receiving and entering subscriptions to the amount of 20000 dollars, in shares of 1000 dollars each, for the purpose of constructing a canal from some point on the James River canal, west of Tuckahoe Creek, to some point on the creek in Goochland, near Crouch's coal pits; and enacted, that whenever two fifths or more of the capital should be subscribed, the subscribers should be incorporated a company by the name of The Tuckahoe Canal Company, with all the rights and privileges, and subject to all the regulations, restrictions and provisions, of the general law concerning turnpike companies, 2 Rev. Code, ch. 234. That whenever two fifths or more of the capital should be subscribed, the managers should call a general meeting of the subscribers, at which the shareholders holding a majority of the shares actually subscribed, should have power to make all necessary rules and regulations, and to elect a president and two directors, for conducting the canal, and so much of the company's business as should be confided to their care. That the president and directors should have power to agree with the owners of lands through which the canal should pass, for the purchase of so much thereof as should be necessary for the canal and the works incident thereto, or, in case of disagreement,

44 \*to proceed to have the lands condemned according to the provisions of the general law concerning turnpike companies. That in case any owner of land on either side of the canal should apprehend damage from the work, any two justices of the peace of the county in which the land should lie, should, at his instance, issue a warrant to the sheriff to summon a jury to assess the damage if any which such proprietor would sustain, and the damage so assessed should be paid to the proprietor by the company before it should proceed to the cutting of the canal. That in consideration of the expenses the company would incur in making the canal, and keeping the same in repair, the canal with all its profits should be vested in the subscribers, their heirs and assigns, as tenants in common, in proportion to their respective shares. That the president and directors should have a right to demand and receive tolls, according to a tariff prescribed by the charter, for the whole work, and to demand and receive a fourth of those tolls, so soon as the canal should be rendered navigable for boats drawing two feet water as far as Buck Branch (a small stream which falls into the Tuckahoe about a mile from

the James River canal). Provided, that nothing in the act contained should authorize the diversion of the Tuckahoe, or any part thereof, into the canal, or the erection of any dam across the creek. And that the canal should be completed within five years from the passing of the act; and if the navigation should not be completed within that time, all the rights and privileges thereby granted should cease and determine. Sess. Acts 1826-7, ch. 64, p. 56.

At the time this act was passed, the James River canal crossed the Tuckahoe by an aqueduct, on a level several feet above the level of the creek, and immediately after crossing it, was let down by locks into the creek, which, thenceforth to its mouth, was part of the canal. And as

no part of the waters of the creek  
45 were \*to be diverted into the Tuckahoe canal, it was, according to the original plan of the work, to be supplied with water from the James River canal, by a feeder taken from its upper level, which was high enough to supply water to the lateral canal for its whole extent.

The charter of the Tuckahoe Canal Company was altered, at the instance of the company, by an act passed on the 11th January 1828; whereby the company was authorized to make a rail road on so much of the ground intended for the location of the canal, as the company should deem expedient; provided that it should not thereby obstruct any private roads or ways, or such other roads as were convenient for persons travelling to Tuckahoe mill: to make navigable any part of Tuckahoe Creek lying between the James River canal and the mouth of Buck Branch by deepening the same, or, if necessary, by erecting a dam and lock for raising the water of the creek, so that it should not be raised more than a foot above the ordinary level; provided it should not charge more than a sixth (instead of a fourth) of the whole toll, for the navigation from Buck Branch to the James River canal: and to cross the Tuckahoe at any point above Tuckahoe bridge on the main road, so as not to raise the water in Tuckahoe mill pond, or the creek above it, higher than its then level, or to obstruct the course of the water in the mill pond or the creek. Sess. Acts 1827-8, ch. 106, p. 75.

The company, however, proceeded with the work upon a plan different from that authorized either by the original act of incorporation or by the amendment of its charter. And on the 9th February 1830, the general assembly passed another act, reciting that the company had proceeded to locate and commence the canal authorized by the acts relating thereto, along the bed of the Tuckahoe, with the consent of all persons interested therein or affected thereby, instead of pursuing the independent \*canal required by those  
46 acts, and that it was desirable that an act should pass to authorize such change in the location of the canal; and therefore enacting, that the company should be authorized to extend the canal along the bed of the Tuckahoe from the James River canal to the upper locks on the lands of

John Wickham, and from the dam erected across the creek above Tuckahoe bridge, to Crouch's lower bridge, and with the concurrence of all the stockholders, by instrument in writing and recorded, to extend the canal along the bed of the creek to the mouth of Deer Pen Branch; and that the dam across the canal above Tuckahoe bridge, which had been already erected, should be authorized as if the same had been erected according to law; provided, that nothing in the act contained should be so construed as to affect any agreement between John Wickham and the company, and that the company should have no right to obstruct the course of the water of the Tuckahoe to the mill of the said Wickham, contrary to the terms of such agreement. Sess. Acts 1829-30, ch. 60, p. 58.

Mr. Wickham was the owner of the lands on the Tuckahoe, from the James River canal to the dam erected by the company, and of Tuckahoe mill also, which was on the creek some distance below that point, with the mill pond and the land covered by it, of considerable extent, appurtenant to the mill; and the agreement referred to in the last act, was a contract between him and the company, stating the terms on which he consented that the company should make its canal through his land, and should have the use of the waters of the Tuckahoe for supplying the same. But though the company had, in the execution of the work, complied with those terms, the contract had not been executed on either part by deed.

The work was executed according to the provisions of the charter contained in the three acts of assembly \*above recited, taken together. From the head of the navigation to the dam mentioned in the last act, the improvement was made by deepening the Tuckahoe, in some parts, clearing away obstructions, and so rendering it navigable, and by cutting canals, in other parts, whereby the stream was straightened; from the dam to the mouth of Buck Branch, a canal was cut, which was supplied with water partly from the Tuckahoe, and partly by a feeder from the James River canal; and at the mouth of Buck Branch, locks were constructed to connect the canal with the stream of the Tuckahoe, which was deepened and rendered navigable from the locks to the James River canal. The canal from the dam to Buck Branch crossed the main road from Richmond to Goochland courthouse, a bridge being made across the canal for the road to pass over, high enough to admit the passage of any boats along the canal, which could be used in the navigation, in the then state of the improvement. The whole length of the canal, from the head of navigation to the James River canal, was five and a half miles.

It did not distinctly appear in proof, when the work was completed. After it was completed, the company demanded and received the full tolls, allowed by its charter: but though, by the charter, it was "subject to all the regulations, restrictions and provisions of the general law concerning turnpike companies," it never complied with the provisions of the 17th and 29th

sections of that statute.\* The company insisted, that the \*provisions of the 17th section were nowise applicable to its case. And as to the provisions of the 29th section, \*it appeared, that though the company had not made the report to the board of public works thereby required, and though the attention of the

\*The general law concerning turnpike companies, 2 Rev. Code, ch. 234, § 17, p. 218, provides—"That so soon as any section of five miles of such road shall be completed, it shall be lawful for the president and directors" of each turnpike company, "to apply to the court of the county in which such section or the greater part thereof may lie, to appoint three discreet and disinterested freeholders to examine the same, who, or any two of whom, being sworn for that purpose, shall examine such section, and make a written report of the condition thereof to the court; and if upon such report, and such other evidence as shall be offered, the court shall be satisfied, that such section is completed in the manner prescribed by this act, they shall make an order of record declaring that it is so completed, and it shall thereupon be lawful for the president and directors, and they are hereby authorized to erect thereon a toll gate or gates, and they shall be entitled to demand and receive the following tolls upon the said section"—prescribing a tariff of tolls for the section of five miles of road.

Id. § 29, p. 222, provides—"That at the end of one year from the completion of the road, the president and directors" of each turnpike company "shall report to the board of public works, a statement shewing the whole amount of the capital expended in the construction of the road, the amount of tolls received during each preceding year, the expenses and charges incurred during each year, and the net annual profit or loss on the capital expended. If from this statement, and such other evidence as shall be offered, the board of public works shall be satisfied, that the net average profits for the three succeeding years, on the capital expended, will not equal ten per centum per annum, then the board of public works shall so augment the tolls hereby allowed, as to make them sufficient, in their estimation, to yield such net annual profit for the three succeeding years; and if the board of public works shall be satisfied from the evidence aforesaid, that the average net profits of the three succeeding years, will exceed fifteen per centum per annum on the capital expended, they shall so diminish the tolls as to make them only sufficient, in their estimation, to yield an annual net profit of fifteen per centum per annum for the said period of three years." The statute then provides, that the like reports shall be made by each turnpike company, and the like action had thereon by the board of public works, from time to time, at the end of every three years. "And if the president and directors of the turnpike company shall fail to make the return accordingly, and to produce the evidence required for its verification, without good cause for such failure, to be shewn to the board of public works, it shall be the duty of the board of public works to make an entry upon their journal declaring such failure, and forthwith to reduce the tolls of the said turnpike company to an amount not exceeding one half the tolls hereby allowed, and calculated to yield a net profit not exceeding, in their estimation, five per centum per annum. Such reduction shall be continued until the proper return shall have been made, verified by the proper evidence, or until good cause shall have been shewn for the failure."—Note in Original Edition.

board was called to the subject in 1831, the board, at that time, for reasons satisfactory to them, declined to act upon it, and had never since thought proper to reduce the tolls.

The Tuckahoe canal was so constructed as to afford navigation for any boats that could navigate the James River canal, as that canal was then constructed. But The James River and Kanawha Company having proceeded, under its new charter, to enlarge that canal, so as to afford navigation for boats of much larger burden, and to conduct the canal in that part on a higher level than the Tuckahoe, a corresponding change in the construction of the lateral Tuckahoe canal was thereby rendered necessary. And by an act of assembly passed the 9th April 1838, The Tuckahoe Canal Company was authorized to increase its capital to the amount of 30000 dollars, and to enlarge the dimensions of its canal and works, and to alter the construction thereof, in the manner provided in the act. Sess. Acts 1838, ch. 204, p. 148.

But, in the meantime, namely, by an act passed on the 27th March 1837, The Tuckahoe and James River Rail Road Company was incorporated, for the purpose of constructing a rail road from the lands and coal mines of Martha Ellis in Henrico, to such point on the James River canal as the company should select. For this work, the act authorized the raising by subscription of a capital of 40000 dollars, in shares of 100 dollars each; and it gave The Tuckahoe Canal Company the privilege of raising the capital, and of executing the work, provided that one hundred shares of the capital should be subscribed, and the work commenced, within two months from the passing of the act, and completed

50 \*within twelve months thereafter.

But if that number of shares should not be subscribed, and the work commenced and completed by the Tuckahoe Canal Company within the times specified, the act provided, that the privilege thereby granted to that company, should, in that case, be forfeited; and that, then, books should be opened for receiving and entering subscriptions for the capital of 40000 dollars in shares of 100 dollars each, and when one hundred shares thereof should be subscribed, the subscribers should be incorporated into a new company by the name of The Tuckahoe and James River Rail Road Company, for the purpose of constructing the said rail road; which company should be subject to the provisions of the general law prescribing certain general regulations for the incorporation of rail road companies.\* Sess. Acts of 1836-7, ch. 132, p. 124.

\*This general law was passed at the same session of 1836-7, Sess. Acts, ch. 118, p. 101. It provided a constitution for all railroad companies which should be afterwards incorporated, prescribed their duties, regulated their proceedings, and ascertained their corporate rights and privileges. The 9th section provides, that "previously to the institution, and during the pendency, of proceedings for ascertaining the damages to the proprietor, for the condemnation of land for the use of any such company, the president and directors, their officers, agents and servants, shall have power and authority

51 \*The Tuckahoe Canal Company did not avail itself of the privilege conferred upon it by this act, of constructing the rail road from Mrs. Ellis's coal mines to the James River canal. And, there-  
52 upon, books were opened \*for receiving and entering subscriptions to the capital of 40000 dollars; the capital, or a sufficient number of shares thereof, were subscribed; and the subscribers became incorporated into the new and distinct company of The Tuckahoe and James River Rail Road Company.

This new company projected its rail road from Mrs. Ellis's coal mines in Henrico, east of the Tuckahoe, to a point on the James River canal also east of that creek, but so as to cross the Tuckahoe Canal at two points. The only motive for thus crossing the line of the Tuckahoe Canal was to save expense in the construction of the rail road. It might have been laid out altogether on the east of the Tuckahoe without crossing the Tuckahoe Canal; and that route, in the opinion of the witnesses, would have been as eligible as the one which was adopted, except that the expense of the work would have been greater.

The rail road, as projected, was to cross the canal on two bridges. At the upper crossing, the elevation of the bridge was to be six feet six inches above the common water level of the canal; but only three feet six inches above the towing path; and the space between the abutments was forty-six feet: the elevation of the bridge at the lower crossing, was to be thirteen feet above the canal, and the space between the abutments a hundred and forty feet. The

to enter upon all lands and tenements through which they may desire to conduct their rail road, and to lay out the same according to their pleasure, so that no dwelling house, or space within sixty feet of one, belonging to any person, be invaded without his consent, and if they think the interest of the company requires it, to take possession thereof for the purposes of the company, and also to enter upon, lay out, and take possession of such contiguous land as they may desire to occupy, as sites for toll houses, warehouses, depots,—and all other buildings for the necessary accommodation of their officers, agents, and servants, their horses, mules and other cattle, and for the protection of the property committed to their care: provided, that the land so laid out and occupied on the general line of the railroad shall not exceed, except in deep cuts and fillings, eighty feet in width, and that the adjoining land for the sites of buildings shall not exceed one acre and a half in any one parcel."

The 9th section further directs, that the president and directors of such company "shall describe by certain limits the lands which they may desire to occupy for any of the purposes aforesaid." And then that section, with the 10th, 11th and 12th sections, authorize every such company "to purchase the land so laid out, or any part thereof;" and "in case they cannot agree with the owner or owners of the lands so entered on and laid out, on the terms of purchase," to have the lands condemned for the use of the company, by proceedings the manner of which is very particularly prescribed.

The 18th section provides, that "in the mean time, no order shall be made and no injunction shall be awarded by any court or judge, to stay the proceedings of the company in the prosecution of their

elevation of these bridges above the canal, and the spaces between the abutments, were greater than the elevation of the bridges, and the spaces between the abutments thereof, which had been erected by The Tuckahoe Canal Company for the crossing of public and private roads over the canal.

The grading of the rail road according to this projection, was completed in April 1838, and contracts for the whole work had been made, and a good part of the work had been done, earlier.

In August 1838, The Tuckahoe Canal Company exhibited a bill, in the circuit superior court of Goochland,

53 \*against The Tuckahoe and James River Rail Road Company, in which, after setting forth the charters of both companies, the actual construction of the canal, and the projection of the rail road to cross the canal at two points, they insisted, that the charter of the Rail Road Company gave it no right to run its road across the canal at all; that the legislature had by design withheld the grant of such a right in the charter; and upon general principles of law, the Rail Road Company had no such right. That the Canal Company had a right, not only to enjoy the profits of its works, free from obstruction, in the then state of the improvement, but also to enlarge and improve its canal, so as to correspond with the late improvement of the James River canal. And that the erection of bridges for the projected rail road, especially the erection of the upper bridge, at the elevation proposed, would obstruct or impede the navigation of the canal, and the use of the towing path, even in the then state of the work; and would utterly pre-

vent the Canal Company from enlarging and improving its canal, so as to correspond with the late improvement of the James River canal, and to afford a navigation for boats of the same dimensions and burden with those that navigated the James River canal, as enlarged and improved. Therefore, the bill prayed an injunction to restrain The Tuckahoe and James River Rail Road Company from constructing any bridge or rail road, or arch of any kind, across the Tuckahoe canal.

works, unless it be manifest, that they, their officers, agents or servants, are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages."

The 16th section provides, that "whenever in the construction of any rail road, it shall be necessary to cross any established road or way, it shall be the duty of the president and directors so to construct their rail road across such established road or way, as not to impede the passage or transportation of persons or property along the same. And where it shall be necessary to pass through the land of any person, it shall be their duty to provide for such person, and keep in proper repair, proper wagon ways across their rail road from one part of his land to another, provided, however, that in order to prevent the frequent crossing of established roads or ways, or any interference with the same, by the rail road, it shall be lawful for the president and directors to change the said established road or way at points where they may deem it expedient to do so, and that for entering or taking any lands which may be necessary therefor, they shall be and are hereby authorized to proceed under the provisions of this act as in case of land necessary for their rail road; and provided further, that previous to making such change the said company shall make and prepare a road equally good with the portion of the road proposed to be changed. But nothing in this act contained shall be so construed as to require the company to keep in repair the portion of any road they may have changed as aforesaid."—Note in Original Edition.

The injunction was awarded.

The Tuckahoe and James River Rail Road Company, in its answer, insisted, that The Tuckahoe Canal Company was nowise entitled to the aid of the court of chancery, because it had not in fact constructed its canal, and kept it in repair, so as to afford a navigation for such boats as navigated the James River canal at the time the Tuckahoe canal was constructed, and because the Canal Company had from the time of the completion of the

54 \*work (which, the defendants alleged, was completed as early as 1831) continued to exact full tolls, yielding an enormous profit on the capital actually expended, and had never made any such report to the board of public works as the company was bound by law to make, in order that the board might determine whether it was proper to reduce the tolls. That the Canal Company had acquired no legal title in the land upon and through which it had dug its canal, but claimed only under an executory contract with Mr. Wickham, which had never been executed by deed; and therefore, any part of that land was still liable to be condemned, as the land of Mr. Wickham, for the use of the Rail Road Company. That, as against the Rail Road Company, the Canal Company had no right to enlarge and improve its canal so as to correspond with the late enlargement and improvement of the James River canal, since it could only claim such right under the act of assembly passed on the 9th April 1838, and the charter of the Rail Road Company was passed on the 27th March 1837, under which the Rail Road Company had been incorporated, had commenced its work, and had made great progress therein before April 1838. That the Rail Road Company had a right to construct its road on any route it thought proper, between the two points mentioned in its charter, and to cross the line of the Tuckahoe canal, provided the road should be so constructed as not to obstruct or impede the navigation of the canal; and that, in fact, the rail road bridges would nowise obstruct or impede the navigation of the actual canal, since they were to be erected at an elevation greater than that of any of the bridges which the Canal Company had itself erected across the canal. That, at all events, the Rail Road Company had a right to construct its road so as to cross the canal, in the manner proposed, even if it should thereby obstruct or impede the navigation of the canal, in which case

55 the Canal Company \*would only be entitled to compensation in damages; and that the court of chancery had no ju-

isdiction to interfere by way of injunction.\*

In March 1839, the circuit superior court dissolved the injunction, so far as the same restrained the Rail Road Company from erecting a bridge for its road, across the canal, at an elevation of six feet or more above the towing path of the canal. The Canal Company applied by petition to this court for an appeal from the order; which was allowed.

The cause was argued here, by R. C. Stanard, Lyons and Leigh, for the appellants, and by Taylor and G. N. and C. Johnson, for the appellees.

I. The counsel for the appellants contended, that, supposing it competent to the legislature, after granting the privilege to a corporate company, of making a canal for the transportation of coal and other articles from one point to another, and granting to the company the profits of the work as a compensation for the improvement, to authorize another corporate company to construct a rail road along side of the canal, for the transportation of the same articles from and to the same points, whereby the profits of the canal company would be wholly taken away, yet the legislature could not, without a violation of the charter of the Canal Company, authorize a rail road which should cross the line of the canal, and occupy, in any way, the very ground, or any part of it, on which the canal was made. They referred to the cases of *The Chesapeake and Ohio Canal Company v. The Baltimore and Ohio Rail Road Company*, 4 Gill & Johns. 1, and *The Proprietors of the Charles River Bridge v. The Proprietors of the Warren Bridge*, 11 Peters

420. The last case, they said, went 56 to as great a length as "any other case (and, they thought, farther than any other) in upholding the right of the legislature to take away, in effect, the whole substantial benefit of corporate privileges which it had itself previously conferred. The question there presented to the court was, whether by a subsequent act of incorporation, a state legislature could constitutionally confer on a junior company, the right of constructing an improvement, which, by establishing a direct and ruinous competition, would impair, if not destroy, the franchise of an elder existing corporation which it had previously chartered? On that question, the supreme court of Massachusetts was equally divided: the supreme court of the U. States, by a divided court (four judges to three,) held the affirmative. In that case, the main question was as to the extent of the franchise of the elder corporation; the Charles River Bridge Company insisting, that its franchise had a reasonable extent beyond ferry ways and the timbers of the bridge, so as to prevent ruinous competition; and the Warren Bridge Company maintaining, on the contrary, that the charter of the other company must be strictly construed, and its franchise confined to the ferry ways and the timbers

of the bridge. But no one denied, that within the ferry ways and the timbers of the bridge the franchise was sacred. It was not pretended, that the legislature of Massachusetts could confer on the Warren Bridge Company, a right to construct its bridge between the same points, or to throw it over the Charles River bridge, or to appropriate to its use the ferry ways, or the termini of that bridge, or either of them, even though the access to it, or the passage or transportation over it, should not be thereby obstructed: to have done that, it was admitted, would have been to invade the paramount and exclusive right which the Charles River Bridge Company had in its own bridge and ferry ways, and would have involved a direct and unconstitutional violation of its undoubted

57 \*franchise. The argument for the Warren Bridge Company was (and such was, substantially, the opinion of a majority of the supreme court) that the franchise of the Charles River Bridge Company was confined within the limits before mentioned, and the construction of the Warren bridge was, therefore, no violation of it; and that as to the loss of the tolls, with which the Charles River Bridge Company was threatened, that was a consequential damage resulting from a lawful act, *damnum absque injuria*, for which the elder company had no redress. Admitting, then, the authority of the judgment of the supreme court in that case, yet so far from sustaining the claim set up by the Rail Road Company in this case, to make bridges across the appellants' canal, they said it was a direct authority against the appellees on that point. However, they controverted the propriety of the judgment of the supreme court by which the claim of the Warren Bridge was sustained against the rights of the Charles River Bridge; founding themselves on the arguments of judges Story and M'Lean, who dissented from the majority of the court. In the controversy between *The Chesapeake and Ohio Canal Company* and *The Baltimore and Ohio Rail Road Company*, the latter, which was the junior corporation, had actually selected the route and had the land condemned for its road, when it was arrested by an injunction from the chancellor of Maryland, which he afterwards dissolved. The court of appeals of Maryland held, that the Canal Company had, under its elder charter, a prior right to select the route for its improvement; and that this right of selection (though it had not yet been exercised) was a vested franchise in the Canal Company, which no subsequent legislation could abridge or impair; and, therefore, reversed the decree, and perpetuated the injunction. It appeared, indeed, in that case, that the rail road, on the route selected for it, would render the construction of the canal impracticable;

58 but, "as chief justice Buchanan said, that was "a question not of principle but of degree;" and the court expressly held, that the Rail Road Company could not be permitted, in the selection of its route, to interfere with, impair, or in any way abridge, the prior and paramount right of choice vested in the Canal Company by its charter. Now, if it was a violation of the

\*This last point of defence was founded, mainly, on the provisions of the 13th section of the general rail road law: see the last preceding note.—Note in Original Edition.

charter of The Chesapeake and Ohio Canal Company, to interfere with its right to select the route for its canal, before that right was exercised, much more would it be a violation of the charter of The Tuckahoe Canal Company, to interfere with the route of its canal, after it had been selected, after the company had purchased a right in the lands on the route for the work, and had completed its canal.

The counsel for the appellees answered, that the legislature had unquestionable power, after having chartered a company to make a particular improvement for public accommodation, without any provision that no rival improvement or competition should afterwards be authorized, in other words without contract or design to give a monopoly, to grant a charter to another company to make an improvement of the same or of a different kind, to afford the like or the same accommodation as the former, however the work of the junior company might impair, or even destroy, the profits of the elder. If the legislature had not such power, they said, the whole legislation of the country on such subjects, had been founded in error and injustice. They referred to very numerous instances in the statute book, in which the legislature had authorized the establishment of rival ferries, rival toll bridges, rival turnpike roads, to serve the purposes of the same travel and transportation, from which established and ancient ferries, and previously chartered toll bridges and turnpike roads, derived their profits. And hitherto, none had ever questioned the power of the

legislature to authorize such competition, \*however injurious or ruinous it might be to the proprietors of older rights and works of the same kind. The propriety of authorizing such competition was a question of expediency, not of the legislative power. It was competent to the legislature too, to authorize one improvement of the kind to cross the line of a former improvement, provided the use of the older improvement was not thereby obstructed. Thus, it had chartered the Portsmouth and Weldon Rail Road Company, though its road was of necessity to cross the road of The Petersburg and Roanoke Rail Road Company: it had chartered The Richmond and Petersburg Rail Road Company, though its road would necessarily cross the Manchester turnpike, the Manchester Rail Road, and the Richmond and Petersburg turnpike, all of which had been constructed under previous charters. In these instances, the right of the junior companies to cross the lines of the older improvements, had never been, and could not be, doubted: but the charters of the junior companies did not, and (they admitted) could not, without providing just compensation, give them any right to obstruct the use of the former improvements. It was the duty of the junior companies, in crossing the lines of former improvements, to avoid the least obstruction to the use of them. The whole question in the present case, then, and the only question that could arise in any case of the kind, was, whether the Tuckahoe and James River rail road crossing the Tuckahoe canal,

at the two points, according to the projection of the road, would, or could, obstruct or impair the navigation of the canal? And this, they said, was a mere question of fact.

II. The counsel for the appellants insisted, that the charter of The Tuckahoe and James River Rail Road Company, neither gave, nor was intended to give, that company any right to cross the line of the Tuckahoe canal. The termini given for the rail road were such, \*that it was nowise necessary that it should cross the canal; and it appeared by the evidence, that a route might have been selected for the road altogether east of the canal, which would have been equally eligible as the route that was adopted, excepting some difference in the expense. Had it been intended, that the rail road should or might cross the canal, it would have required but a few additional words to express the purpose. And had it been so intended, the legislature would not have failed to provide some proper process for ascertaining, whether, in crossing the canal, the road would obstruct the navigation of it, or in any way impair the rights of the Canal Company, and for compensating it for any damages it should thereby sustain. The charter of the Rail Road Company, not being intended to confer upon it any such right, provided no such process. And, they said, there was no general law providing any such process, that could possibly be held applicable to the case. They entered into a critical examination of the 9th, 10th, 11th and 12th sections of the general rail road law of 1836-7, ch. 118, for the purpose of shewing, that those provisions authorized incorporated rail road companies to purchase or have condemned for their use, only such lands and tenements as belonged to individuals; such as could be laid off by metes and bounds, and full possession thereof taken; such as had not been previously condemned for public use, or for the use of other public companies chartered to construct works of internal improvement: that they by no means authorized the condemnation, over again, of lands which had been already acquired or condemned for public use, or for the use of other chartered companies; much less did they authorize the condemnation of the rights and franchises of an established corporation for the benefit of another corporation. They did not deny, that the legislature might authorize the condemnation of property already before \*condemned for the use of a chartered company, or even the franchises of the company, for the purpose of improvements of paramount importance, providing at the same time just compensation to the owners: they only denied that the legislature had done so in this instance; and, they said, it had never done so, in any instance to be found in the history of our legislation. But if the provisions of the general rail road law could, by any violence of construction, be applied to a case like this, yet, they said, the appellees had not availed themselves of those provisions, and had not acquired, or attempted to acquire, any rights under them. That statute provided compensation in all cases in which it authorized the condemna-



tion of property; otherwise, it would have been unconstitutional. *Crenshaws v. The Slate River Co.*, 6 Rand. 245. Therefore, if the statute authorized the appellees to have the property, much more the corporate franchises, of the appellants, condemned for the use of the rail road, it also provided a process for ascertaining the damages, and required that just compensation should be paid. Sensible of all this, the appellees had insisted in their answer, that the appellants had not acquired the legal title of the land through which they had made their canal; that the legal title of the soil was still in Mr. Wickham; and that they had a right to have the same land condemned as the land of Mr. Wickham, for the use of their rail road. It did not appear by the record, that the appellees had procured the condemnation of the land as Mr. Wickham's land: but if they had, they could only have acquired, by such a proceeding, the rights of Mr. Wickham; namely, the naked legal title, subject to the equity of the appellants to call for a conveyance, according to their agreement with Mr. Wickham, and subject to their exclusive right, under that agreement, to the use of the land for the purposes of their canal, without obstruction from Mr.

62 Wickham, or \*any person claiming under him. Now, it could hardly be pretended that Mr. Wickham, or any one claiming under him, would have had a right to erect bridges over the canal, without the consent of the Canal Company, even if such bridges would not obstruct the navigation of the canal, much more if they would obstruct it.

The counsel for the appellees answered, that the charter of The Tuckahoe and James River Rail Road Company, gave The Tuckahoe Canal Company the preferable right to construct the rail road from the lands of Mrs. Ellis in Henrico to such point on the James River canal as the company should select; and if it should decline to undertake the work, then the act incorporated the new company to construct "the said road." It could not be doubted, that if the Canal Company had undertaken the work, it might have so constructed the road as to cross the line of the canal; that it might have selected any point on the James River canal, whether west or east of the Tuckahoe, for the terminus of the road; and if it selected a point west of that creek, the road must have crossed the line of the canal. The Rail Road Company was authorized to construct "the said road;" its rights were measured by the previous grant to the Canal Company; it had the privilege of selecting any route for the road which the Canal Company might have selected; it had a right to select a point west of the Tuckahoe, for the terminus of the road on the James River canal. It followed, that the Rail Road Company was authorized, by its charter, to select any route for its road, which it should deem most eligible, whether it should cross the line of the canal or not. But again, the charter referred to the general rail road law, and made the provisions of that statute part of the charter, for ascertaining and regulating the rights and duties of the Rail Road Company. And the

16th section of the general rail road law expressly provided, \*that "when-  
63 ever, in the construction of any rail road, it should be necessary to cross any established road or way, it should be the duty of the president and directors so to construct their rail road, as not to impede the passage or transportation of persons or property along the same." Now, the Tuckahoe canal was only an established way; and the appellees had a clear right to run their rail road across it, only taking care so to construct the road as nowise to impede the navigation. They said, the appellees did not claim a right to condemn the bed of the canal, or the towing paths, or any rights, whether legal or equitable, which the appellants had acquired therein; much less did they claim a right to condemn for their use the corporate franchises of the appellees. They only claimed the right to have condemned for the abutments of their bridges, the lands of Mr. Wickham on both sides of the canal, in which the appellants had acquired no rights legal or equitable; and then to construct their bridges across the canal, but only so to construct them as not to obstruct the canal itself, or the towing paths, or to impair in the least the rights of the appellants. So that the question again came round to the question of fact, whether the Tuckahoe and James River rail road, crossing the Tuckahoe canal at the two points, according to the projection of the road, would, or could, obstruct or impair the navigation of the canal?

The counsel for the appellants replied, that the 16th section of the general rail road law, in authorizing rail road companies to cross established roads or ways, meant the ordinary highways of the country, not such ways as a navigable canal made by a corporate company under authority of its charter. And this, they said, clearly appeared from the context; for the provision not only authorized rail road companies to cross, but where they should cross, to change, established roads or  
ways; and it could not be pretended

64 that the statute \*intended to authorize a rail road company to change the course of a navigable canal, made under an older charter, at the points where the rail road should cross it.

III. The counsel for the appellants earnestly contended, that the construction of the rail road bridges across their canal would materially impair their corporate rights. According to the projection of the rail road by the appellees, the upper bridge was to have crossed the line of the canal at an elevation of six and a half feet above the ordinary level of the water in the canal, but only three and a half feet above the towing path. This bridge would, probably, have impeded the passage of boats along the canal at high water; and, certainly, it would have prevented the passing of a horse of ordinary size along the towing path. It was in vain to say, that the elevation of the bridge above the ordinary level of the water in the canal, was greater than that of the bridges which the Canal Company had itself made, for the main road and the private ways over its canal: the Canal Company had the right to raise its



own bridges to greater elevations at its pleasure; but it would have no right to raise the viaducts of the rail road when they should once have been constructed. The circuit superior court dissolved the injunction it had awarded, so far as it restrained the appellees from erecting bridges for their road across the canal at an elevation of six feet or more above the towing path of the canal; and this might, possibly, obviate the impediment to the navigation of the canal in the existing state of that improvement. But what the counsel chiefly insisted on, was, that even with such additional elevation of the viaducts for the rail road, they would impede and prevent the navigation of the canal, when it should be enlarged and improved, so as to correspond with the late improvement of the James River canal, and to afford a navigation for boats of as great dimensions and burden as could navigate the James

River canal in its present enlarged  
65 and \*improved state. They con-

tended, that the Tuckahoe Canal Company, under its original charter, independently of the act of the 9th April 1838, had a right to enlarge, improve and alter its canal, so as to connect the navigation thereof, and to make it of equal capacity, with the James River canal. At the time the Tuckahoe Canal Company was chartered, the James River canal had been completed according to the laws which authorized that work; its level, its dimensions, its navigable capacity, from Tuckahoe creek to Richmond, were all ascertained. The purpose of the charter of the Tuckahoe Canal Company was to provide a lateral navigation, corresponding in level, in dimensions and capacity, with the then level, dimensions and capacity of the principal canal; if the lateral had not corresponded with the principal canal, in navigable capacity, its utility would have been comparatively trivial; and if the lateral canal had been constructed upon a lower level than that of the principal, it would have been of little or no use. The Tuckahoe Canal Company, therefore, so constructed its canal as to connect the navigation thereof with the James River canal, and to adapt the one to the other. And after the Tuckahoe canal was completed upon this principle, the construction of the James River canal, by authority and upon the requisition of the legislature, was wholly changed, its dimensions enlarged, its capacity improved, so as to afford navigation for boats of much greater burden than before; and especially, it was conducted on a higher level than formerly; and thus, the connexion of the lateral navigation with, and its adaptation to, the principal canal, was destroyed. The Tuckahoe Canal Company had a clear right, without any new authority from the legislature, to make a corresponding alteration in the level, the dimensions, and the capacity of its canal; since in so doing, it would accomplish the precise purpose for which it

66 was originally \*chartered, and without so doing, the profits of its improvement to itself would be much reduced, perhaps wholly lost, and the advantage to the public materially impaired, if not an-

nihilated. It had a right to agree with the James River and Kanawha Company, for water to supply its canal so enlarged, and with the land owners for the additional land which the enlargement should require: and surely, the commonwealth could not exact a forfeiture of its charter for usurpation, when by her own act, she had made the enlargement of the work necessary. Then, if the Tuckahoe Canal Company had the right to make such alteration, enlargement and improvement of its canal, it was impossible to doubt, that the projected bridges of the Rail Road Company across it might, and would, directly interfere with, hinder and prevent the exercise of its corporate rights.

The counsel for the appellees answered, that it was quite certain, that the projected bridges for the rail road across the Tuckahoe canal, would not obstruct the navigation thereof, in the present state of the improvement, since the elevation of the bridges, and the spaces between the abutments, were greater than those of the bridges which the Canal Company had itself made over the canal. As to the claim set up for the Canal Company, to enlarge and improve its canal, so as to make it correspond with the James River canal in its enlarged and improved state, they said, it could maintain no such claim, as against the Rail Road Company, under authority of the act of the 9th April 1838, because that act was subsequent to the charter of the Rail Road Company. And it could maintain no such claim under its original charter, for this conclusive reason (if for no other) that the charter required, that the work which it authorized, should be completed within five years from the act of incorporation, and provided that if it should not be completed within that time, the rights conferred by the charter should

cease and determine. The term  
67 \*of five years had long since expired.

The charter gave the Canal Company no authority now to construct a new work. This claim to enlarge the canal was founded on nothing like right; for such a work would depend absolutely on the will and pleasure of the James River and Kanawha Company, from whose canal alone the water could be supplied for such an enlargement of the lateral canal; on the will and pleasure too of the owners of the lands on the lateral canal, there being now no process by which additional lands could be condemned for such a use. Besides, they added, when once a navigation company like this, had projected and constructed its work, and the term within which its charter required the work to be completed had elapsed, the company had no right so to enlarge the capacity of the canal, as to affect the rights or interests of other persons. *Blakemore v. Glamorganshire Canal Navigation*, 1 Mylne & Keene 154; 6 Condens. Eng. Ch. Rep. 544.

IV. The question as to the jurisdiction of the court of chancery to interfere, by way of injunction, to restrain the Rail Road Company from constructing bridges for its road across the canal, was discussed at the bar, 1st, on the general principles, and 2ndly, on the construction and effect

of the 13th section of the general rail road law.

The counsel for the appellants, 1. to shew the general jurisdiction of a court of chancery to interfere, by injunction, in cases of this kind, cited, among other authorities, *Livingston v. Van Ingen*, 9 Johns. Rep. 506; *Croton Turnpike v. Ryder*, 1 Johns. Ch. Rep. 611; *Livingston v. Ogden*, 4 Id. 48; *Newburgh Turnpike v. Miller*, 5 Id. 101; *Chesapeake and Ohio Canal Co. v. Baltimore and Ohio Rail Road Co.*, 4 Gill & Johns. 1. And 2. they said, that the 13th section of the general rail road law referred to the provisions of the 9th, 10th, 11th and 12th sections, which authorized Rail Road Companies to purchase, or have condemned

for their use, such lands and tenements \*as they should select for the purpose, and before purchase or condemnation, to take possession of such lands and tenements, and to proceed in the construction of their roads: and the 13th section provided, that no injunction should be awarded to stay the proceedings of such companies in the prosecution of their works, "in the mean time," namely, before or pending their proceedings to purchase or have condemned for their use such lands and tenements. But this section nowise took away the jurisdiction of a court of chancery to enjoin a rail road company from invading a franchise, which the previous provisions of the statute had not authorized it to have condemned. And this was the injury which the appellants complained of here, and asked the court to prevent by injunction. Besides, the statute directed, that no injunction shall be awarded, "unless it be manifest, that the Rail Road Company are transcending the authority given them by the act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages." They said, the word and ought to be construed or, so as to leave the court of chancery free to exercise its preventive justice in either of the cases mentioned: but if they were right upon the merits, the appellees were transcending the authority given to them by the statute, and their proceedings would produce irreparable injury to the appellants.

The counsel for the appellees contested the general jurisdiction of the court of chancery to interfere by injunction, in a case circumstanced as this was: but, however that might be, they maintained, that the 13th section of the general rail road law was conclusive against the jurisdiction. That provision ought to be so construed as to fulfill the policy that induced the enactment; which was to save rail road companies from the mischief of having their work arrested at every step, and their improvements indefinitely suspended, by the

69 \*process of a court of chancery; a suspension, which must result in serious loss to them, if it should not render it impossible for them to complete the work within the time prescribed by their charters. There was no reason, why a franchise should be held more sacred than the land to which it was annexed, or the land of a corporate company more carefully protected than the land of an individual, or an equi-

table title more than a legal title. The statute in question intended no such distinction. Whatever might be the opinion of the court upon the merits, they said it seemed to them impossible, that any court could think it "manifest" that this Rail Road Company was transcending the authority given to it, or that the injury which the Canal Company sought to prevent, was such as "could not be adequately compensated in damages."

TUCKER, P. In the discussion of the respective rights of these parties, a very wide debate has been indulged, in the investigation of the legislative power, and the constitutionality of the charter granted by it to the Rail Road Company, to the prejudice, as is alleged, of the Tuckahoe Canal Company, whose charter is of anterior date.

Conceding, without question, the power of the judiciary to examine into and decide upon the constitutionality of laws, it cannot be denied, that it is a power which ought not to be lightly exercised. The separation of the legislative and judicial powers, and the inhibition of the invasion by the one of the powers of the other, demands that we should be cautious lest we transcend our own limits, in the attempt to confine a coordinate branch within its legitimate boundaries. We must carefully distinguish between legislative discretion and legislative power. With the former we have nothing to do, however harshly or injudiciously it may have been exercised. With us, this question is a

70 \*question of power, not a question of the judicious exercise of it. With these views of our authority to pronounce upon the constitutionality of a law, I have considered the questions submitted in this case with an earnestness due to their importance.

The first appears to me to admit of no reasonable doubt. It has been contended, that a charter having been granted to the Canal Company for the construction of a canal along a certain line, it is not within the constitutional power of the legislature to grant another charter for another improvement running side by side with the first, although in the first charter there is no express grant of exclusive right, and although the second improvement does not cross the line of the first. On the other hand, it is contended, that if the grant contained in the first charter be not exclusive, if the law which created it has not provided that no rival improvement shall be constructed by legislative authority, it is at all times competent to the legislature to grant new charters to rival companies upon the same line, even though the value of the first may be impaired or utterly annihilated thereby. In the latter opinion I concur. Such legislation may be, and indeed often is, unwise, unjust and ruinous; but those are considerations which are in vain addressed to us, where the legislative body acts within the pale of its authority. That authority knows no limit but the charter of the government, and in that charter the only relevant provision is that no law shall be made impairing the obligation of contracts. The question then resolves itself into this: Has the legislature contracted

with the Canal Company, that it shall have the exclusive transportation of the Tuckahoe valley, and that no rival company shall be incorporated which may impair its profits or take away its custom? That it has expressly done this, cannot be pretended. The act of incorporation contains

no such provision. Is such a contract on the part of the \*government to be implied from the grant of the charter for the construction of the canal? I think not. It can never be conceded, that the incorporation of one company for internal improvement, is an implied negative of all future power in the legislature to incorporate other companies for other improvements. Such has never been the interpretation of legislative grants in Virginia, but wherever exclusive rights are intended, express provisions are introduced for the purpose of tying up the hands of the legislature, and restricting the future exercise of legislative power. It never was dreamed, that the establishment of one bank was in itself a negative on the power to establish others. It never has been admitted, that making one rail road was a negative to all future power to construct another which might rival it; but where that was the design of the charter, it has ever been so expressed; as in the act of 1833, ch. 3, § 38, the rights of the Richmond and Fredericksburg Rail Road Company are expressly protected, for a limited time, against all rival charters. Were it otherwise, what difficulties would present themselves! Without express and definite provision and limitation, how could we ascertain the extent of the exclusive right? Experience has proved, that monopoly is very ingenious in extending its rights and enlarging its pretensions. Give it the carte blanche of an implied contract, and we should soon find it without other limit than the limits of professional ingenuity; and the great mischief would at once present itself, of the improvement of the country being arrested by the perpetual objection of interference with chartered rights. Chartered companies are ever sensitive at the approach of a rival, and if the discovery of a possible clashing of interests shall be held sufficient to nullify a subsequent charter, it is impossible to foresee to what extent the legislative power may be crippled in this important branch of its duties. Already have

72 we seen \*the passage of an act incorporating a rail road company from Norfolk to Weldon most vehemently opposed by a former company established between Petersburg and Roanoke. So the making a rail road from Richmond to Lynchburg was warmly opposed by the James River and Kanawha Company. And here we see the Tuckahoe Canal Company insisting that their privileges are invaded by the chartering of the Tuckahoe and James River Rail Road Company. If these pretensions are listened to, there will soon be an end of the necessary improvement of the country. But they are without foundation. Monopoly is not a matter of inference. It must rest its pretensions upon express grant. It is a restriction upon common right, and upon legisla-

tive power, and cannot be implied. What then is here insisted on? Is it a monopoly of the right to take tolls for the transportation on the canal? If this be all, we cannot again say it. The canal is their own property; and property necessarily implies a right in the owner, to the exclusion of all others. Is it a monopoly of the right to the transportation of the Tuckahoe valley? If so, the claim is not admitted. Upon the principles maintained by their own counsel, it is denied. What right, upon those principles, has the legislature to take from the colliers the liberty of transporting their coal by wagons, or in any other mode they may elect? What right to prevent their purchasing from the landowners the necessary ground, and constructing a rail road without a charter? So far as respected the Canal Company, the Rail Road Company needed no charter to legalize their operations, if they did not cross the canal. It was only necessary to enable them to condemn the lands of others, and to sue and be sued. They do not derive their right to make such a road for transportation of coals from legislative grant. They would have had that without it, and it could never be affirmed, that a charter to them invaded the previous

73 charter, since so \*far as the Canal Company are concerned, a charter would have given them nothing more than they had before, viz. a right to withdraw their coals from the canal transportation, and to transport them by land for themselves and others, according to their own pleasure and ability. After the very able and comprehensive investigation of this subject in the case of *The Charles River Bridge v. The Warren Bridge*, it would be superfluous as well as vain for me to attempt to enforce by any arguments of mine, the principles established by the majority of the court, and sustained with such conspicuous ability by the counsel for *The Warren Bridge*. It will suffice for me to refer to that case, and to express my assent to the proposition it establishes, that the incorporation of a company for the construction of a bridge or other improvement, where the public interest is concerned, is not to be construed as conferring exclusive privileges, where none such are expressly given by the charter; and, by consequence, that by charters of this description the legislature is not deprived of the power of granting other charters to other companies, even side by side with the former, and in the same line of travel, provided there is no express restriction upon their power in the first act of incorporation. Every principle of sound policy, indeed, forbids that this should be lightly done; or that it should be done without securing some indemnity to those who suffer under such legislation. But it is not matter of right in the company; it is matter of discretion in the legislature; and hence, it is very clearly no matter for judicial decision. The injury done is not more direct than that which is in various instances occasioned by laws of unquestioned validity. The inns and villages upon every public road fall into dilapidation and ruin, upon the change of the course of

travel by the construction of a rail road, and flourishing towns which have  
 74 risen to wealth and importance \*on the faith of public law; by being made a port of entry, sink into insignificance upon the removal of their custom houses to more favoured spots. Yet who doubts the power, though many may doubt the wisdom of the legislature, in making ill advised changes, which bring ruin upon the enterprising, and misery upon thousands? This sport with human prosperity and happiness, indeed, cannot be too much reprobated; but its corrective is to be found elsewhere, and not here, unless the legislature transcend its power; and we have already seen, that unless exclusive rights are contracted for, the legislative power is without a trammel.

The case before us, however, is unlike any that has heretofore occurred, in one very important particular. The Tuckahoe Rail Road Company set up a pretension to run their road across the canal, on a bridge of a certain elevation. They are not content with passing on side by side with their rival, but they assert a right by their charter to cross his line of improvement. This brings us to the inquiry, how far the legislative power is adequate to the grant of such a right? And here, I imagine, the right of eminent domain, which rides over every other, will be found sufficient for the purpose. It is well observed by my brother Brooke, in his lucid opinion in the case of *Stokes v. Upper Appomattox Company*, 3 Leigh 337, on the subject of the *jus publicum*, that "though our institutions and laws are justly tenacious of private rights, yet the ruling principle of them is, that where private rights come in conflict with public, the former must yield to the latter; in which event, the legislature alone is competent to make compensation." It may, indeed, be truly said, that this *jus publicum*, this eminent domain, is the law of the existence of every sovereignty. It is as vital to it as air to animal life; and hence, it has no limit but the necessities of the body politic, of which that body alone must be the judge. It is absolute over the persons, as well as \*the property, of its members. It commands the sacrifice of life, as well as the surrender of possessions; and it would be strange, indeed, if to that sovereignty which can compel me to lay down my life in its service, the power should be denied of taking my property for its uses. At this time of day, it is too late to set up any barrier to that power. It has been in constant exercise since the existence of society, and must continue unrestricted so long as society shall last. It has been exerted in the establishment of every common road through the country; in the erection of public buildings, the condemnation of land for public improvements, the empressment of property *flagrante bello*, and in various other modes not necessary to be here stated. In its exercise, however harsh, it never has been deemed to be a violation of individual right, or a breach of contract with the subject, either express or implied. For though the sovereignty has granted its land, or its privileges,

without an express reservation of a right to take them for public uses, yet that right is necessarily implied; and even if alienable at all, it is not to be presumed to be surrendered without an express abandonment. As was observed by chief justice Marshall of the taxing power, "The whole community is interested in retaining it undiminished, and that community has a right to insist that its abandonment should not be presumed where the deliberate purpose to abandon does not appear."

It seems to be supposed, however, that the rights of the Canal Company which are called a franchise, cannot be invaded, though the power to take other private property for public uses may not be denied. It is proper, then, to come to a proper understanding of this word franchise, that we may the better comprehend what is to be regarded as trenching upon it. Now, I take a franchise to be, 1. an incorporeal hereditament, and 2. a privilege or authority vested in certain persons by grant  
 76 \*of the sovereign, (with us, by special statute) to exercise powers, or to do and perform acts which without such grant they could not do or perform. Thus, it is a franchise to be a corporation, with power to sue and be sued, and to hold property as a corporate body. So it is a franchise to be empowered to build a bridge, or keep a ferry, over a public stream, with a right to demand tolls or ferriage; or to build a mill upon a public river, and receive tolls for grinding &c. But the franchise consists in the incorporeal right; the property acquired is not the franchise. A bank has a right to purchase a banking house: when purchased, is the house a franchise? Surely not, for it is corporeal, whereas a franchise is incorporeal. So of a rail road company: it has the franchise to condemn land for its road, which at once becomes vested in the company in absolute property; but the land is not the franchise. It is real property held by the company upon the same implied terms, on which others hold their lands, that it may be taken for public uses upon compensation being made. Indeed, in former days, the eminent domain in the establishment of roads was exercised (as we are reminded by judge Brooke in the case before cited) without compensation; but it is now very wisely and justly provided by the constitution, that in all cases where private property is taken for public uses, just compensation shall be made to the owner for his loss.

It is not then perceived that the property of a corporation is less liable to the exercise of the *jus publicum*, than the property of a private individual. In both cases, the private right must yield to the necessities of the public, and in both the public must make compensation for the loss. In the former, indeed, the necessity is more apparent; for were it otherwise, the greatest mischiefs would ensue. The James River Canal running east and west, and the rail roads running north and south, might very seriously impede the intercourse  
 77 \*between the different parts of the state, if the companies have the right to prevent the passage across their line of improvement, and the *jus publicum* cannot

be exercised in the creation of new roads to meet the growing exigencies of the country. A person fifty yards from his mill, or county courthouse, may be driven to the necessity of travelling miles around to reach them, or of submitting to the unreasonable exaction of a monopolist. It would be difficult to make him comprehend, how the legislative power could extend to taking away his land to make the rail road, and could cut him off from his ordinary comforts and conveniences, and yet be inadequate to the exercise of the eminent domain in giving him a right of passage across the line of the improvement thus constructed to his detriment.

Upon the whole, therefore, I think it was competent to the legislature to empower the Rail Road Company to cross the line of the canal, whether the Canal Company be regarded as the proprietors of the soil, or of a mere right of way. If they are proprietors of the soil, then they hold it by the same tenure that every man holds his land; that is, subject to the *jus publicum*. If it is a mere right of way to which they have title, the argument applies with yet more force, since the power to condemn the land itself is greater than that of condemning an easement upon it. In the exercise of this power, however, it must never be forgotten, that a just compensation for rights or property condemned must always be made.

But several questions here present themselves: 1. Is it necessary to the validity of the act, that compensation should be provided before the property can be taken? The constitution provides, that the legislature shall pass no law whereby private property shall be taken for public uses without just compensation. And although there is no express requisition that the act which invades the right shall provide

78 the indemnity, yet, after \*much reflection, I incline to the opinion that it should do so. The instances which may occur *flagrante bello*, of impressments and destruction of property, though at first view they may seem to indicate a different construction, yet are rather to be referred to the necessities which war imposes, when the safety of the state is the supreme law, and justice is silenced by the din of arms.

2. Conceding, as I readily do, that the question of compensation is a judicial question, and that it is not in the power of the legislature to settle it, since this would be to unite judicial and legislative powers, and to enable the government to decide in its own case, it may next be asked, whether an act invading private property, will be held to be void, when it clearly appears to the judicial tribunal, that no injury is done, and nothing taken, which will entitle the party to compensation? To this I should answer in the negative; for however proper and prudent it might be to provide for the establishment of that fact by the ordinary proceedings, yet if, upon full investigation before the proper tribunal, no injury should appear, we should be justified, I think, in considering the statute as not in conflict with the spirit of the constitution.

In the present case, however, these ques-

tions are unimportant, if it shall appear that by the Rail Road charter a method is provided for ascertaining and making compensation for property necessary for the road. Now, this I think clear, by the reference in the charter itself, to the general rail road law, as the law of the company. According to that law, they are bound to proceed to condemn the lands necessary for their road. If the Canal Company are the owners of the soil where the road passes their line of improvement, the Rail Road Company should have it condemned as their property; if they are not the owners of the soil, they should have proceeded to condemn the property as mr.

79 \*Wickham's property, or have purchased his rights by private contract; and in either case, they would hold subject to the easement of the canal, precisely as he held it. The record does not shew how this matter is, nor is it material to the question we are considering; for the charter having duly provided for compensation, it is not void, although the company may have failed to pursue its provisions. That is a matter to which I shall have occasion presently to refer.

We proceed next to inquire, whether the charter authorizes the Rail Road Company to cross the line of the canal. This must be decided by reference to several acts: 1. the charter itself, which fixes one terminus of the road at Mrs. Ellis's land: the other terminus is declared to be such point on the James River canal as the Rail Road Company may select. 2. It then vests in the company the liberty to construct their road subject to the provisions of the general rail road law. 3. By the provisions of that statute, the company have a right to enter upon all lands through which they may desire to conduct their road, and to lay out the same according to their pleasure. By this provision, then, they were invested with unlimited power to locate the road between the two termini as they pleased. If, then, the location so made crossed the canal, the law authorized them to cross it; and we have already seen that such authority was within the competence of the legislature to give. The only obligations upon the company are to avoid encroaching on dwelling houses &c. and to pay for the property taken.

We have, then, it is conceived, established these two points; that the Rail Road charter is not unconstitutional, and that it authorizes the company to cross the line of the canal. Upon what terms, is the next question to be solved. And here, there is some difficulty in ascertaining from the record what is the state of the fact. It does

80 not appear whether any proceedings have \*been instituted by the company, or the proprietor, for the condemnation of the land and the assessment of damages. Certain it is, that the Rail Road Company cannot pass the canal, without being responsible to the owner of the land for the damages done by the condemnation. In what manner the Canal Company may be entitled to compensation for any injury they may sustain, and to what extent, it would be premature in this case to inquire. Satisfied as I am

from the record, that they are not the owners of the soil, either legally or equitably, and that they have only title to an easement, I have no doubt that the land should be condemned as *mr. Wickham's*. I am also of opinion, that when so condemned, the title to the land will vest in the Rail Road Company, subject to the easement; and that they will be bound, as *mr. Wickham* was bound, not to obstruct or impair its enjoyment. Whether it would be practicable for them, if they so desired, to extinguish that easement by any proceeding now known to the law, it is not necessary in the present state of things to inquire. Our only concern is to know, whether they have undertaken to exercise their right of passing the canal prematurely. It seemed to be considered by the counsel, that the condemnation must precede the execution of the work. This is, I conceive, a misconception of the law. The company have a right to proceed with their work before condemnation; and, indeed, there is no absolute obligation on them, to institute the process for assessing the damages to the land, since in case of their default the owner himself may do so. It is, therefore, clear that the work is not to be suspended until the damages are assessed and paid; and this is rendered more undeniable by the 13th section, which in connexion with the previous sections provides, that "in the mean time" (that is, while the process of valuation or assessment is going on) "no injunction shall be awarded to stay the proceedings of

81 the company in \*the prosecution of their works, unless &c." It was not then necessary, that the damages should have been assessed and paid before the company proceeded to the erection of their bridges.

With these views of the law of this case, I cannot perceive that the Rail Road Company have, in any respect, "transcended the authority given by the law," in proceeding to erect their bridges over the line of the canal. Nor can I perceive, that they have done, or are about to do, any injury to the Canal Company which cannot be adequately compensated in damages. On the contrary, it is palpable, that (apart from the competition, which we have already shewn the Canal Company cannot complain of) there is no injury done them whatever. The rail road bridges are much higher above the water than their own bridges. Every load which can pass the canal bridges will be wholly unobstructed by the rail road bridges, while boats that can pass the latter would be obstructed by the former. It is, therefore, not true that any injury whatever, and much less an irreparable injury, has been done, or is likely to ensue. The interference by injunction was, therefore, improvident, and in direct conflict with the statute, and with the established principles of a court of equity. I am, therefore, of opinion, wholly to dissolve it, and to dismiss the bill. It will be at its own peril if the Rail Road Company so erects its bridges as to obstruct or impede the easement of the canal. It has not yet done so. When it does, it will be time enough to invoke the extraor-

dinary powers of a court of equity, by shewing the danger of actual and irreparable injury. It will then also be time enough to decide how far the Canal Company have power to extend their easement, either laterally, or by raising their bridges, and removing as a nuisance that which is erected by the Rail Road Company. Those inquiries, at this time, appear unnecessary and premature.

82 \*According to this opinion, the decree of the circuit superior court was right in dissolving the injunction, but erroneous in imposing the restriction as to the height of the bridges. It ought to have been wholly dissolved, as improvidently awarded.

The other judges concurred.

Decree, that the circuit superior court ought to have dissolved the injunction as improvidently awarded, without imposing any restriction as to the height of the bridges, and that the said order is erroneous.

83 \*Haffey's Heirs v. Birchetts & c.

April, 1840, Richmond.

**Deed of Trust to Secure Note—Covenant—Breach—Subrogation to Remedy against Heirs on Warranty of Ancestor.**—In order to secure the accommodation indorsers of a note due at bank, the maker conveys land to trustees by a deed in which he covenants for himself and his heirs, with the trustees and the bank respectively, that he is possessed of an absolute estate of inheritance in the premises, and that he will warrant and defend the same against all persons. After the death of the grantor, the indorsers pay the debt to the bank, and the trust property having been sold to satisfy a debt secured by a prior deed of trust thereon, they file a bill to be subrogated to the rights of the bank under the second trust deed, and to have satisfaction out of other lands of the grantor descended to his heirs. **Held,**

1. **Same—Same—Same.**—The covenant in the second deed was broken by the sale under the first :

2. **Same—Same—Same—Measure of Damages.**—The complainants are entitled to come into equity for satisfaction out of the real assets in the hands of the heirs, to the extent of the damages accru-

\***Sale of Land—Covenant of Title—Breach.**—See the principal case cited and approved in *Sheffey v. Gardiner*, 79 Va. 318; *Rex v. Creel*, 22 W. Va. 375.

†**Same—Same—Same—Measure of Damages.**—In *Moreland v. Metz*, 24 W. Va. 188, it is said : "If a covenant of warranty is broken in Virginia or West Virginia, the measure of damages, when the land is entirely lost to the vendee, is the purchase money with interest from the date of the actual eviction, the costs incurred in defending the title and such damages as the vendee may have paid or may be shown to be clearly liable to pay the person who evicted him. But if the actual value of the land at the time of the sale be proven to be greater than the purchase money with interest, &c., perhaps this actual value might be recovered in lieu of the usual measure of recovery. *Stout v. Jackson*, 3 Rand. 132; *Threlkeld v. Fitzhugh*, 2 Leigh 451; *Jackson v. Turner*, 5 Leigh 119; *Haffey v. Birchetts*, 11 Leigh 83."

**Judicial Sales—Terms.**—On this question, the principal case is cited in *foot-note* to *Kyles v. Tait*, 6 Gratt. 45; *Pairo v. Bethell*, 75 Va. 833. See monographic notes on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

ing from the breach of the ancestor's covenant :

3. Same-Same-Same-Same-Issue to Ascertain.—The amount of those damages being the sum paid in discharge of the first incumbrance, and so fixed and certain, an issue for the purpose of assessing them is unnecessary.

**Lands Descended to Heirs—Decree of Sale—Terms.**—

Decree requiring lands descended to heirs to be sold for cash, to satisfy a debt due from ancestor reversed, and sale directed to be made upon a credit of six, twelve, and eighteen months.

Appeal from a decree of the circuit superior court of law and chancery for Henrico county.

Roderick Haffey, late of the town of Petersburg, by deed dated the 7th of December 1822, conveyed to Thomas Lambert and Robert Birchett a lot of ground on Sycamore street in the said town, upon trust to sell the same and apply the proceeds in discharge of a debt amounting to 1727 dollars, due from Haffey to a certain George Williamson, in case the said debt should not be punctually paid by Haffey at the expiration of twelve months from the date of the deed. This deed was duly recorded in the corporation court of Petersburg on the 1st of May 1823.

84 \*By another deed, dated the 25th June 1823, between Haffey of the first part, John F. May and Robert K. Jones of the second part, and the president, directors and company of the bank of Virginia of the third part,—reciting that Haffey was indebted to the bank, at their office of discount and deposit in Petersburg, upon two accommodation notes negotiable there, each for 1350 dollars, upon which notes Robert Birchett, Edmund Birchett and Peter Puryear were then the indorsers, and that, it being expected the said sums would be continued from time to time as loans from the bank to Haffey, upon other notes of the same character, indorsed by the said Birchetts and Puryear, or others, he had agreed to secure the payment thereof, and thereby indemnify the said indorsers, or any other or second indorsers,—the same lot conveyed by the former deed for the security of Williamson's demand was again conveyed to May and Jones, for the purpose of securing the debt due to the bank as aforesaid, with interest and charges thereon. Haffey, for himself and his heirs, covenanted with May and Jones, and the president, directors and company of the bank of Virginia, respectively, "jointly and severally, that he is possessed of an absolute estate of inheritance in the premises, and that he will warrant and forever defend the same against all persons whatever." This deed also was duly recorded in the corporation court of Petersburg.

In September 1824, Birchetts and Puryear filed a bill in the superior court of chancery for the Richmond district, setting forth, that Roderick Haffey (who was now dead) was in his lifetime indebted to them in a balance of account for goods purchased by the complainants on behalf of themselves and the said Haffey jointly, the complainants being, at the time, merchants and partners in trade, and Haffey being also a merchant and manufacturer; that at the time of executing the deed of

the 25th June 1823, (which was exhibited with the \*bill,) Haffey owned but one lot on Sycamore street, although two brick tenements were erected on it, and the said deed was intended to convey, and did convey, the whole lot and both tenements, while the deed for the benefit of Williamson conveyed only one half of the lot; that Haffey died leaving three infant children, Margaret, Henry and Jane, and his personal estate had been committed to Roger Mallory, serjeant of Petersburg, for administration; that the complainants had been compelled to pay the debt of 2700 dollars to the bank, with 8 dollars 6 cents for charges of protest, for recovery whereof they had brought an action against Haffey's administrator, which was yet undetermined; that Haffey's personal estate would be insufficient to pay the debt; that the moiety of the lot conveyed by the first deed of trust would shortly be sold, and the residue would be the only estate out of which the debts due the complainant could be satisfied. The bill prayed that the heirs and administrator of Haffey, the president, directors and company of the bank of Virginia, and May the survivor of the two trustees in the deed of the 25th June 1823, might be made defendants; that the lot might be sold, and the whole debt due the complainants paid; and general relief.

The president, directors and company of the bank of Virginia, and May the trustee, answered, admitting that Haffey's debt to the bank had been paid by the complainants as indorsers.

The heirs of Haffey, by their guardian assigned ad litem, answered, denying the allegation that their ancestor owned but one lot on Sycamore street; insisting that he held two adjacent lots on that street at the time of his deed to May and Jones, which conveyed but one of them, the same that had been previously conveyed for the security of Williamson's demand; and claiming the other lot as their own property, free from the claim of the complainants.

86 \*As to Haffey's administrator, the bill was taken pro confesso.

The complainants, having obtained leave to amend their bill and make new parties, accordingly filed an amended bill in December 1826, in which they stated, that since the institution of this suit, the lot conveyed by the deed for Williamson's benefit had been sold under the provisions of that deed, and purchased by Joseph C. Swann; and they impeached the sale, as having been irregularly made. They further insisted, that even if they were mistaken in supposing the whole lot on Sycamore street to have been conveyed by the deed of the 25th June 1823, yet as that deed was expressly made for the purpose of indemnifying them as the indorsers of Haffey, they were entitled to the benefit of Haffey's covenant of warranty entered into with the trustees and the bank, and that covenant having been broken, they might rightfully claim indemnity out of the other portion of the lot, which was the only real estate in the hands of the heirs. To this bill, the heirs and administrator of Haffey, Thomas Lambert trustee in the



first deed, George Williamson the creditor thereby secured, and Swann the purchaser of the trust property, were made defendants.

The heirs of Haffey answered, submitting to the court whether the complainants were entitled to the benefit of the warranty contained in the deed to May and Jones; contending however, that if it could under any circumstances enure to their benefit, yet as they had full notice of the existence and contents of the prior incumbrance, that incumbrance ought to be taken as excepted from the scope and intent of the warranty.

Swann answered, insisting upon the fairness and regularity of his purchase under the first deed of trust; of which he contended that the complainants had actual notice, inasmuch as one of them, Robert Birchett, was one of the trustees in that deed.

87 \*Neither Williamson nor the administrator of Haffey answered the bill.

In the progress of the cause, the court made an order referring to a commissioner, for settlement, the accounts between the complainants and Roderick Haffey, the account of Mallory's administration upon Haffey's estate, the account of the assets descended to Haffey's heirs, and the account of the product and application of the fund conveyed in trust by the deed for the benefit of Williamson. By the commissioner's report it appeared, that there was in the hands of Mallory, the administrator, the sum of 950 dollars 21 cents, due the estate of his intestate: that the real estate claimed by the heirs of Haffey was of the annual value of 300 or 400 dollars: that the proceeds of the lot conveyed by the first deed of trust amounted to 2459 dollars 5 cents, of which 2035 dollars 56 cents, the amount of Williamson's claim, had been paid to him, and the residue to the complainants; after crediting which, there remained due to the complainants 239 dollars 62 cents on account of their other transactions with Haffey in his lifetime, and 2746 dollars 11 cents on account of the bank debt.

The circuit court of Henrico (to which the cause had been regularly transferred) held, that the deed of trust under which the plaintiffs claimed, dated the 25th June 1823, only conveyed the tenement included in the prior deed of the 7th December 1822, and that the adjacent tenement was not conveyed by either of those deeds; but that the plaintiffs were entitled in equity to be substituted to the right of the president, directors and company of the bank of Virginia under the deed first mentioned, and to have satisfaction out of the real assets descended to the heirs of Haffey, to the extent of the damages sustained by the plaintiffs under the covenant of warranty in the first deed contained. Wherefore the court,

88 confirming the report of the commissioner in all respects, decreed that the administrator of Haffey should pay to the complainants the sum in his hands, due the estate of his intestate; and that unless the heirs of Haffey should, within six months from the date of the

decree, pay the complainants so much of the sum of 2035 dollars 56 cents (the amount paid to Williamson the first incumbrancer) as should be equal to the balance remaining due to them after applying the personal assets in the hands of the administrator of Haffey as aforesaid, the land descended to the said heirs should be sold by commissioners named in the decree, at public auction, for cash, in order to satisfy that balance.

From this decree, the heirs of Haffey appealed to this court.

Spooner, for appellants.

May, for appellees.

TUCKER, P. The only questions of importance in this case are those which arise out of the warranty in the deed of trust to May and Jones. The effect of that covenant of warranty was to give to the bargainees of the trust premises, in case of eviction, a right of recovery in value from the bargainor if living, or, if he be dead, to charge his heirs for the damages sustained by the breach of covenant, to the value of the assets descended to them. Moreover, in the case of an incumbrance on the land anterior to that in question, the covenant is broken so soon as the bargainee has been turned out of possession by the first incumbrancer, or even so soon as he has been compelled in invitum to pay off the first incumbrance. 2 Lomax's Dig. 273; Hamilton v. Cutts, 4 Mass. Rep. 349. There is no necessity for him to involve himself in a law suit, to defend himself against a title which he is satisfied must ultimately prevail. Sprague v. Baker, 89 17 Mass. Rep. 586. For the \*covenant to warrant and defend implies a covenant for quiet enjoyment, Emerson v. Proprietors of land in Minot, 1 Mass. Rep. 464, and it is broken by any lawful disturbance of a third person. In this case, therefore, the rights of the prior incumbrancer having been enforced by sale, and the incumbrance of the bargainees May and Jones thereby altogether defeated, the covenant of warranty may well be considered as broken.

The next question is as to the measure of damages. In case of a sale, the measure is the value at the time of the same, and the test of this value is the purchase money. But in case of an incumbrance, this principle can have no application, for price is not a subject of adjustment in the treaty for a security. Adequacy alone is inquired into. The true measure of damages, therefore, in case of eviction by superior title, is the value of the mortgaged or trust subject at the time of eviction, provided it do not exceed the amount of the debt secured; for it is obvious the creditor can never be damaged to a greater amount than that. If this view of the matter be correct, then it is clear that there is no error herein to the prejudice of the appellants; for the damages are taken to be 2035 dollars only, while the debt was 2700 dollars.

It is said, however, that the right of the parties to damages for breach of this covenant could only be asserted at law, and that a court of equity could not properly



estimate them. As a general principle, this is true; but here the plaintiffs, having no rights but by the equitable principle of substitution, could assert no remedy at law. They could only get relief in equity. Moreover, although it is generally true that damages should be inquired of by an issue at law, yet here that could not be necessary, since the damages were fixed and already certain. The damage was the value of the land lost, and that value was ascertained by what it sold for. The debt

90 of Haffey to Williamson was paid \*out of a trust subject to which the second incumbrances had title, and Haffey could not complain, nor can his heirs complain, at reimbursing the second incumbrances to the full value of what has been paid for him to their prejudice. In this view of the matter, an issue must have been superfluous.

The decree, however, is erroneous in directing a sale for cash.

As to the other errors assigned, there is nothing in them, as they were not made objections in the circuit court.

On the whole, I am of opinion to reverse the decree, as to the direction to sell for cash, and affirm for the residue.

The other judges concurred.

The decree entered in the court of appeals was as follows:

"The court is of opinion that the legal effect and operation of the deed of trust from Haffey to May and Jones, and of the covenant of warranty therein contained, was, to entitle the parties for whose benefit it was executed, or those who might be substituted to their rights, to charge the real assets descended with such damages as may have arisen from a breach of that covenant. The court is further of opinion that the sale of the trust property under an anterior deed of trust was a breach of the covenant, and that the measure of damages was not (so far at least as the appellants were concerned) improperly fixed at the price for which it sold. The court is further of opinion that as the plaintiffs claim by substitution only, their remedy was properly in a court of equity, where only the principles of substitution can be properly enforced. The court, however, is of opinion, that though in this case the long

91 time that would elapse, before the application of the \*net amount of rents from year to year to the discharge of the appellees' claim would satisfy it, forbade a resort to that mode of providing the means of satisfying that claim, and justified the court below in accelerating that satisfaction by a sale; yet, in the proper exercise of judicial discretion, the court below ought not to have decreed such sale to be made for cash, but such sale should have been made on a reasonable credit, which in this case is deemed to be a credit of six, twelve and eighteen months for equal instalments of the purchase money." Therefore, decree reversed so far as it directs the sale to be for cash, and affirmed in other respects, with costs to appellants; and cause remanded for further proceedings.

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\*Dupuy and Others v. Southgates.

April, 1840, Richmond.

(Absent STANARD, \*J.)

**Executors and Administrators—Creditor Accepting Confession of Judgment When Assets—Estoppel.**—A creditor of a decedent accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand.

**Same—Same—Same—Case at Bar.**—A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, files a bill in equity against the administrator for a discovery and account, and upon taking the account it appears, that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the endorser or assignor thereof: **Held**, under such circumstances, the technical estoppel will avail in equity as a defence against the creditor's claim. *Accord. Orcutt v. Orms*, 3 Paige 459.

Samuel H. Binford in his lifetime was indebted to John and Wright Southgate, by a specialty bearing date the 26th of November 1811, for 400 dollars payable sixty days after date.

On the 27th of March 1820, Jesse L. Dupuy qualified as administrator of Binford, and gave bond as such in the penalty of 17000 dollars, with William H. Neilson and William Neale as sureties.

On the 10th of April 1821, John and Wright Southgate brought an action of debt upon the specialty, in the court of Norfolk borough, against Dupuy as administrator of Binford. Service of the writ was acknowledged the same day. And at June term 1821, Dupuy confessed a judgment when assets, for 400 dollars the amount of the specialty, with interest from the 25th of January 1812 till payment, and the costs of the suit.

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\*On the 10th of April 1826, John and Wright Southgate commenced a suit in the late superior court of chancery for the Williamsburg district, against Dupuy and his sureties in the administration bond. The bill, after setting forth the judgment against Binford's administrator, alleged that Binford at the time of his death was possessed of a considerable personal estate, which came, or by due diligence might have come, to the hands of Dupuy to be administered, and that Dupuy, at the time of confessing the said judgment, had in his hands assets of his intestate to a considerable amount, which were subject and liable to the payment of complainants' demand, but complainants were then unable to prove the fact, and were yet unable to do so without the aid of a court of equity. Wherefore the bill prayed that Dupuy might render an account of his administration on the estate of Binford; that

\*He had formerly been counsel for the appellants.

†See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

‡See monographic note on "Estoppel" appended to *Bowen v. McCormick*, 23 Gratt. 316.

the defendants, or some of them, might be decreed to pay the amount due the complainants; and general relief.

The process being served on Dupuy and Neale, and an order of publication being executed as to Neilson, the bill was taken for confessed as to all the defendants.

The court directed an account of Dupuy's administration on the estate of Binford to be taken, stating the nature and dignity of the debts paid by him, and the time of such payments; and also a statement of the amount due the plaintiffs.

The plaintiffs produced before the commissioner, and he reported without alteration, an account of Dupuy's administration settled in May 1825, under an order of the court of probate; which stated a balance in Dupuy's favour, on the 31st of May 1822, of 809 dollars 74 cents, but made this balance by giving Dupuy the following credit on the same day,—“To amount of your two notes due at Farmers bank, under seal, in my favour as your indorser, \$1651 77.”

94 \*The plaintiffs also required the commissioner to examine as a witness Daniel Stone, a bookkeeper in the bank. He was examined accordingly, and proved that the 31st of May 1822 was the time at which the payment of 1651 dollars 77 cents was made by Dupuy as administrator of Binford to the bank, and that this payment was on account of two notes of Binford under seal, indorsed by Dupuy and held by the bank, which became due in February and March 1820.

If the payment of the 1651 dollars 77 cents by Dupuy after the plaintiffs had obtained judgment against him were held invalid, the amount of assets liable to the plaintiffs would be 842 dollars 3 cents, as of the 31st of May 1822; a sufficient sum to satisfy the judgment, which amounted to 782 dollars 85 cents, with interest on 400 dollars part thereof from the 10th of October 1827.

It appeared on the face of the administration account that the whole amount of assets which ever came to Dupuy's hands was received as early as June 1820.

There was no exception to the report of the commissioner, but there was an exception to Stone's deposition, founded on a supposed rule of court that depositions were not to be taken before a commissioner in stating accounts. This exception however was overruled by the court; which proceeded to decree that Dupuy and his sureties should pay the amount of the judgment and the costs of suit, but directed that the plaintiffs should not enforce payment of the decree by execution against the sureties, until they should have taken out an execution against Dupuy, and the same should be returned unproductive. From which decree the defendants appealed to this court.

Lyons and R. C. Stanard for appellants. G. N. Johnson and Robinson for appellees.

95 \*CABELL, J. The appellees brought an action of debt against Dupuy as administrator of Binford, on a single bill, and voluntarily accepted from him a confession of judgment when assets. This was an admission on the part of the

plaintiffs that there were not at that time any assets in the hands of the administrator, liable to the payment of their debt. It was not denied by the counsel for the appellees that this is the just construction of such a judgment in the estimation of a court of law; nor can I perceive any difference in this respect between courts of law and courts of equity. The judgment must mean the same thing in both courts. It is true that courts of equity may exercise an ulterior jurisdiction unknown to the courts of law, by relieving the plaintiff, in a proper case, from the effects of his admission. But even courts of equity will not suffer that to be again brought into litigation, which has been once solemnly settled between the parties by their admissions on record, unless there be some good reason assigned for so doing. I know of no sufficient reason, but the allegation and proof of some fraud, misrepresentation or mistake. Nothing of the kind is alleged or proved in this case. There is nothing but the mere allegation of that, the contrary of which had been previously admitted on record. On this ground, I am of opinion that the decree is wholly erroneous.

But even if it were competent to the appellees to go behind the judgment at law, and to demand an account of the assets in the same manner as if that judgment had never been rendered, I should be of opinion that the administrator would be entitled, as against the appellees, to a credit for the full amount of the two single bills indorsed by him and negotiated for the benefit of Binford. Bathurst v. De la Zouch, 2 Dick. 460. As the indorser and surety of Binford, he had a right to pay off these bills. He did pay them, and by doing so, equity

will regard him as standing in the shoes of the bank to which they were paid; as a specialty creditor, and as such entitled to retain as against the appellees, who, so far as regards the assets in dispute, are only specialty creditors. For the dignity of their debt was not changed, as to these assets, by their judgment; a judgment when assets giving no lien on previous assets. The decree is therefore erroneous in this respect also.

The decree should be reversed and the bill dismissed.

BROOKE, J., concurred.

TUCKER, P. Though this case has been argued with great ability and at much length, it appears to me to lie within a very narrow compass. Inverting the order which has been pursued in the argument, I shall address myself to the following questions:

1. Could the administrator Dupuy, on the day when the judgment was rendered upon his confession, have successfully pleaded a retainer against the plaintiffs' demand?

2. If he could not, ought he to have defeated the demand by falsely alleging that he had no assets, when he then had more than sufficient to pay the debt?

3. If not, are the appellants entitled to relief in equity?

As to the first question; without examining or controverting the case in 2 Dickens 460, where a retainer on an equitable demand was in equity allowed, it may, I

think, safely be affirmed that in June 1821 when the judgment was rendered, the administrator could not have pleaded a good plea of retainer at law on account of his liability for the bank debt. That debt had been passed to the bank by assignment or indorsement, no matter which. It was on that day, and for twelve months after, the property of the bank. Non constat

that Dupuy ever could have been 97 made personally responsible \*for the amount. Considering the instruments as negotiable notes, there is no evidence that they were properly dealt with, so as to make him liable as indorser; and considering them as bonds, it is impossible to say that Dupuy the assignor might not, by some act of the bank, have been discharged of his liability. But be this as it may, in June 1821, he was not the creditor of Binford. The bank was the creditor, and had he become insolvent before payment, he never would have been the creditor. The utmost that can be said is that he was responsible for the debt. Now, the forms of pleading shew that he who pleads a retainer at law must plead it as an actual, subsisting, legal demand. See the form, 3 Chitty's Plead. (Philadelphia ed. of 1828) p. 946. It may indeed be payable in futuro, but it must be debitum in præsentī. Reduce the plea of retainer to form, and this is obvious. Again, he who is merely responsible cannot retain for his responsibility against an actual creditor, for perhaps he may never be charged, or if charged may never be able to make payment, and so may never be a creditor of the estate. There is no precedent, that I can find, of such a plea of retainer. To arrest the payment of an unquestionable debt because of a possible responsibility, would be inconsistent with all the analogies of the law. Thus, even a simple contract creditor cannot be impeded in his recovery by a contingent security, such as a bond of indemnity, if the contingency has not taken place. Toller 282. Moreover, if Dupuy had actually paid the debt to the bank at the time of the confession of judgment, though he would thereby have made himself a creditor and would have had a right in equity to stand in the shoes of the bank as a bond creditor, yet at law he would have been only a simple contract creditor, and could not retain against a specialty. If he had been a surety in the bond, instead of indorser, the result would have been the same. For, upon paying off 98 the debt, he \*would have been, at law, only a simple contract creditor, and indeed, according to english law, he would have been no creditor at all, since the obligation became, at law, his own debt by the co-obligor's death. I am persuaded, then, that no good plea of retainer could have been framed on the facts in this case.

Secondly, as Dupuy had no right to retain, ought he to have defeated the demand by falsely alleging he had fully administered,\* when he had ample assets in his

pocket? I think not. Such conduct violated the trust reposed in him, his oath of office, and his official bond. He binds himself truly to administer the assets according to law, and though he occupies the position of antagonist to the creditor so far as the demand is in question, yet he is the fiduciary of the creditor as regards the assets. It is a breach of trust, and a fraud upon him, to allege that he has no assets, when he is full handed. The creditor does not and often cannot know whether the allegation is true. He has a right to expect it to be true, and though, beyond doubt, at law he is estopped, by taking a judgment when assets, from going behind the judgment, yet in equity there is no such estoppel. It is competent for him, before that tribunal, to allege that the fiduciary has falsified his oath—has been guilty of a fraudulent concealment of the state of the assets, and has, by a false plea, which it was not in his power to controvert, barred him at law by an odious estoppel. This brings me to enquire,

Thirdly, whether the appellees were entitled to relief? Let us see what 99 the bill states. It alleges that \*at the time of the judgment confessed, the administrator had assets, but the plaintiffs were unable and are still unable to prove the fact without the aid of a court of equity. That they were not able in June 1821, may be fairly inferred from the account not having been audited and settled till 1825. Were they able to do so when they brought this suit? By no means; for the judgment having been when assets, they could not have gone behind that judgment. Equity only could enable them to do so. Equity only could give them the account which would shew the state of the assets. They have therefore well said, not that they cannot prove assets without an appeal to the conscience of the administrator, but that they cannot do so without the aid of equity. They have not then proved themselves out of court, by producing the settled account of 1825.

It is said, however, that as the judgment estopped them, equity ought not to relieve them against the sureties. To this it may be well replied, that equity should not respect this estoppel in the case of a trustee who has violated his oath of office, has misapplied the funds of the estate, has misled the creditor by a false allegation which it was not in his power to controvert, and has applied to his own relief the assets to which the appellees had a legal title; that estoppels are odious in equity, and never avail unless insisted on; that here, all the defendants, sureties as well as principal, confess the matters set forth in the bill, and that this brings it to the case of an estoppel against estoppel, by which the matter is set at large. If the creditor, by his judgment, admitted there

out in form from this minute, must have been that "the defendant pleaded plene administravit;" and then, that "the plaintiff, not being advised but that the said plea is good, prays judgment of his debt &c. of the goods &c. which shall hereafter &c. Therefore it is considered that he recover" accordingly. See Lilly's Entries 506.—Note in Original Edition.

\*Note by the president. The entry in this case is only of a short minute in the borough court—"Judgment confessed when assets." The order, drawn

were no assets, the defendants, by confessing that there were assets, admit that he was mistaken in his admission. The estoppel, therefore, cannot avail.

Does the fact that some of the defendants are sureties make a difference? I think not. The charge is of a devastavit in not paying the plaintiffs' debt, and in 100 \*falsely alleging that there were no means of payment. This charge is admitted by the pleadings; yet it is still contended that the sureties, having been discharged at law, cannot be charged in equity. But how discharged at law? By the falsehood and fraud of that man for whose fidelity and bona fides they were responsible. They never can avail themselves of this discharge in equity.

As to the error supposed to exist in the form of the decree, I think it is without foundation. It is the usual form, I believe, in cases in equity in which the creditor seeks to charge the sureties with a devastavit, but from the nature of his case is unable to issue his fieri facias at law. It postpones any resort to the sureties until, by an execution returned unproductive, the devastavit is fixed beyond contradiction.

I am of opinion to affirm the decree.  
Decree reversed and bill dismissed.

### Janney & c. v. Barnes and Others.

April, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

#### Fraudulent Conveyances—What Conveyance Providing for Debts Is Valid as to Other Creditor of Grantor\*

—Case at Bar.—The members of a mercantile partnership, in falling circumstances, make a deed conveying to A. their storehouse, all their stock of goods therein, and all debts due or to become due to the firm, subject to the following conditions and agreements: 1. that A. should (and he thereby bound himself so to do) pay certain debts of the firm, specified in a schedule annexed to the deed, within twelve months next succeeding; 2. that the grantors should be, and they were thereby, appointed the joint agents of A. to remain in the store, to sell the stock of goods until the whole

should be disposed of, and to collect all the 101 debts due and to become \*due to the firm; 3. that if the proceeds of the property conveyed should be more than sufficient to pay the debts specified, A. should apply the surplus to the ratable payment of such other debts as were then due from the firm. The deed is executed as well by A. as the grantors; but being mislaid or kept back by one of the grantors, in whose possession it was left on his undertaking to have it recorded. A. procures the grantors to execute another deed for his indemnity: which, reciting that the grantors are justly indebted to A. in the sum of 3000 dollars, and also "to various other creditors," conveys to a trustee "all the goods, bonds, debts and accounts, and all the property of every kind now in their possession" (without other description), and stipulates that they shall be permitted to remain in quiet possession of the goods, and sell the same, or such part as can be sold for ready money, paying over to the trustee from time to time the proceeds of such sales; and at the expiration of three months it is made the trustee's duty to sell the whole residue of the property at public auction, and pay 3000 dollars of the proceeds to A. and the residue to the other creditors in ratable proportions. This second deed is duly recorded; and a few days afterwards the first deed being found and surrendered to A. is also recorded. A. pays the debts specified in the schedule annexed to the first deed, but not until the twelve months have expired. The debts assumed and paid by A. are just debts of the grantors, and as to him the whole transaction is fair in point of fact. On a bill filed by other creditors of the grantors, who obtained judgments after the execution and registry of the deeds, though for debts contracted before, insisting that the deeds are void, and praying that they may be set aside, *Held*, A. is entitled to full indemnity out of the property thereby conveyed, for the liabilities assumed and paid by him.

By a deed dated the 6th of February 1837, H. B. Barnes and W. A. Dandridge, of the county of King William, merchants and partners trading under the firm of Barnes & Dandridge, for and in consideration of certain liabilities thereafter assumed by James P. Corbin, sold and conveyed to the said Corbin "all their entire stock of dry goods, groceries, hardware &c. contained in their store at Aylett's in the county of King William, all the fixtures and furniture belonging to the said store, all the

debts due or to become due to the 102 said firm of \*Barnes & Dandridge, whether by bond, note, due bill, open account or otherwise, together with the house and lot now occupied by the said firm as a store and counting house; the whole of which stock of dry goods &c. and the said house and lot with the appurtenances &c. are to be held by the said James P. Corbin, his heirs, executors &c. forever; subject nevertheless to the following conditions, covenants and agreements—First, That the said James P. Corbin shall (and he doth hereby bind himself, his heirs, executors &c. so to do) pay unto certain creditors hereinafter named the full amount of their respective claims against the said Barnes & Dandridge, the said payment to be made within twelve months next succeeding the execution of this indenture. Second, That the said H. B. Barnes and W. A. Dandridge shall be and they are

\***Fraudulent Conveyances—Postponement of Sale.**—In *Dance v. Seaman*, 11 Gratt. 782, it is said: "The reservation of an interest in the property, by postponing the time of sale, or directing a sale on credit, or providing for the payment of the surplus after satisfying the creditors secured, do not of themselves furnish evidence of fraudulent intent, has been affirmed by the repeated decisions of this court. *Spilworth v. Cunningham*, 8 Leigh 271; *Keenan v. Branch*, 1 Gratt. 274; *Lewis v. Caperton*, 8 Gratt. 148; *Cochran v. Paris*, 11 Gratt. 348; *Janney v. Barnes*, 11 Leigh 100."

See also, on this subject, citing the principal case, *foot-note* to *Sheppards v. Turpin*, 3 Gratt. 379; *foot-note* to *Cochran v. Paris*, 11 Gratt. 348; *Marks v. Hill*, 15 Gratt. 480 (see *foot-note*); *Henderson v. Hunton*, 26 Gratt. 936 (see *foot-note*); *Young v. Willis*, 82 Va. 296; *Gardner v. Johnston*, 9 W. Va. 407; *Harden v. Wagner*, 22 W. Va. 371; *Clafin v. Foley*, 22 W. Va. 441; *Livesay v. Beard*, 23 W. Va. 590; *Klee v. Reitzenberger*, 23 W. Va. 755; *Shattuck v. Knight*, 25 W. Va. 597, 598; dissenting opinion in *Landeman v. Wilson*, 29 W. Va. 724, 2 S. E. Rep. 208, 215. See generally, *Monographic note on "Fraudulent and Voluntary Conveyances"* appended to *Cochran v. Paris*, 11 Gratt. 348.

hereby appointed the joint agents of the said James P. Corbin, to remain in the said store at Aylett's, to sell the stock of dry goods, groceries, hardware &c. therein contained, until the whole shall have been disposed of, and to collect all the debts now due to the said firm of Barnes & Dandridge, and also all debts which shall hereafter become due to the said firm. Thirdly, That if the proceeds of the sale of the said stock of dry goods, groceries, hardware &c. with the debts as above referred to, and also the proceeds of the sale of the said house and lot, shall amount to more than enough to pay the debts hereinafter named, and as above assumed to be paid by the said James P. Corbin, then and in that case the residue shall be held by the said James P. Corbin, upon trust that he shall pay to such other persons as the said firm of Barnes & Dandridge may now be indebted to, the full amount of their respective demands, provided there shall be enough to answer this purpose, otherwise the said residue shall be divided *pari passu* among the said creditors. Fourthly, That after all the debts of the said firm of Barnes & Dandridge shall have been  
103 paid in the manner and form \*herein provided for, then and in that event the residue, if any residue there be, shall be paid over by the said James P. Corbin, his heirs, executors &c. to the said firm of Barnes & Dandridge."

Subjoined to the deed was a "list of creditors, with the amount of their respective debts, as above referred to, and assumed to be paid by the said James P. Corbin within twelve months next succeeding the execution of this indenture." These debts amounted to 3262 dollars 46 cents.

Both the deed and the schedule were signed and sealed by Barnes, Dandridge, and Corbin; and, on the 19th of May 1837, being acknowledged by the said parties in the clerk's office of King William county court, were admitted to record.

By another deed, dated the 13th of May 1837, between Barnes & Dandridge of the first part, Walker Hawes of the second part, and James P. Corbin of the third part, reciting that the parties of the first part "are justly indebted to the said Corbin in the sum of three thousand dollars, by the indorsements of said Corbin on the notes of Barnes & Dandridge, and also by other liabilities which said Corbin has incurred for said Barnes & Dandridge, and the said Barnes & Dandridge are indebted to various other creditors, all of which debts, with legal interest thereon, they are willing and desirous to secure,"—the said Barnes & Dandridge, in consideration of the premises, and of one dollar to them paid by Walker Hawes, bargained and sold to the said Walker Hawes, his heirs and assigns forever, "all the goods, bonds, debts and accounts, and all the property of every kind and description, now in possession of the said Barnes & Dandridge; upon trust that the said Walker Hawes, his heirs and assigns, shall permit the said Barnes & Dandridge to remain in quiet possession of the said goods, and sell the same or such part thereof  
104 as can be sold for ready money, paying over from time to time to the \*said

Walker Hawes, his heirs or assigns, the proceeds of such sales; and at the expiration of three months, it shall be the duty of the said Walker Hawes, his heirs or assigns, giving twenty days notice in one of the newspapers of Richmond, to sell for ready money all the goods and other property of the said Barnes & Dandridge, and out of the money arising from the sales of such goods and from the accounts, bonds and debts due the said Barnes & Dandridge, after paying the expenses thereof and for the collection of said debts, to pay James P. Corbin, his heirs or assigns, three thousand dollars; and the residue of the money arising from the sales of such goods, and the accounts, bonds and debts, to be paid to the creditors of Barnes & Dandridge in equal or ratable portions."

This second deed was admitted to record on the 15th of May 1837, upon the acknowledgment of Barnes & Dandridge.

On the 4th of September 1837, Janney, Hopkins & Hall filed a bill in chancery in the circuit superior court of King William county, against Barnes & Dandridge the grantors, Hawes the trustee, and Corbin the cestui que trust, in the deed of the 13th of May; stating, that on the 16th of September 1836, Barnes & Dandridge became indebted to the plaintiffs in the sum of 710 dollars 64 cents, by their promissory note of that date, payable six months after date, on which the plaintiffs, about the time of the execution of the said deed of trust, instituted a suit against Barnes & Dandridge in the county court of King William, and at the August term 1837 recovered a judgment (of which they exhibited a copy); setting forth the provisions of the said deed; charging, that when the same was executed, Barnes & Dandridge were not indebted to Corbin in the sum of 3000 dollars, as therein recited, nor do the plaintiffs believe they were then indebted to him at all,  
—that the provision permitting the

105 grantors to dispose of the goods \*by sale, and to receive the proceeds, is illegal, fraudulent and void,—and that the said deed is altogether fraudulent, and should be annulled; and praying that the deed may be set aside, and that the property and debts thereby conveyed which yet remained unsold or uncollected, together with the proceeds of sales and collections already made, (of which accounts were asked) or sufficient thereof to discharge the plaintiffs' demand, may be applied in satisfaction of the same.

And on the 25th of November 1837, another bill was filed in the same circuit court, against the same defendants, by Archibald Hart, F. & R. Voss, and Turner & Voss, (all of whom were merchants trading in Baltimore). This bill set forth, that Barnes & Dandridge became indebted to the complainants in September 1836, for the price of goods purchased of them respectively, for which they executed their promissory notes, payable six months after date; namely, a note to A. Hart for 1642 dollars 46 cents, dated the 15th of September 1836; a note to F. & R. Voss for 200 dollars, dated the 20th of September 1836; and a note to Turner & Voss for 1811 dollars 20 cents, dated the 16th of September 1836: on which notes the com-

plainants had respectively recovered judgments in the county court of King William at the August term 1837. (Copies of the judgments were exhibited with the bill.) That the goods so purchased of the complainants were taken into possession by Barnes & Dandridge, and placed in a store at Aylett's in the said county, and there exposed to sale; and before the said notes became due, these very goods, or such of them as remained unsold, were conveyed to James P. Corbin by the deed of the 6th of February 1837. After setting forth the provisions of that deed, the bill charged that the same was fraudulent and void as to the complainants, and was designed to delay, hinder and defeat them in the recovery of their debts; that it is void on its

face, as it vests in Barnes & Dandridge, \*as debtors, rights entirely inconsistent with those of the trustee, and of the creditors intended to be secured thereby; that no debt was due to Corbin when the deed was made, and none had since arisen, as he had never discharged the liabilities therein said to be assumed by him; and that the property conveyed was much more than sufficient to pay the debts which were specifically provided for. That, in order more fully to effect the fraudulent objects of the first deed, the said Barnes & Dandridge, on the 13th of May 1837, executed another deed to Walker Hawes as trustee, embracing the same property as that conveyed by the first (or at least that part of it which then remained). The bill set forth the provisions of this second deed; and then proceeded to allege that after the grantors had for some time remained in possession, selling the goods and collecting the debts, an auction sale was held by authority of the trustee Hawes, who had received a considerable sum of money the proceeds of that sale, and had since permitted Dandridge to act in collecting debts embraced by the deed. That Corbin, the complainants believe and charge, had never paid any thing out of his own pocket on account of the liabilities assumed by him, and if any such had been discharged at all (which they do not believe), it was with money arising from sales of goods and collections of debts embraced in the said deeds. The bill prayed a discovery of the property and debts embraced by the deeds, of the sales and collections made by Barnes & Dandridge and the other defendants respectively, and of the sums paid by Corbin on account of the liabilities assumed by him as aforesaid; that Barnes & Dandridge be enjoined from any further collection of the debts embraced in the deeds, and a receiver appointed to collect the same; that Hawes be restrained from paying over or disposing of the fund in his hands; that the deeds be declared fraudulent and void,

and all the debts and effects embraced  
107 \*in them be applied to satisfy the claims of complainants and other just creditors of Barnes & Dandridge who may come in and contribute to the expenses of the suit; and general relief.

The injunction prayed by this bill was awarded.

At May term 1838, by consent of all the parties in the two suits, it was ordered that

the same be consolidated, and that a commissioner of the court take and report an account of the value of the goods and debts embraced in the said deeds, of the goods, moneys and evidences of debt which had come to the hands of the defendant Hawes as trustee, and of the sales and collections made by Barnes & Dandridge or either of them.

The defendants Barnes and Dandridge failed to answer the bills; which, as to them, were taken pro confesso.

Hawes answered, that he knew nothing of the debts alleged by the complainants to be due to them; that, in the execution of the deed to him as trustee, he had no reason to suspect, nor does he believe, that any fraud was intended or perpetrated; that he has understood and believes the deed was made to secure a just debt to Corbin; that the grantors were permitted to remain in possession for the limited time mentioned in the deed, with a view to enable them to arrange their books and business, and place their affairs in a proper train for settlement; that during this period they sold goods to the amount of about 400 dollars, which this respondent believed they had honestly accounted for and paid over to him; that the remainder of the goods was then sold at auction, and brought about 2000 dollars; and that he is ready to account and to pay over the balance in his hands as the court may direct.

The defendant Corbin, in his answer, gave a full and minute detail of the circumstances respecting the execution of the two deeds of the 6th of February and the 13th of May. He said, that early in 108 1837, Barnes and \*Dandridge (with whom he had been acquainted for several years) came to him, and represented that they were in embarrassed circumstances, daily expecting to be sued; that they believed their property would not be sufficient to pay all their just debts, and though they were anxious to pay them all as far as their means would enable them, they yet particularly desired to secure certain favoured creditors by giving them a preference; to effect both of which objects, as well as to obviate the loss and vexation attending suits, they proposed to this respondent to assume the payment of their debts to certain creditors whom they would designate, to the probable amount and value of their whole property, which they would convey to him as an indemnity for his liabilities so to be assumed, the assumption of the liabilities and the execution of the deed to be concurrent, and the deed to be recorded immediately. That, actuated by a friendly feeling towards Barnes and Dandridge, this respondent agreed to make himself liable to the extent proposed, in consideration that they would secure him by a direct conveyance and transfer of their property real and personal, including debts due; he to make sale of and collect the same, and from the proceeds thereof, first to satisfy himself on account of his said liabilities, and should there be an overplus, to hold the same upon trust generally for the remaining creditors of the said Barnes & Dandridge. That, being himself ignorant of the business of a dry goods merchant,

and confiding in the skill and capacity of the said Barnes and Dandridge, he contracted with them, and they, as a further inducement to him to assume the liabilities aforesaid, engaged with him, to remain in the store at Aylett's as his agents, and in that character to sell the goods and collect the debts due. That in pursuance and on the faith of this agreement, this respondent, on the 6th of February 1837, executed his obligations to sundry creditors of Barnes & Dandridge, for various

109 \*sums, amounting in the whole to 3262 dollars 46 cents, and at the same time received the deed of that date, duly executed by the defendant Barnes, who was then in Richmond; which obligations were executed to the creditors and for the amounts specified in the schedule annexed to the said deed. That the amount so assumed was considered by the parties at the time of the transaction a fair price for the whole property conveyed, and respondent now believes and charges that it exceeded the value of that property. That on the execution of the said deed by Barnes, this respondent entrusted it to him, for the purpose of procuring it to be executed by his partner Dandridge (who was then at Aylett's in King William), which Barnes promised to do, and also to have it immediately recorded. That some months afterwards, this respondent, who resides in King & Queen county, went to Aylett's for the purpose of ascertaining what progress had been made by his agents in selling the goods; when, finding that the deed had not been recorded, receiving no satisfactory account of it from Barnes & Dandridge, and believing that Barnes had destroyed it, he insisted that they should immediately execute another deed to secure him for the liabilities he had assumed. This they were persuaded to do, and the deed of the 13th of May was accordingly executed and recorded. That shortly afterwards respondent got information that the first deed, duly executed by Dandridge, was in existence and in the possession of Barnes; whereupon he insisted that it should be delivered up to him; which at last was done, and that deed admitted to record on the 19th of May. Respondent expressly denies that there was any fraudulent intent whatever connected with either of the said deeds, and insists that they were executed for the purpose of effecting a fair and legal object. He contends that the deed of the 6th of February ought to be considered as an absolute conveyance of the property to

110 \*him, for a full and fair consideration; that, as the absolute purchaser, he had a right to constitute Barnes & Dandridge, or any other persons, his agents to manage and take charge of the property; and that the character of their possession, as his agents and not as owners, appears on the face of the deed itself, which is notice to all the world. He admits that at the execution of the deed, there was no debt due to him from Barnes & Dandridge, except on account of the liabilities which he then assumed for them; the whole amount of which he avers that he has since paid out of his own pocket, and not with moneys arising from sales and collections under the

deed, from which source he has never received a single farthing. But even if it should be considered that he is not entitled to the full benefit of the property conveyed by the first deed, as the absolute purchaser thereof, he insists that that conveyance ought to be considered as a mortgage in fee to him, with power to make sale of the property, and out of the proceeds first reimburse himself to the extent of the liabilities assumed and paid for Barnes & Dandridge: and to that extent he claims the benefit of all the provisions for his indemnity contained in both the said deeds.

By exhibits filed with the answer of the defendant Corbin, it appeared that Barnes & Dandridge, on the 6th of February 1837, executed their promissory notes to Corbin himself for amounts specified in the schedule annexed to the deed of that date, all of them payable twelve months after date; that these notes were assigned by Corbin to creditors of Barnes & Dandridge named in the schedule; and that actions having been brought against Corbin by the assignees, and judgments recovered therein, he satisfied and paid those judgments (amounting in the whole to 3172 dollars 14 cents) in the month of June 1838.

Several depositions were taken and filed in the progress of the controversy; but 111 the evidence, so far as it related to the nature and purpose of the transactions between Barnes & Dandridge and Corbin, did not conflict with the account thereof given by Corbin in his answer, except perhaps in one particular:—the scrivener who wrote the deed of the 6th of February, being examined as a witness, deposed, that in a conversation with Corbin immediately before that deed was prepared, Corbin told him he was satisfied that Barnes & Dandridge "had property enough to pay all their debts, if they could be allowed to wind up without disturbance."

The commissioner reported that Hawes, the trustee in the second deed, had in his hands the sum of 2133 dollars 39 cents in cash, and bonds amounting to 430 dollars more, the proceeds of sales and collections made by authority of that deed.

The causes came on to be heard the 24th of May 1839: when the court, being of opinion that the two deeds which the bills sought to set aside were not fraudulent as to the defendant Corbin, but were fair and bona fide, decreed, that the trustee Hawes pay the money and assign the bonds appearing by the commissioner's report to be in his hands, to the defendant Corbin, towards the discharge of the debt due him by Barnes & Dandridge; that the bills of the plaintiffs be dismissed; and that the said plaintiffs pay to the defendant Corbin his costs of suit.

From this decree an appeal was allowed, on a petition of the plaintiffs assigning for error—

1. That, upon the supposition that both deeds are bona fide, the other creditors of Barnes & Dandridge are provided for after indemnifying Corbin, and it was wrong to dismiss their bills with costs, instead of decreeing to subject the real property conveyed by the deeds and not disposed of by the trustee.



2. That, upon the same supposition (that the deeds are fair), the first conveyed the property to Corbin, and the second passed nothing to the trustee, who had there-  
112 fore no \*authority to sell. But if it be said that both deeds were made for the same object, to indemnify Corbin in case he should pay the assumed debts in twelve months, and that therefore the proceeds must be applied as if the sale were regular, then it is answered, he has failed to comply with the terms, and has lost his security; for the notes fell due the 6th of February 1838, and were paid under execution some time afterwards.

3. That the deeds are void, on the authority of *Lang v. Lee &c.*, 3 Rand. 410, 423,—substituting a mere personal accountability by the debtor, instead of a security in rem.

4. That the evidence convicts the defendants of fraud in fact.

R. T. Daniel for appellants.

C. S. Carter for appellees.

The decree of the court of appeal was as follows:

"The court is of opinion that the said decree, so far as it sustains the right of the appellee Corbin to indemnity out of the proceeds of the effects and debts of Barnes & Dandridge, surrendered by them to the trustee Hawes, and directs the application of those proceeds and the outstanding debts to that object, is correct. The court is also of opinion that the appellants are entitled to any surplus, after Corbin is indemnified, of the debts and effects so surrendered, and of the proceeds of the house and lot mentioned in the deed from Barnes and Dandridge to Corbin, of the 6th day of February 1837, and that the court below ought not to have dismissed their bills, until the whole subject, including the house and lot and the outstanding debts, had been administered, so as to ascertain whether or no there be any surplus; and if there be, then, instead of dismissing the bills, that surplus should be decreed to the appellants. There-  
113 fore it is decreed and ordered that the

\*said decree, so far as it directs the application of the funds in the hands of the trustee Hawes to the indemnity or reimbursement of Corbin, be affirmed, and that so far as it dismisses the bills with costs, it be reversed and annulled," with costs to the appellants. And cause remanded for further proceedings in conformity with the principles of the foregoing opinion and decree.

### Campbells v. Patterson.

April, 1840, Richmond.

(Absent PARKER and STANARD,\* J.)

**Bonds—Usury†—Bill for Discovery—When Borrower Must Pay Principal and Interest—Statute—Quære.**

The obligor in a bond secured by a deed of trust files a bill in equity against the obligee and the trustee, alleging that the bond was given for money borrowed at usurious interest, and that such interest (some of it compounded) was included therein: calling for a discovery of the amount of money advanced, and the rate of

interest reserved; and praying an injunction to stay all proceedings on the trust deed, and the collection of the debt, until the matter can be fully heard in equity; that all compound, illegal and usurious interest may be expunged; that the plaintiff may have such further relief as his case may require and justice dictate; and that all persons be released from all penalties of the statute against usury; **Held**, the bill is not within the third section of the statute against usury, 1 Rev. Code, ch. 102, and the plaintiff is only entitled to relief upon the terms of paying the principal money borrowed, with legal interest thereon. Whether the third section of the statute against usury, 1 Rev. Code, ch. 102, applies to the case of a bill not filed against the lender himself in his lifetime, but against his personal representative after his death? And per **TUCKER, P.** it seems that it does not.

**Same—Same—When Usurious Bond Is Evidence of Amount Loaned;—Case at Bar.**—A bond is given to close a series of transactions between the obligee and obligor, consisting of loans on the one

114 side and payments \*from time to time on the other, and when the bond is executed, all the written evidences of the previous transactions are surrendered to the obligor: after the death of the obligee, the obligor files a bill in equity against his administrator, alleging usury in the bond, and setting forth the rate of interest reserved, but not the amount of moneys advanced, of which a discovery is called for from the administrator, who answers that he has no information enabling him to make such discovery: this court is of opinion that the transactions were in fact usurious, and that the bond, though containing no usurious interest in it, yet having been given for money loaned on usury, is within the statute and void as a security for money: **Held** nevertheless, under the circumstances of this case, the bond should be received as evidence of the amount advanced.

On the 12th of February 1828, Charles C. Patterson exhibited his bill in the superior court of chancery for the Lynchburg district, setting forth, that he had various transactions during several years with one Thomas Campbell of Bedford county, since deceased, in the course of which transactions he borrowed money of said Campbell, under an express stipulation to pay him interest at the rate of 12 per centum per annum on all sums advanced. That on the 25th of March 1820, he executed his bond to said Campbell for £221. 15. 10. payable on demand, principally for money loaned at the rate aforesaid, the interest on the previous loans being calculated at that rate, and included in the bond. That afterwards on the same day he executed to said Campbell another bond, also payable on demand, for £7. 12. 5.—exclusively for interest at the rate aforesaid on sums previously loaned, which Campbell alleged had been omitted in taking the larger bond. That on the 9th of October 1822, the complainant and said Campbell had a settlement up to that date, at which the complainant took in the two bonds aforesaid, and executed a

†**Usury.**—On this subject, the principal case is cited in *Davis v. Demming*, 12 W. Va. 269, 271, 277; *Nichols v. Campbell*, 10 Gratt. 566, 568, 570, 572; *Munford v. McVeigh*, 92 Va. 457, 23 S. E. Rep. 857. See generally, monographic note on "Usury" appended to *Coffman v. Miller*, 26 Gratt. 698.

\*He had formerly been counsel for the appellants.

†**Bonds.**—See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.



paper whereby he acknowledged himself indebted to Campbell in the sum of 1029 dollars 36 cents; a considerable part of that sum being made up of interest at the rate of 12 per centum per annum, some of which had been compounded \*at that rate. That Campbell having agreed to advance to the complainant a further sum, sufficient, with the 1029 dollars 36 cents, to make up the amount of 3000 dollars, on condition that the complainant should pay interest at the rate of 12½ per cent. per annum, and execute a bond for 3000 dollars, and a deed of trust to secure the payment thereof, the complainant accordingly, under the pressure of pecuniary embarrassment, which had much increased since the commencement of his dealings with Campbell, executed his bond to said Campbell on the 23d of December 1822, for 3000 dollars payable on demand, and to secure the payment thereof, executed to Robert Campbell (a son of the said Thomas) and B. A. Eidson, a deed of trust on a valuable tract of 400 or 500 acres of land, and eight slaves. That when the bond for 3000 dollars was taken, Campbell made a calculation of interest (on what sum the complainant does not know) which he said was to be included in that bond as part thereof; and immediately after the execution of the said bond and trust deed, he required complainant to execute another bond, for 63 dollars, which he said was also for interest. That complainant executed the bond for 63 dollars, and afterwards paid off and took in the same. That the express agreement between said Campbell and the complainant, before and at the time of executing the bond for 3000 dollars and the trust deed, was, that Campbell should pay to the complainant, in cash, at that time or in a few days afterwards, the difference between 3000 dollars and the amount of the 1029 dollars 36 cents with interest thereon at the rate of 12½ per centum; but the said Campbell failed and refused to perform his part of the agreement, and instead of paying cash, procured outstanding debts due from complainant to other persons, to a considerable amount, and compelled him to allow them as part of the consideration for the bond of 3000 dollars. That Campbell having subsequently \*advanced to complainant a claim for 680 dollars on one Irvine, and 150 dollars in cash, informed complainant in January 1824, that he had made a statement of their accounts, including interest at the rate aforesaid, and required complainant to execute a further bond for 752 dollars 57 cents, and to secure the same by an additional trust deed. That complainant, without having ever seen the statement, accordingly executed his bond for the last mentioned sum, and conveyed to the same trustees, for securing the payment thereof, another tract of land of 105 acres, and four other slaves. That complainant never did receive, directly or indirectly, the whole amount of the last mentioned bond: that both the bond for 3000 dollars, and that for 752 dollars 57 cents, were in part composed of usurious interest: and that the latter not only included interest on the former at the rate of 12½ per centum, but interest

compounded at that rate. That the complainant had at various times made considerable payments to the said Campbell, (the dates and amounts were particularly set forth in the bill,) which were applied to the extinguishment of the usurious and illegal interest claimed of him. That the said Campbell died in 1827, intestate, and his two sons William and Robert, and his grandson M. D. Gray, were the administrators of his estate. That the trustees in the deeds executed by the complainant had advertised for sale the property thereby conveyed to them, for the purpose of raising the amount which appeared to be due on the two bonds aforesaid. The bill made those trustees, and the administrators of Thomas Campbell, defendants, and called upon them to answer all the allegations thereof, and particularly to discover and set forth the rate of interest agreed to be paid by the complainant for moneys advanced him by the said Thomas Campbell, in what manner the amounts specified in the two bonds aforesaid were made up, the payments made by the complainant to the said Thomas Campbell, and \*the application of those payments. And the prayer of the bill was, that an injunction be awarded "to stay all proceedings on the said trust deeds, and the collection of the debt therein named, until the matter can be fully heard in equity; that the whole matter be referred to a commissioner of the court, to adjust and settle, and expunge all compound, illegal and usurious interest, and credit your orator by all sums in any manner paid, and extend to your orator all such other and further relief and aid as his case may require and justice dictate; and that all persons be released from all penalties under the statutes against usury."

An injunction was awarded according to the prayer of the bill.

All the defendants answered. They all disclaimed any knowledge of usury in the transactions between the intestate and the complainant; and the answers of William and Robert Campbell expressed the belief of those respondents that no usurious interest whatever was included in either of the bonds secured by the trust deeds. William Campbell said, it was not the practice of his intestate to include such interest in any of his bonds, but when he lent money at more than legal interest (as he sometimes did), he relied on the promise of the borrower for the excess. And Robert referred to and insisted on the statement of the bill itself, as incompatible with the allegation that usurious interest was included in either bond. These two respondents declared themselves ignorant of the manner in which the amount of either bond was made up. They admitted a payment of 950 dollars by the complainant to their father in his lifetime, but disclaimed all knowledge of any other, or of the manner in which that was applied.

The two bonds of 3000 dollars and 752 dollars 57 cents were exhibited with the answer of Robert Campbell; and all the other evidences of debt, referred to by the complainant in his bill, were exhibited therewith. \*At the foot of one

of these, namely, the bond for £221. 15. 10. was the following memorandum—"Agreed to pay 12 per cent." And at the foot of another (the bond for 63 dollars) was the following: "The above note of \$63 was for interest due at the time of taking the bond of \$3000 as believed not legal to put in with the principal." Each memorandum was proved to be in the handwriting of the decedent.

The deeds of trust, it seems, were never filed in the cause.

On the 27th of October 1828, the cause coming on to be heard, the court dissolved the injunction as to the sum of 1497 dollars 55 cents, part of the bond for 3000 dollars, and as to the sum of 322 dollars 53 cents, part of the bond for 752 dollars 57 cents; which sums were the balances of principal money due on those bonds respectively, according to a statement made by a commissioner of the court, "to which" (the record stated) "there was no objection for the present by either party." The court further ordered that the marshal should make sale of the land and slaves conveyed in trust to secure the bond of 3000 dollars, or of so much as might be sufficient to discharge the said sum of 1497 dollars 55 cents; and of the land and slaves conveyed in trust to secure the bond of 752 dollars 57 cents, or of so much as might be sufficient to discharge the said sum of 322 dollars 53 cents; and should pay the proceeds, after defraying the expenses of sale, into one of the banks at Lynchburg, to the credit of the cause, and make report of his proceedings, in order to a final decree. At the same time the court referred the accounts between the parties to a commissioner, with directions to make two statements thereof, in one of which he should exclude all interest, and in the other allow it at the legal rate.

The marshal reported that on the day of February 1829, he made sales of property comprised in the two deeds of trust, to the amount of 1820 dollars 8119 cents \*(which was the aggregate of the two sums directed to be raised), besides the expenses of sale. That amount was, by an order of court made the 29th of May 1830, directed to be paid over to the administrators of Thomas Campbell. The date of the actual payment to them was the 7th of July 1830.

The commissioner to whom the accounts were referred reported, 1. A statement wherein the complainant was charged with 3752 dollars 57 cents the aggregate of the two bonds secured by the trust deeds, and credited with 12 per cent. interest on the bond of £221. 15. 10. from the 25th of March 1820, the date of that bond, to the 23d of December 1822, the date of the bond for 3000 dollars,—with the amount of the two small bonds for £7. 12. 5. and 63 dollars,—and with two payments of 200 dollars and 950 dollars. According to this statement, the balance due from the complainant was 2287 dollars 63 cents.—2. A statement in which the complainant was charged with the amount of the two bonds for 3000 dollars and 752 dollars 57 cents, and legal interest on the same, and credited with half the amount of interest, half the

amount of the two small bonds, and the whole amount of the two payments, which had been allowed in the first statement. According to this second statement, the balance due from the complainant on the 1st day of May 1830, was 3849 dollars 58 cents of principal and interest.

Both parties excepted to the commissioner's report. To the first statement the complainant excepted, 1. Because a certain credit (which he specified) was not allowed him. 2. Because the charge for interest on the bond of £221. 15. 10. was less than it should have been. 3. Because he was improperly charged with the whole amount of the bond of 3000 dollars; "there being no evidence that the said Thomas Campbell ever advanced to the plaintiff the amount which, at the time said bond was executed, he contracted to advance to 120 \*make up the sum of 3000 dollars."

4. Because the complainant was improperly charged with the amount of the bond of 752 dollars 57 cents, "when the sums constituting that amount may have been advanced to make up the amount of 3000 dollars." To the second statement the complainant excepted for the same reasons assigned in his exceptions to the first statement, and also because, in the said second statement, he was charged with interest, when, under the act of assembly, the creditor was entitled to none. The defendants excepted to the report for the following reasons: 1. "This suit was not brought against Thomas Campbell in his lifetime, who could have given a true account of it: it is brought against his administrators, who can give no account of it. They deny (as far as administrators can deny such allegations) that the interest was included in the bonds. The plaintiff ought therefore to prove his case, and in the absence of all proof on his part, it should be taken for granted that the sums expressed on the face of the bonds were the sums advanced." 2. Because, the plaintiff having been credited with interest, it was improper to credit him also with the amount of the bonds for £7. 12. 5. and 63 dollars, which were given for interest, since that was to credit him twice for the same sum. 3. "The plaintiff in this case only seeks relief as to the compound, illegal and usurious interest (see his bill). The defendants are entitled, even if the court should think usurious interest was received, to their principal money with lawful interest upon it."

Many depositions were taken and filed in the cause; but it is only material to notice the testimony of one of the witnesses; who deposed, that about November 1825, a sale of the plaintiff's property being expected to take place for the benefit of Thomas Campbell, the witness was requested by the plaintiff to propose to said Campbell, that he should take property of the 121 plaintiff \*at a fair valuation, in satisfaction of his debt, instead of compelling a sale; and in conversation with the witness on that occasion, said Campbell told him that 12 or 12½ per cent. was the interest that the plaintiff had promised to pay. But the witness did not suppose this interest was included in the

bonds, though he supposed there might be some written agreement for the payment of it.

The cause was finally heard on the 25th of November 1831; when the court overruled the exceptions filed by the defendants to the commissioner's report, sustained those filed by the plaintiff, and approved and adopted a new statement made by the commissioner, in which the two bonds of 3000 dollars and 752 dollars 57 cents were wholly disregarded as evidence of the amount advanced by Thomas Campbell to the plaintiff. Charging the plaintiff with the amount of the original bond for £221. 15. 10. and the principal of the sums which were proved by the other evidence in the cause to have been actually advanced to him by Thomas Campbell, and giving him credit for his payments, including the two small bonds of £7. 12. 5. and 63 dollars, and the net proceeds of the sales made by the marshal, this statement produced an excess of payments amounting to 550 dollars 26 cents, with interest from the 7th of July 1830. The court therefore proceeded to decree, that the injunction be made perpetual, and that the administrators of Thomas Campbell pay to the plaintiff, out of their proper goods and chattels, the last mentioned sum with interest, and out of the assets of their intestate, the plaintiff's costs expended in this suit.

From this decree the administrators of Thomas Campbell obtained an appeal to this court.

Lyons and R. C. Stanard for the appellants.

Johnson and the attorney general for the appellee.

122 \*TUCKER, P. I do not think the principles of this case difficult to adjust. But the amount due from the appellee to the appellants is not so easily ascertained.

The first question of importance is the measure of the recovery. Is the appellant entitled to interest upon his advances, or must he sit down contented with his principal?

When a borrower comes into equity seeking relief against usury, he is, by the principles of the court, bound to do equity by paying up both principal and interest. Our act of assembly, however, provides that any borrower may exhibit his bill against the lender, and compel him to discover upon oath the money lent, and if thereupon it shall appear that there was usury, the lender shall be obliged to accept his principal money without interest. 1 Rev. Code, ch. 102, § 3, p. 374. I incline to think that wherever a case is strictly within this section, and the borrower insists on its protection, he can only be compelled to pay the principal; and that herein the principle of equity is modified by the statute. But where a case is not within the third section of the act, or where its protection is waived, the principles of equity have the strictest application. Such is the case of a bill filed to recover back what has already been paid. In this case it is now well established that the borrower can only recover back the usurious interest; thus leaving to the lender the enjoyment

of his legal interest, as well as his principal.

The case before us I take to be not within the third section of the act. It is certainly not within its letter. The bill here is not exhibited against the lender, but against his representatives. The bill under the statute must be exhibited against the lender himself, and call upon him to discover the money lent. If the plaintiff rests upon the disclosure of his adversary, he shall pay only the principal, and the usurer shall receive no more. But if he declines, during the usurer's lifetime, to exhibit 123 \*his bill, and to afford him an opportunity of explaining the transaction, and of shewing what is justly due, it may well be doubted whether it was designed that he should be absolved from the payment of any portion of what is justly due. Moreover, the usurer being dead, and it being no longer possible that the penalty can fall upon the guilty head, there would be much reason for distinguishing the innocent representative from his rapacious ancestor. He, at least, has done nothing which forbids him to look for sheer justice at the hands of a court of equity.

Be this as it may, there is another ground on which the case may securely stand. The plaintiff in his bill clearly puts his case upon the general principles of equity, and excludes it from the operation of the third section. His prayer is, that "all compound, illegal and usurious interest may be expunged; that he may have such relief as his case may require and justice may dictate; and that all persons may be released from the penalties of the statute." I can understand this in no other way than as expressing a willingness to pay principal and legal interest. That is what justice dictates, and what every honest man will do. And shall we reject the plaintiff's proffer to be honest? Shall we, by a forced construction of the prayer of his bill, interpret him to refuse to pay what he justly owes? Shall we really enter into the views of his counsel, and construe a prayer to expunge illegal interest, as a prayer to expunge all interest whatsoever? and this too upon the singular hypothesis, that in usurious contracts, even legal interest becomes illegal? I think not. And if, as I conceive, the plaintiff is fairly to be understood as waiving the penalty, and proffering to pay principal and interest, a court of equity will not be so eager to enforce a forfeiture, as to compel the defendants to receive their principal only, and leave the plaintiff in possession of the interest which, upon its own principles, he ought to pay.

124 \*The second question to be settled before we enter upon the facts, is as to the effect of the bonds as evidence. It cannot be denied that the bonds, as securities for money, are void. It cannot be denied, moreover, that where there are manifest signs of fraud (or usury) in the obligee, he ought to be put to the proof of actual payment. 3 P. Wms. 289. Yet this general rule admits of exception or modification. For where, as in this case, a borrower lies by until the death of the lender, and then calls for proof of the

moneys advanced, a court of justice would be cautious in the application of the rule. But where the borrower has moreover taken up all the original evidences, as is the case here; where he has, therefore, all the means of explanation in his own hands, yet fails to make it; where he comes into equity asking relief, and yet omits to set forth the money borrowed, so that equity may lay him under the customary terms of paying the amount with interest, I cannot think the rule could fairly be applied. If he has not furnished in his bill a statement of facts, within his own knowledge, and resting upon documentary evidences which have been delivered up to him, so as to enable the court to administer its justice between the parties, he cannot complain that it should look to the evidences under his own hand for proof of the facts. And where, as here, he has lain by till the lender's death, he could with no show of reason expect to throw the onus probandi upon those who were not actors in the transaction, and are uninformed as to its character. The bonds in this case must therefore be resorted to as evidences (subject indeed to contradiction and explanation) of the amount which has been loaned.

In this case, however, there can be no difficulty. The plaintiff does not pretend that he did not receive large advances from the defendants' intestate. But he alleges that in both the bonds for 3000 dollars and that for 752 dollars 57 cents, usurious interest was included, \*and moreover compounded. The usury was 12 or 12½ per centum; that is, 6 or 6½ in addition to legal interest. We are of course left to infer that the residue of the bonds was composed of the advances. If, then, we purge the bonds of the 12 per cent. and of compound interest, we get the true amount loaned. And this is the more clear when we look to the prayer of the bill, which is only to expunge the illegal and compound interest, and sets up no pretence to scale the bonds because they falsely represent in other respects the amount due.

Let us, then, from all the sources of information furnished by the record, endeavour to discover what the appellants are entitled to demand. In the obscurity hanging over the transactions, it will be impossible to ascertain this with certainty. A proximation is all we can hope for. And here, first observe, that as all the obligations are payable on demand, there can be no prospective usury in any of them. And as to the usurious interest accruing upon the several sums, I am of opinion that it was not included in the bonds of 3000 dollars and 752 dollars 57 cents. For the scheme of the parties was to keep the usury separate and distinct, lest the bonds themselves should be tainted by it. This appears from the bond of £7. 12. 5. which the bill says was exclusively for interest, which, according to the terms of the loan, was calculated up to March 1820. It also yet more clearly appears from the bond of 63 dollars, which is distinctly stated to be for interest not put into the large bond. Of what it was made up, we can only conjecture. It was probably the balance, at its date, of the whole extra interest account.

Taking the bonds then as containing no interest, the matter probably would stand thus: [Here the president entered into a statement of the account between the parties.]

126 \*BROOKE and CABELL, J., declined expressing any opinion on the point, whether the third section of the statute against usury extends to the case of a bill filed, after the death of the lender, against his representatives. With that reservation, they concurred in the opinion of the president.

The decree entered by the court of appeals was as follows:

"The court is of opinion that the transactions set forth in the bill were usurious, and that the bond of 3000 dollars and 752 dollars, though they are believed to contain no usurious interest in themselves, yet, having been given for money loaned on usury, are within the statute, and void as securities for money. But the court is further of opinion that as the borrower, at the successive settlements, got into his hands the documentary evidences of the transactions, and has failed to set forth the amount borrowed, the bonds above mentioned must be received as evidence, subject however to contradiction and scrutiny, and to be purged of usury, if it had appeared (which the court does not think) that their amounts were in any part composed of illegal interest. And the court is further of opinion that the bill of the appellee not being within the third section of the statute of usury, he is only entitled to relief upon the terms of paying principal and interest, and that the amount now due, after deducting the proceeds of sale by the deputy marshal under the decree made in this cause, is 1808 dollars and 72 cents, with interest thereon at the rate of six per centum per annum from the 23d day of February 1829 till paid, for which sum the appellants should be permitted to proceed." Therefore, decree reversed with costs.

"And this court proceeding &c. it is further decreed and ordered, that the injunction awarded the appellee in the cause be dissolved as to the sum of 1808 dollars 72 cents, with legal interest \*thereon from the 23d day of February 1829 till paid, and perpetuated as to the residue, and that the appellants be allowed to enforce their deeds of trust on the property not already sold by the marshal, so far as may be necessary for the payment of the said sum of 1808 dollars 72 cents, with interest as aforesaid, and the costs attending the sale;" and that the appellee recover his costs expended in the chancery court and circuit superior court.

#### Selden and Others v. Overseers of the Poor of Loudoun.

April, 1840, Richmond.

(Absent TUCKER, \* P.)

**Glebe Lands—What Sale by Overseers of Poor Valid—**  
Case at Bar.—In 1778, a tract of land in L. county, purchased with money contributed by the mem-

\*He decided the cause in the court of chancery.

†The principal case is cited in Wambersie v. Orange Humane Society, 84 Va. 455, 5 S. E. Rep. 25.

bers and parishioners of the church and parish of S. is conveyed to two persons, churchwardens of that parish, and their successors. "for the use and behoof of the present incumbent of the said parish, minister of the church of England, and his successors, incumbents of the said parish, forever." In September 1827, the overseers of the poor of L. county enter upon the land and make sale of it, under authority of the act concerning the glebe lands, 1 Rev. Code, ch. 32b. Whereupon a bill in chancery is filed against the overseers, the purchaser from them (who is in possession, but has not paid the purchase money), and the heirs of the original grantor, by W. S. and others, claiming to be the vestry and churchwardens, and T. J. claiming to be the minister and incumbent, elected and inducted in August 1827, of the said parish and the protestant episcopal church thereof, (the said W. S. and others suing also as individual members and parishioners, and on behalf of all the members and parishioners);

128 setting forth the facts above \*stated; insisting that the overseers of the poor acted without legal authority, and that so far as the said act concerning glebelands assumed to confer such authority, it was contrary to the constitution of the United States, and void; and praying that the overseers and the purchaser from them be restrained from all further interference with the land, that the latter be decreed to surrender the same, and account for its profits to the plaintiff T. J. and that the heirs of the grantor be decreed to convey the said land, by a more effectual deed, to trustees for the benefit of the plaintiffs. On a demurrer to the bill, as not shewing any title of the plaintiffs to relief, the chancellor sustains the demurrer and dismisses the bill; and the court of appeals, following the decision in Turpin et al. v. Locket et al., 6 Call 113, affirm the decree.

This was an appeal from a decree of the superior court of chancery holden at Winchester.

The bill was filed in April 1828, in the said court, by Wilson Cary Selden and others, the vestry of the parish of Shelburne in the county of Loudoun, and of the protestant episcopal church of the said parish, Wilson C. Selden and Henry Clagget, churchwardens and trustees of the said parish and church, and Thomas Jackson, the minister and incumbent of the said parish and church, against David Lewis and others, the overseers of the poor of Loudoun county, John Aldridge, and the heirs of Joseph Combs; the said plaintiffs all suing in their own several and respective rights as officers and parishioners of the said parish and church, and as individual members and parishioners of the said church, and in the right and on behalf of all the other members and parishioners of the same church, by whom or by whose ancestors and predecessors the glebe lands of said parish and church were originally purchased and paid for.

The bill stated that the vestry and churchwardens of the said parish had been regularly elected and appointed from the establishment thereof to the present time; that the plaintiffs, the present vestry and churchwardens, had been so elected

129 and appointed, and that the \*said Thomas Jackson was, and from his appointment and induction had been, the actual incumbent and officiating minister of the said parish and church:

That the glebe land aforesaid was purchased by the churchwardens of the said parish and church in the year 1773, from Joseph Combs and wife for the sum of £400. and was conveyed to them and their successors, for the use of the ministers incumbent of the said parish and church and their successors:

That the purchase money was made up by contributions from the members and parishioners at that time of the said parish and church, and the glebe was purchased for the occupation and use of the minister and his successors, and for the benefit of the said members and parishioners and their successors:

That the said land was not bestowed or granted to the said parish and church by the crown, nor held by them before the revolution under the crown, otherwise than the lands of all private purchasers were held under the crown; nor after the revolution was it held under the commonwealth, or by its bounty, nor was it bought with the public money, but held only under the said purchase and deed from Combs and wife:

That no title to this land has ever vested in the commonwealth; but if from any defect in the deed, or from the want of capacity of the grantees or cestuis que trust to take, hold and enjoy in perpetual succession, the land did not thus pass in succession after the death of the original grantees, it reverted not to the commonwealth but to Combs the grantor to his heirs. But whether it then passed to the grantor and his heirs by reversion, or to the commonwealth by escheat, the estate thus acquired by reversion or escheat was a mere legal estate, subject to the equities and trusts created by the said deed:

That Thomas Lewis and Craven Peyton, the churchwardens living at the time 130 of the execution of the deed \*from Combs and wife, and to whom the said land was immediately conveyed by that deed, have both been dead many years, and have been succeeded by other churchwardens from time to time appointed; but the plaintiffs are advised that according to the form and technical effect of the language of the deed, the legal estate at the death of the said Lewis and Peyton did not pass to the churchwardens their successors, nor to their heirs, but reverted to the said Combs and his heirs:

That Combs has long since been dead, and the plaintiffs have not been able to discover who are his heirs; but they believe them to be resident within the United States, and ask that they be made defendants by name if discovered, or if not, by the description of the heirs of Joseph Combs:

That in September 1827, the overseers of the poor for the county of Loudoun, under the pretence of authority conferred by two acts of the general assembly of Virginia, one passed on the 24th January 1799, the other on the 12th January 1802, entered upon the said glebe land and sold it to the defendant John Aldridge, who has wrongfully taken possession under the purchase, and yet holds possession, enjoying the

rents and profits thereof, though he has not paid the purchase money:

That the said sale, entry and possession were without any authority of law, and operated to the great injury of the plaintiffs; and as far as they were sanctioned by the said acts of assembly, those acts were contrary to the constitution of the United States, especially to that provision of the constitution which prohibits the states from passing ex post facto laws, or laws impairing the obligation of contracts, and were therefore void.

They prayed that the said overseers and their successors and the said Aldridge be enjoined from all further interference with the said glebe land, and that the latter be decreed to surrender the said land,

131 and account \*for its rents and profits to the plaintiff Thomas Jackson, minister as aforesaid, and his successors; that the heirs of the said Combs be directed to convey the said land by a more effectual deed to trustees for the benefit of the complainants according to the intent of the deed from Combs and wife aforesaid; and for general relief.

With the bill was exhibited "an extract from the records of the protestant episcopal church of Shelburne parish," certified by the secretary of the vestry, importing that on the 31st of August 1827, the reverend Thomas Jackson, having been first duly elected, was legally inducted and installed as rector of that church.

The deed from Combs and wife was also exhibited. It bears date the 12th of November 1773, and conveys, for the consideration of £400, a tract of 465 acres of land on the northwest fork of Goose creek in the county of Loudoun to Thomas Lewis and Craven Peyton, churchwardens of the parish of Shelburne in the said county, and their successors, churchwardens of the same parish, "to and for the only use and behoof of the present incumbent of the said parish, minister of the church of England, and his successors, incumbents of the said parish, forever," with covenants of further assurance and warranty.

The defendants demurred to the bill, shewing for cause of demurrer that the plaintiffs had not made such a case as entitled them to discovery or relief from or against the defendants, and no such discovery touching the matters in the bill could avail them, or entitle them to any relief.

The cause was heard on the 27th of April 1830, when the demurrer was sustained by the court, and the bill dismissed with costs.\*

From which decree the plaintiffs appealed.

132 \*The case was argued here, with great earnestness and ability, by Johnson for the appellants and J. Robertson for the appellees; but the ground taken by the court in deciding the cause renders it unnecessary to report the argument.

STANARD, J. The main question is that which was involved in the case of

Turpin & al. v. Locket & al., 6 Call 113, decided in 1804; and in that case the decision of chancellor Wythe, sustaining the validity of the acts of assembly dissolving the vestries and providing for the sale or other disposition of the glebe lands of the protestant episcopal church, was affirmed by an equal division of the judges of the court of appeals. Under those laws, sustained by that decision, the overseers of the poor, in the respective parishes where glebe lands were situated, proceeded to dispose of those lands as they became vacant, and under that authority almost all the glebe lands in the state were disposed of before the year 1830. If this authority was questioned in the courts of the commonwealth, except in the case in judgment, it is presumed it was upheld by the decisions of the intermediate courts, and those decisions were acquiesced in, as the case in judgment is the only one that has been brought up to the court of appeals, in which the validity of those laws was challenged. The case of Claughton v. Mac-naughton, 2 Munf. 513, decided in 1811, did not require the court to pass on that question; yet from the decision of the chancellor, affirmed by the court of appeals, an implication may be fairly made that neither of those courts thought the validity of those laws could be effectually controverted. It may be safely assumed, that from the date of the decision of the case of Turpin v. Locket, until 1830, when the constitution of the state was revised and amended in convention, there was a general acquiescence in that decision by

133 the members and ministers of \*the protestant episcopal church, and that the community at large, the legislature, and the courts, considered the validity and constitutionality of those laws established; that the ecclesiastical corporations of the protestant episcopal church were effectually dissolved, and the glebe lands liable to the dispositions prescribed by those laws. It is matter of history that almost all those lands have been disposed of under those laws, and acquired by purchasers, as may reasonably be presumed, in the confidence inspired by the acquiescence of the members and ministers of the church, and the opinions pervading the community, the legislature, and the judicial tribunals of the state, during the long time intervening between the decision of the case of Turpin v. Locket, and the revision of the constitution. During that period, one or more applications have been made to the legislature by one or more religious sects, for acts of incorporation, to enable them to hold and administer more conveniently for the religious objects of the petitioning sect, property to a limited amount, voluntarily contributed for those purposes. It is well known that such applications encountered in the legislature the twofold objection of their incompatibility with the principles of religious freedom declared by the act of 1785, and of the inexpediency of exercising the power to create such corporations though it were constitutional to do so; and that, under the influence of one or other of these objections, or of both combined, those applications were rejected by large

\*The elaborate opinion of the chancellor may be seen in Tucker's Commentaries, vol. 2, appendix.—Note in Original Edition.

majorities. Such was the state of things in 1829-30, when the constitution was under the revision of the convention; a state of things well calculated to produce in that body (what doubtless was the case) a conviction that the corporations of the protestant episcopal church, and all the rights and incidents that pertained to them, were effectually dissolved or abrogated, and a grave doubt at least of constitutional

power to create corporations of  
134 \*or for any religious sect, when (as was done) the principles declared by the said act establishing religious freedom were incorporated in the new constitution as limitations of legislative power. In that convention, an attempt was made to incorporate a provision in the constitution which would have expressly reserved to the legislature a power "of incorporating by law the trustees or directors of any theological seminary, or other religious society or body of men created for charitable purposes or for the advancement of piety and learning, so as to protect them in the enjoyment of their property and immunities, in such case and under such regulations as the legislature might deem expedient and proper;" but such corporation at all times to be subject to be altered, remodeled or repealed at the discretion of the legislature. This proposition was opposed, and though the mover supposed that the legislature would, without such reservation, possess the power to grant such charters of incorporation, that was not assented to, and the proposition was resisted on the ground that no such power ought to be given or exercised, and was overruled by a very large majority. Without deciding or even considering the influence that the making and rejection of this proposition in the convention may have on the interpretation of the constitution in respect to the extent of the legislative power over the incorporations specified in the proposition, it may be safely assumed that such a proposition would not have been rejected, had not the convention taken it for granted that the corporations of the protestant episcopal church were at an end. For if they still had legal existence, and were to continue (as the argument in this case must maintain, to entitle the appellants to success) intangible by legislative and even conventional power, then the only means of even approximating other religious sects to an equality of immunities

would be to confer and exercise the  
135 power of giving them like \*corporate organization and privileges. Whatever may be the true interpretation of the constitution, with the material principles declared by the act establishing religious freedom forming a part of it, coupled with a rejection of the reservation of a qualified power to incorporate religious societies of charitable purposes or for the advancement of piety and learning, I do not doubt that incorporations of religious sects, providing for church government of the members, and the election or appointment and institution of ministers, are without the scope of legislative power, and incompatible with the principles of the said act, now incorporated in the constitution. It is under these circumstances of long acquiescence in the

laws aforesaid, the alienation of almost all the glebe lands, and ingrafting thereon of interests large, complex and multifarious, the general assent to and confidence in the decision that warranted such alienation, and the action, during more than a quarter of a century, of the judiciary, legislature and convention, founded on that confidence, that the court is in this case called on to review and reverse the decision in the case of *Turpin v. Lockett*. In such a case the injunction *stare decisis* is of most commanding authority, and challenges obedience from every judge who is not supported in his dissent by an unhesitating conviction that the decision from which he dissents is clearly erroneous. My examination of this case, so far from yielding such support to an opinion dissenting from the decision in the case of *Turpin v. Lockett*, strongly inclines me to assent to it, and had I been one of the court which decided that case, my impression is that I should have concurred in the opinions that prevailed. But I do not mean to say that had the responsibility devolved on me of deciding that case, the question being then for the first time submitted to judicial decision, I should not have felt it my duty to subject the impression now avowed to a  
136 stricter scrutiny than I \*have given it, nor do I mean to declare an undoubting conviction that under such scrutiny it would have ripened into a judicial opinion. It suffices for this case, that such are my ascertained convictions in respect to the main question involved, as to make the rule *stare decisis* imperative on me, and of course to require me to affirm the decree.

PER CURIAM, Decree affirmed.

#### Huston's Adm'r v. Cantril and Others.

April, 1840, Richmond.

**Bonds—Heirs Not Mentioned—Effect.**—In the obligation of a bond, the obligors acknowledge themselves (not naming their heirs) to be held and firmly bound to the obligee, his heirs, executors &c. in a penal sum; the condition provides, that if the obligors or either, or any of their heirs, executors or administrators, shall pay a less sum specified, on or before a given day, then the obligation is to be void: HELD, the heirs of the obligors are not bound by the instrument.

**Same—What Is Not an Equitable Mortgage, but a Power of Attorney—Case at Bar.**—A principal debtor executes an instrument under his hand and seal, by which he constitutes the surety his attorney, for the special purpose of making sale of a certain tract of land, and applying the proceeds to the payment of the debt; but it is provided that the land is not to be sold for a less price than one dollar per acre: and the principal binds himself, his heirs &c. to warrant and defend the land to any person or persons to whom the surety may sell as aforesaid. The land is not sold during the life of the principal; and after his death, the surety pays the debt, and then files a bill against the administrator and heirs of the principal, insisting that the instrument created a lien in equity on the land for his indemnity, and praying that in

\*Bonds.—See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.



default of satisfaction out of the personal assets, he may be authorized to sell the land and apply the proceeds to his reimbursement. **Held**, the instrument had not the effect of an equitable mortgage or charge upon the land; but the

137 power therein \*contained, not having been carried into effect in the grantor's lifetime, was utterly revoked by his death.

**Gifts—What Valid against Donor's Creditors—Marriage of Donee—Effect.**—A father, owing a debt at the time, makes a deed of gift of personal chattels to his infant daughter, which is duly recorded: the daughter marries; and after the father's death, the creditor files a bill against the daughter and her husband, impeaching the deed as fraudulent, and seeking to subject the property to the payment of his demand: **Held**, whatever might have been the character of the conveyance in its origin, it was rendered good and available against creditors upon the marriage of the daughter, who thereupon was to be considered a purchaser by relation for valuable consideration: *dissentiente* STANARD, J.

**Same—Donee—Lapse of Time.**—Questions as to the effect of long possession of personal chattels by a voluntary donee, in protecting the property, after the donor's death, against the claims of his creditors, discussed by some of the judges, but not decided by the court.

**Fraudulent Conveyances—Retention by Grantor of Property Sufficient to Pay Debts—Quære.**—Whether a voluntary conveyance is fraudulent as to existing creditors of the grantor, if he retain other property amply sufficient at the time to pay all his debts?

**Appellate Jurisdiction—Equity Practice—What May Be Considered by Appellate Court—Case at Bar.**—A specialty creditor of a decedent files a bill in equity against the administrator and heirs, for an account of the personal and real assets, and

+**Gifts—By Debtor to Infant Daughter—Marriage of Daughter—Effect.**—The principal case holds that where a father, owing debts at the time, makes a deed of gifts of personality to his infant daughter, which is duly recorded and the daughter marries, a creditor of the father cannot file a bill against the daughter and her husband to have the deed set aside as fraudulent, and the property applied to the satisfaction of his debt. For this proposition the principal case is cited and followed in *Bentley v. Harris*, 2 Gratt. 363, and *foot-note*; *Hayes v. Jones*, 2 Pat. & H. 587, 603, 605, 607; *Herring v. Wickham*, 29 Gratt. 637, and *foot-note*. The principal case is distinguished in *Snoddy v. Haskins*, 12 Gratt. 360, 370, which case holds that a widow having received her distributable share of the personal estate of her husband is not a purchaser for value, so as to be entitled to set up the defence of purchaser for value without notice. It is also distinguished in *Turner v. Campbell*, 1 Pat. & H. 260, 263, 274. But see citing the principal case *McCue v. McCue*, 41 W. Va. 156, 23 S. E. Rep. 601; *foot-note* to *Wilson v. Buchanan*, 7 Gratt. 334; *foot-note* to *Hunters v. Waite*, 3 Gratt. 26. See generally, monographic *note* on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

**Judicial Sales—Setting Aside—Parties—What Appellate Court May Look to.**—On this subject, see principal case cited in *foot-note* to *Parker v. McCoy*, 10 Gratt. 504; *foot-note* to *Buchanan v. Clark*, 10 Gratt. 164; *Burton v. Brown*, 22 Gratt. 16; *London v. Echols*, 17 Gratt. 19; *Estill v. McClintic*, 11 W. Va. 425. See monographic *note* on "Judicial Sales" appended to *Walker v. Page*, 21 Gratt. 636.

satisfaction of his demand out of those funds, which are accordingly directed by the court of chancery to be applied to that purpose, but prove insufficient; whereupon the creditor files a supplemental bill, to subject certain slaves given by the decedent in his lifetime to his daughters (who, as heirs, are parties defendants to the original bill); in their answers to the supplemental bill, the daughters not only controvert the claim made by that bill, but impeach the sale of the real estate, decreed and confirmed by the court on the original bill: on appeal by the creditor from a decree dismissing the supplemental bill, **Held**, the proceedings upon the original bill are also brought up to this court by the appeal, and errors in those proceedings may be examined and corrected.

Appeal from a decree of the late superior court of chancery holden at Staunton. The record, as originally certified to this court, presented the case as follows:

In December 1782, George Clendenin and George Huston executed to John Mayo jr. an obligation in these words: "Know all men by these presents that we George Clendenin and George Huston, one of Greenbrier county and the other of 138 Rockingham county, are held \*and firmly bound unto John Mayo jr. in the just quantity of thirty thousand pounds weight of inspected crop tobacco with the casks, inspected at Richmond or Manchester on James river, or Petersburg on Appomattox, and not more than twelve months inspected before payment, to the said John Mayo, his certain attorney, his heirs, executors or assigns, jointly and severally, firmly by these presents, sealed with our seals and dated this 28th day of December 1782.

Be it remembered nevertheless, that if the above bound George Clendenin and George Huston, either or any of their heirs, executors, administrators or assigns, shall well and truly pay or cause to be paid unto the said John Mayo jr. his certain attorney, executors, administrators or assigns by these presents, in the just sum of fifteen thousand weight of crop inspected tobacco with the casks, at some of the above mentioned warehouses, and clear of inspection, on or before the 1st day of October 1784, then the above obligation to be void, or else to remain in full force and virtue. As witness our hands the day and year above mentioned.

Geo. Clendenin [Seal]  
G. Huston [Seal.]

On the 23d of October 1786, Mayo assigned the bond to William Watts.

Watts, on the 26th of August 1794, commenced an action in the district court at Staunton against the obligors, but an endorsement was made on the writ that it was to be executed on Huston alone. Against him alone the declaration was filed, and on the 5th of September 1795 a verdict was found against him on the plea of payment, and judgment entered against him for 30,000 pounds of inspected crop tobacco with the casks, inspected at Richmond or Manchester on James river, or Petersburg on Appomattox, and not 139 more than twelve \*months inspected before payment, being the debt in the declaration mentioned, and also for one



penny the damages assessed by the jury, and the costs; to be discharged by the payment of 15,000 weight of crop inspected tobacco with the casks, at some of the above mentioned warehouses, and clear of inspection charges, with interest thereon after the rate of five per centum per annum from the 1st of October 1784 till paid, and the costs.

A ca. sa. being issued on this judgment, it was executed on Huston, and he entered into a prison bounds bond. The executors of Watts brought suit on the bounds bond against Huston and his sureties, and obtained judgment therein the 7th of April 1800, which was discharged by Huston the 29th of May 1800. The receipt of the agent for the executors of Watts bears date on that day, and is for 26,617 pounds of crop tobacco, Petersburg inspection, in full of the judgment.

In the mean time, to wit, on the 28th of December 1794, Clendenin had executed the following power of attorney:

"Know all men by these presents that I George Clendenin of the county of Kanawha in the state of Virginia do constitute and appoint George Huston of the county of Rockingham in the state aforesaid my true and lawful attorney, for the special purpose of making sale of a certain tract or parcel of land with the appurtenances, or any part thereof, lying and being in the county of Greenbrier, containing 3000 acres, and granted to me by grant dated the 3d day of November 1787, and the money arising from such sale to be applied by the said George Huston to the payment of a debt due by me, with him as security, to William Watts (assignee of John Mayo) of Botetourt county in the aforesaid state, for the quantity of about 15,000 pounds of tobacco, which debt became payable about 12 years since, also to pay the interest now due and that may hereafter become

140 \*due on said debt, with all costs that may have accrued or hereafter may accrue in consequence of the debt aforesaid, as also all costs that he the said George Huston may be at in conveying the said land or any part thereof to the purchaser or purchasers. But nevertheless the said George Huston is not to sell the said land or any part thereof for a lesser price than one dollar per acre, and the overplus of the money arising from such sale, after payment of the debt, interest and costs aforesaid, is to be returned by the said George Huston to me, my heirs and assigns. And I the said George Clendenin doth bind myself, my heirs, executors and administrators, firmly by these presents, to warrant and defend the right, title and possession of the said land with the appurtenances, and every part thereof, to any person or persons, his, her or their heirs or assigns, to whom the said Huston may sell as aforesaid, against the claim or claims of all and every person or persons whatsoever. In witness whereof I have hereunto set my hand and seal this 28th day of December in the year of our lord 1794.

George Clendenin [Seal.]"

On the 24th of April 1798, Huston commenced a suit in chancery in the county court of Kanawha, against Jemima Clendenin, John Meggs, who intermarried with Parthenia one of the daughters and heirs of the said George, and Cynthia and Mary Clendenin, two other daughters and heirs. The bill of Huston set forth his entering into the bond before mentioned as surety for Clendenin, the execution of the power of attorney, and the death of Clendenin before any sale under that power, "by which circumstance he is advised that the powers granted unto him by the said Clendenin cease and are determined; but as those powers were given to carry into execution a purpose in itself just and laudable, and as it is conceived

141 \*he hath a lien on those lands for the purposes aforesaid, so it hath been deemed expedient that application should be made to this court for assistance and relief." The prayer is, that the court will, by its decree, order and direct that the said Jemima, Parthenia, Cynthia and Mary vest the plaintiff with the powers formerly granted to him by the said George, under the rules and restrictions in the said powers contained, or that the administratrix, out of the personal estate of the decedent, pay the amount of the debt with interest and costs, or, in default of such payment, that the court will authorize the plaintiff to sell and dispose of the premises aforesaid, and apply the moneys arising from the sale thereof according to the direction contained in the letter of attorney. The widow answered, "that having fully considered the bill of the plaintiff, and being well apprized of the circumstances and truth therein contained, she prayed the aid of the court to convey such power and authority as she might have, unto the plaintiff, to carry into execution the power given him to dispose, sell and convey the lands therein specified, and for the purposes and under the regulations therein mentioned and expressed." Meggs and wife filed an answer under their hands and seals, the purport whereof was, that they granted and renewed to Huston full and sufficient power to dispose of, sell, or cause to be sold the tract of land, according to the tenor of the power of attorney, and they relinquished their title, right and claim as heirs. On the 11th of September 1799, the following decree was made: "It appearing to the court from the answers of Jemima Clendenin and John Meggs and his wife, that they are desirous and willing that the complainant should have power and authority to carry into execution the powers given him to sell, dispose of and convey the lands therein specified, and for the purposes and regulations therein expressed, the court doth order and

142 decree the same "accordingly." The cause was afterwards continued until the 10th of December 1807, when the plaintiff not further prosecuting, on the motion of the defendants it was ordered that the suit be dismissed, and that the complainant pay to the defendants their costs.

On the 19th of December 1812, another suit was commenced by Huston in the superior court of chancery holden at Staunton. The bill in this suit sets forth the discharge by Huston of the judgment against him,

the execution of the power of attorney, the death of Clendenin before sale, the previous suit in chancery, the nature of the answers therein, the decree authorizing the plaintiff to sell the land, and the dismission, which is stated to have been owing to the negligence of the plaintiff's counsel. The bill then states that John Cantril has intermarried with Mary Clendenin, and become the administrator de bonis non of George Clendenin's estate, that — Lamb has intermarried with Cynthia Clendenin, and that Meggs the former husband of Parthenia is dead, and she has intermarried with Andrew Bryant. It alleges that there is considerable personal estate in the hands of the administrator, that the land aforesaid yet remains unsold, and that other lands have descended from Clendenin. Cantril and wife, Bryant and wife, Lamb and wife, and Jemima Clendenin are made defendants. The bill prays an account of the personal assets, and satisfaction of the plaintiff's claim from them, if sufficient, if not, that the land specified in the power of attorney, and, if necessary, the other lands descended, may be sold for its payment.

In December 1814, Cantril, as husband of Mary Clendenin, and as administrator de bonis non of George, filed his answer, setting forth his marriage in November 1803, his qualification as administrator in the spring of 1804, the insufficiency of the personal estate to pay the decedent's debts, and the various parcels of real estate. This

answer of Cantril was referred to and 143 adopted by \*his wife, and by Bryant and wife, in the answers put in for them respectively.

On the 8th of December 1818, the chancellor decreed that unless the defendants, on or before the first of June following, should pay to the plaintiff the sum of 26,617 pounds of crop tobacco with the casks, with interest thereon from the 29th of May 1800, the marshal of the Greenbrier chancery court, after advertising the time and place of sale in the manner specified in the decree, should sell at public auction in the town of Lewisburg in Greenbrier county the said tract of 3000 acres of land, requiring so much of the purchase money to be paid in cash as would defray the costs and charges of sale, and bond with security for the payment of the residue into court on the 1st day of the term next after the sale should be made. It was further ordered that an account be taken before a commissioner, of the real and personal estate which had come to the hands of the defendants as heirs and administrators of George Clendenin, and the manner in which the same had been disposed of. By a subsequent order, of the 3d of July 1821, the commissioner was directed to state the annual value of each parcel of real property descended from George Clendenin to his heirs, and the value of the whole interest in such property, as well at the time of the order, as at the time when any parcel thereof might have been disposed of by the heirs, or any of them.

The commissioner made a report shewing the assets in the hands of the administrator, and the facts in relation to certain

slaves given by Clendenin in his lifetime to his children by deeds of gift. His report also set forth the real estate and the value thereof. In relation to the tract of 3000 acres, he stated, "that from 600 to 1000 acres of it is land of first quality for that country, and if sold in small tracts to suit purchasers, and on a reasonable credit, would probably produce 5 dollars an acre,

but the balance thereof is worth 144 but little." This \*statement was

made "as well from the answers to interrogatories propounded by him to the defendants Cantril and Andrew Bryant, as the answer of the defendant Cantril."

Both parties excepted to the report; the third of the plaintiff's exceptions being, because the commissioner had not charged the administrator with all the slaves in the intestate's possession at his death, the deeds of gift under which they were claimed by his children being (as the plaintiff contended) void as to creditors.

On the 25th of July 1822, the court, being of opinion that the true balance of assets in the hands of the administrator, where-with he was properly chargeable, was 628 dollars 77½ cents with interest from the 1st of January 1817, decreed that he pay the same into court. At the same time the marshal of the Greenbrier chancery court was directed to proceed to execute so much of the decree of December 1818, as related to the sale of the 3000 acres of land. In relation to the slaves conveyed by the deeds of gift, the court made no decree, but it declared that it would thereafter, if the plaintiff desired it, give him leave to amend his bill for the purpose of charging them.

The marshal of the Greenbrier chancery court reported, that on the 22d of July 1823 he sold the 3000 acres of land, and the plaintiff Huston became the purchaser, being the highest bidder, at 30 cents per acre, equal to 900 dollars; of which, deducting 24 dollars for his commission, and 6 dollars for the printer's charge, there was left 870 dollars to be applied towards the satisfaction of the plaintiff's claim.

On the 3d of July 1826, the death of the plaintiff Huston was suggested, and by consent the cause was revived in the name of Philip Pitman, his administrator.

On the 21st of July 1827, on the motion of the plaintiffs, leave was given them to file a supplemental bill. This supplemental

bill, after briefly reciting the former 145 \*proceedings, alleged that Clendenin

in his lifetime owned a large number of valuable negroes, which with other property he conveyed away to his children, or to persons in trust for them, without any valuable consideration, by deeds bearing date subsequent to the time when Huston became his surety. It specified a deed executed by Clendenin to his brother William, bearing date the 3d of May 1790, conveying two negroes and four cows for the benefit of Mary Clendenin, now Mary Cantril. It averred that Clendenin also conveyed two other negroes to Parthenia, now the wife of Andrew Bryant, and two others to Cynthia, now the wife of — Lamb. And it charged that these deeds were all made by Clendenin in fraud of his just

creditors, and that he remained in possession of said slaves and other property till his death, when they were claimed and received by his daughters and their husbands under the deeds. Cantril and wife, Bryant and wife, Lamb and wife, and William Clendenin were made defendants. The prayer was, that the deeds might be produced, the consideration discovered, and the negroes with their increase also discovered; that the deeds might be declared void as to the complainant; and that the negroes with their increase might be sold to satisfy the balance due to Huston's estate.

To this supplemental bill there was filed a plea, demurrer and answer for Cantril and wife, and a like plea, demurrer and answer for Bryant and wife. The plea was to the jurisdiction, averring the nonresidence of the defendants within the Staunton district; and blanks in the bill were assigned as the causes of the demurrer.

With the answers were exhibited copies of the deeds. Each of them was stated on its face to be in consideration of the love, good will and affection which the maker of the deed bore to the daughter to whom the gift was made. To Mary was given  
146 a negro man \*named Rob, about 23 years of age, a mulatto girl called Daphne, about 7 years of age, and 4 head of cows. To Cynthia was given a negro woman named Doll, about 35 years of age, a mulatto boy named York, 9 years of age, and about 4 head of cows. And to Parthenia was given a negro boy called Peter, 5 years old, a negro girl called Phoebe, 3 years old, a roan mare, and 4 milch cows. In each deed, after the property was mentioned, were the following words, "described in an inventory given in trust for her to my well beloved and favourite brother William Clendenin, before the signing and sealing of these presents, which inventory is signed with my own hand, and bearing even date with this my deed of gift;" or words of like import. The deeds bore date the 3d of May 1790, and on that day, upon the motion of George Clendenin, the court of Kanawha county admitted the same to record.

Cantril and wife, in their answer, after objecting to the jurisdiction of a court of equity, insisted that the deed relied on by them was not fraudulent. They state, that the grandfather of the female respondent gave her, when of very tender years, some property, which went into the possession of her father for her benefit, and that property, with its increase, they believe to have been a consideration of the deed, as well as the consideration mentioned therein; that at the time of making the deed, and long after, Clendenin had property amply sufficient to pay all his debts; that the respondent Mary, at the time the deed was made to her, was not more than about 7 years old; that in a few months after the deed was made, the negro man Rob died; that though the said Mary lived with her father until his death, which happened early in 1797, yet the slave Daphne, with such of the other property as remained, was in her possession, and treated by her and by the rest of the family as her own

property: and they rely upon the statute of limitations. They further

147 \*state that the tract of land sold was of more than sufficient value to have paid the debt, but was sacrificed for less than one third of its value; that Huston, who bought it in, admitted to Cantril that the land was worth at least one dollar per acre, which it is in fact, and which the affidavit of Archibald Hutchinson and the papers filed in the original suit will shew; and they submit to the court whether it will not even now compel the complainants to take the land at one dollar per acre, as stipulated in the power of attorney, or direct a new sale to be made of the land, in such parcels and on such reasonable credits as might suit the circumstances of purchasers in the county where the land lies, so as to obtain a fair price for the same. The answer concludes as follows: "These respondents farther say, that they have always understood and believed that the true reason of making the deed aforesaid at the time it was made, was, that the country at that time was infested with indians, who lurked in every corner to murder the inhabitants of these widely extended forests, and in this state of uncertainty the grantor deemed it prudent to make such division of this property among his children as was just and equitable. And these respondents farther say, that in consequence of the pressing necessities of the inhabitants, part of the stock, they believe, was killed and eaten by the family of the said George Clendenin in his lifetime. The balance was sold by the widow, and the proceeds appropriated to the use of her daughter Cynthia. After the death of the slave Robert, the other slave Daphne was raised by the female respondent, and taken by her to the state of Kentucky, whither she removed about the year 1799, and where she continued to reside till about the fall of 1803, when she finally returned to Virginia and married her husband the codefendant, who, at considerable expense, went to Kentucky and brought said slave Daphne and her infant child to  
148 Mason county \*in the year 1805, where he now lives. The child (now a man) he yet has. Daphne, with another infant child, then very young, he sold about 1810 to Andrew Burks, now of Kanawha county."

The answer of Bryant and wife is nearly to the same effect as that of Cantril and wife. It states that mrs. Bryant was about 10 or 11 years old at the time the deed to her was made; that during her father's life she held the property as her own, and it was known and recognized as such by the family.

Archibald Hutchinson, whose affidavit is referred to in Cantril's answer, made oath that he had a tolerable knowledge of the greater part of the tract of land sold, "and from said knowledge he does believe that the said tract is, on an average, worth one dollar per acre, and so informed Huston at the time of said sale, and he does believe that if said land was laid off in parcels to suit purchasers, and sold on short credits, it would bring at least that sum."

The cause came on to be heard the 25th

of August 1830, on the supplemental bill, answers thereto, exhibits, and examination of witnesses: when the chancellor, expressing the opinion that the deeds of gift from Clendenin to his daughters were originally fraudulent, but were made good by the subsequent marriage of the donees, which supplied a consideration, decreed that the supplemental bill be dismissed, and that the parties respectively pay their own costs.

From this decree Huston's administrator appealed.

The cause was first argued in March 1836, by Johnson for the appellant, and Robinson for the appellees, before a court consisting of Tucker, P., and Brooke, Cabell, Carr and Brockenbrough, J. On the 30th of March 1836, the following opinions were delivered and decree entered.

149 \*BROCKENBROUGH, J. The bond executed by Clendenin as principal, and Huston as surety, to Mayo, bears date as far back as 1782. After various efforts made by the creditor, he at length, in 1800, obtained a judgment against Huston the surety, who paid the amount of the debt on the 29th of May 1800. The supplemental bill by which Cantril and wife, and the other daughters of Clendenin and their husbands, were made parties, was filed on the 21st of July 1827. That bill seeks to set aside certain deeds as voluntary and fraudulent, by which Clendenin had conveyed some slaves to his three infant daughters, for the consideration of love and affection, which deeds were admitted to record as early as May 1790. If the plaintiff has any right to set aside those deeds, and to subject the property conveyed by them to the payment of Huston's debt due from the estate of Clendenin, that right accrued at least as early as May 1800, more than 27 years before the filing of the supplemental bill; and the defendants rely on the lapse of time as a bar to the recovery.

It was contended by the appellant's counsel, that the plaintiff's action did not accrue till he had established his debt against the rightful administrator; and as an excuse for not making this demand at an earlier period, it was stated, that shortly after it was ascertained from the commissioner's report what was due, and then that there was not a sufficiency of other assets to discharge the debt, this bill was filed against the fraudulent donees. It is well established at law, that the limitation begins to run from the moment that the cause of action accrues, and not from the time that it is ascertained that damage has been actually sustained by the breach of contract. *Battley &c. v. Faulkner &c.*, 3 Barn. & Ald. 288; 5 Eng. C. L. R. 288, and *Wilcox &c. v. Plummer's ex'ors*, 4 Peters 172, are strong cases to that effect, and I see no reason why the same rule should not prevail in equity. After the enjoyment of the property for 37

150 \*years, and 27 years after the right of action, if any, accrued to the plaintiff, I think the title of the children ought not to be disturbed. The supplemental bill ought not to have been allowed, and was properly dismissed.

I concur with my brethren in the opin-

ion, that as the bond on which the claim is founded does not bind the heirs of the obligors, no decree can be rendered against the children of Clendenin, to subject to the payment of this debt any land inherited by them, other than that on which Huston acquired a lien by the deed in the record mentioned: and that, by the very terms of that deed, Huston was bound to allow for that land at the rate of one dollar per acre.

I am for affirming the decree.

CARR, J. The original bill in this case was filed to enforce a lien on a tract of land, given by Clendenin to Huston, in the form of a power of attorney to sell, but operating as a mortgage on the land. The bill was filed against the real and personal representatives of Clendenin, and on hearing, the court decreed a sale of the land. It was sold; and the report of the marshal shewing that it left a considerable part of the debt unpaid, the court (without confirming the report, as I understand the record) gave leave to file a supplemental bill, for the purpose of impeaching three deeds made by Clendenin to his daughters, conveying to them slaves and other chattels, and of having those slaves sold to pay the residue of the debt. Without acting finally on the original bill, the court proceeded to hear the supplemental bill, and dismissed it: from which dismissal this appeal is taken by the plaintiff.

I think this dismissal right, for several reasons. In the first place, I do not think that under the aspect of the case at the time, the court ought to have given leave to file the supplemental bill. Here 151 was a specific subject "pledged for the debt, and resorted to by the bill, and until that was fairly exhausted and shewn to be insufficient, there was no need and no propriety in seeking to condemn other property. Now, to my mind, this specific fund has by no means been shewn to be insufficient; on the contrary, the fact seems to be, that, properly disposed of, it would have discharged the debt and left a considerable surplus. The lien on the land, dated in December 1794, contains a stipulation between the parties that it should not be sold for less than one dollar per acre. This is prima facie evidence that, at that early period, the parties thought it worth that price. In the commissioner's report, made in 1821, we find him representing "that from 600 to 1000 acres of this land is of the first quality for that country, and if sold in small tracts and on a reasonable credit, would probably produce five dollars per acre: but the balance thereof is worth but little." This report was before the court when the last order of sale was entered. In 1822, Archibald Hutchinson makes oath that he is well acquainted with the land, and thinks it worth on an average one dollar per acre. And yet, in July 1822, this whole tract is set up and sold in a lump, and bought in by Huston the plaintiff at 30 cents per acre, making, to be credited to the decree, 870 dollars only; whereas, if it had been sold according to the suggestions of the commissioner, 800 acres of it would probably have brought 4000 dollars. I feel satisfied

that if this monstrous sacrifice had been brought to the notice of the chancellor, he would have ordered a resale; this being strongly prayed for in the answers to the supplemental bill, and in itself most reasonable and proper. But the report seems never to have come under his notice: the subsequent proceedings are wholly taken up with the case made by the supplemental bill, answers and evidence, ending with the dismissal of that bill, from which the appeal is taken.

152 \*I think this dismissal correct, in the second place, on the ground taken by the chancellor; that the deeds from Clendenin to his daughters, though in their origin voluntary, and, while they continued so, assailable by creditors, yet became, by the marriage of those daughters, deeds for a valuable consideration, and from the dates of their marriages the daughters and their husbands became purchasers for a valuable consideration, liable to no creditor of their father who had not, before such marriage, obtained, by judgment or otherwise, a specific lien on the property. That a deed voidable may be rendered valid and effectual by matter ex post facto, is an undeniable proposition, and as old as the statute of Marlbridge. (See 2 Inst. 111.) In *Prodgers v. Langham*, 1 Sid. 133, a conveyance was made in trust for an only daughter for 21 years, to the intent that the profits before her marriage should be applied to her maintenance, and if she married with her father's consent, then in trust for her during the rest of the term. The court held that the deed to the daughter was voluntary, and would have been void against the defendant, a subsequent purchaser for valuable consideration, if the marriage had not intervened; but when that took effect, the deed ceased to be voluntary, and became supported by a valuable consideration which was unimpeachable, inasmuch as the marriage was an advancement to the daughter, and the husband was induced (though that fact does not appear in the case) by the prospect of this provision. The cases of *Kirk v. Clark*, Prec. in Ch. 275, and *East India Co. v. Clavell*, Id. 377, are to the same effect, except that in these the marriage was had with notice by the husband of the deed, and in the first such notice was presumed. In *Brown v. Carter*, 5 Ves. 862, lord Alvanley reviews all the cases, and considers that proof of notice of the settlement before the marriage is not material. He says, "The lady had a right, the children have a right,

153 \*to have it considered that he had the estate which he appeared to have. Therefore I am of opinion, though it does not appear that the friends of the wife did speculate upon this and take it into consideration, it must be presumed they did act upon it, and the husband has not a right now to disturb it." In the case of *George v. Milbanke*, 9 Ves. 190, sir Ralph Milbanke had a power of appointment of £5000. to be raised under a trust term, and if he failed to appoint, then to his executors. In pursuance of this power, he directed that £500. should be paid to his natural son Mark Milbanke, and the rest of the £5000. he appointed in favour of his

natural children and their mother. Mark Milbanke (soon after the death of sir Ralph) in consideration of £400. paid him by G. and P. assigned to them the £500. charged on the trust in his favour. Sir Ralph died in debt; and this bill was filed by a specialty creditor, also administrator with the will annexed, to have the £5000. or so much as was not well appointed and disposed of by sir R. in his lifetime, raised and paid to the plaintiff. Lord chancellor Eldon said, it was too clear for argument, that the £4500. appointed to the woman and children was part of the personal assets of sir R. applicable to the payment, of his debts, they being volunteers; but as to the £500. after a careful examination of the cases, he concludes thus: "This is an assignment, in equity merely, of a sum of money. But the question would be, whether the general creditors have a better equity than a purchaser of this specific part of the estate, having paid his money? And I think his the better equity. The son, as a volunteer, would hold it against every one but creditors; and the question is whether, being not a volunteer but a purchaser, creditors having no specific charge upon this property have as good an equity? I think they have not." In his review of the cases, lord Eldon makes this remark upon *Prodgers v. Langham*: "In the 154 case in *Siderfin*, the settlement \*is expressed to be by covin. The reason is stated is this, that though a voluntary feoffment is bad as between the creditor and the feoffee, yet it is good as between the feoffer and feoffee; and therefore the latter, if prior, shall hold against the subsequent feoffee of the feoffor. The consequence is, that the feoffment of the voluntary feoffee is good against creditors." In *Sugden on Vendors*, ch. XVI, § 1, part III, (american ed. of 1836, vol. 2, p. 198, 9,) the author, having laid down the rule that a deed merely voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter ex post facto, proceeds to cite the cases I have quoted, and remarks, "If a voluntary grantee gain credit by the conveyance to him, and a person is induced to marry him on account of such provision, the deed, though void in its creation as to purchasers, will, on the marriage being solemnized, no longer remain voluntary, as it was in its creation, but will be considered as made upon valuable consideration. And it is to be inferred" (he adds) "from a late decision" (referring to *Brown v. Carter*) "that though it does not appear that the friends of the wife did speculate upon the provision and take it into consideration, yet it must be presumed that they did act upon it; and it cannot afterwards be disturbed." In *Sterry v. Arden*, 1 Johns. Ch. R. 261, chancellor Kent remarks, "The marriage was a valuable consideration which fixed the interest in the grantee against all the world; she is regarded from that time as a purchaser, and as much so as if she had then paid an adequate pecuniary consideration. It has been a principle of long standing, and uniformly recognized, that a deed voluntary or fraudulent in its creation, and voidable by a purchaser, may become good by matter

ex post facto. It is the constant language of the books and of the courts, that a voluntary deed is made good by a subsequent marriage; and marriage has always  
155 been held \*to be the highest consideration in law. Co. Litt. 9 b. The cases do not require that the settlement should have been made with a view to any particular marriage; it is sufficient that the settlement was afterwards known to third persons, and was one probable inducement to the subsequent marriage. Indeed, in *Brown v. Carter*, lord Alvanley did not think it very material to prove that the marriage was even made with notice of the voluntary settlement, as the knowledge of the circumstances of the party, and the inducement, were to be presumed." See 12 Johns. Rep. 536, where this case, on appeal, was unanimously affirmed; Spencer, J., delivering a most able opinion.

The three deeds in the case before us seem to have been ordered to record in open court, in Kanawha, on the day of their date (May 3, 1790), upon the motion of the grantor,—a circumstance calculated to give them much publicity; and it cannot be reasonably doubted that gentlemen inclined to address these ladies would in some way get notice of them. We know too that on the death of the grantor the slaves were taken into the separate possession of the daughters, and never inventoried as the property of their father. The daughters were all married after this, and of course with the slaves in their possession, and their deeds of record. How can it be doubted that their husbands had a knowledge of these notorious and open facts before their marriages?

It was said, however, that this defence of the marriage, and its operation as a purchase for value, was not pleaded, nor any way put in issue. It is true there is no plea, nor any formal defence on this ground; but the facts are all stated and not at all contested—indeed stated in the bill itself. It was further insisted that Clendenin, when he made these deeds, was not in a situation in which he could have made a marriage settlement in favour of his daughters that would have been valid, and therefore that the deeds could not be  
156 validated by \*the subsequent marriages. I cannot admit either the position, or the consequence deduced from it. What was the situation of Clendenin when he made these deeds? We hear of no debt but that to Huston, and he was a creditor at large; or rather, there was no debt even to him, but a liability only, which did not become a debt until ten years afterwards, when he paid the money as surety. Will it be said that if, at the date of the deeds, Clendenin had sold bona fide and for a valuable consideration every slave he had, Huston could have disturbed such sale? And what is a settlement of slaves or other property upon a child in consideration of marriage, but a sale for a valuable consideration? Is not marriage the highest consideration, the most favoured? I have always seen it so laid down. Co. Lit. 9 b.; 1 Bro. P. C. 244; 2 Id. 596; Mitford's Plead. (4th ed.) 278. But let us take the case actually before us—the case of these deeds.

Could Huston have set them aside? Never while he was a creditor at large; and he was no creditor till he paid the debt as surety, which was not till 1800. He must then have gotten a judgment and sued out execution before he could file a bill to impeach them. Instead of this course, he preferred to take a lien on the 3000 acre tract, then by his own admission an ample security for the engagement into which he had entered as the surety of Clendenin. This lien indeed was given to enable him to sell the land and meet the debt, and thus save himself from paying any thing out of his own pocket; and if he had used due diligence, it would seem that he might have effected this; for he received the power of attorney in 1794, and Clendenin did not die till 1797. But be this as it may, after taking this security, what had he to do with Clendenin's personal estate? Could he tie it up in any way? Assuredly not. He stood merely as a surety bound for a debt and holding in his hands ample counter security. While he occupied this  
157 ground, \*Clendenin died; his daughters came into actual possession of the slaves, and married. This event, as the cases tell us, "fixed the interest of the grantees against all the world; from this moment they must be taken as purchasers, and as much so as if they had been paid an adequate pecuniary consideration." This seems to me a complete defence against the claim set up in the supplemental bill; for surely if, at the times of the marriages, the slaves had been sold to a purchaser for their value in money, Huston could never have disturbed those sales.

I am also of opinion that the statute of limitations is a bar to the claim: but I have been so tedious upon the points already discussed, that I refer myself entirely to the view my brother the president has taken of this point, and the cases he has cited.

TUCKER, P. In this case, Huston, the surety of Clendenin, having paid off the debt after Clendenin's death, claimed to be substituted to the rights of the bond creditor against his heirs and personal representatives. His right to be so substituted cannot be contested, and is not denied. But having failed to make his debt out of the personal estate in the hands of Clendenin's administrator, and the lands in the hands of his heirs, the appellant, the administrator of Huston, filed a supplemental bill, with a view to subject to his demand some slaves and other property in the hands of Clendenin's daughters, which he conveyed to them in 1790, in fraud, as it is alleged, of his creditors, and of Huston in particular.

The first defence set up by Cantril and others against this demand is, that the court has no jurisdiction of the subject. The court of chancery, however, very properly thought otherwise, and proceeded to consider the case upon another point, on which it gave judgment against the plaintiff by dismissing the bill. This was,  
158 \*that although the deeds from Clendenin to his daughters were fraudulent in their inception, they were made good by the subsequent marriage of the

daughters. That such would have been the effect of a marriage settlement cannot be questioned. Whether the mere marital rights of the husband would render valid an anterior fraudulent conveyance, is a broader question, upon which I do not feel prepared to pronounce, though the authorities indeed seem to sustain the proposition. *Sterry v. Arden*, 1 Johns. Ch. Rep. 261; *Roberts on Fraud. Conv.* 503, 508. Nor do I think it necessary to decide another question that has been made. It is contended that if a fraudulent donee, or any other who holds an estate subject to a charge, parts with it so as to withdraw it from the power of the creditor, the donee becomes personally liable for the demand. See *Ferrara v. Cherry*, 2 Vern. 384. If so, then it is said the *femes covert* here became, by the discharge of the property, debtors to its value, and the husbands have taken them and their property with that burden. Without, however, touching this question, or that upon which the chancellor dismissed the bill, I am satisfied it was properly dismissed on other grounds.

The defendants are charged on the ground of a fraudulent conveyance executed 37 years anterior to the exhibition of this charge against them, the fraudulent grantor having also been dead nearly 30 years before this assault upon his memory. There are two grounds on which the charge of fraud rests: first, that the conveyance was voluntary and without consideration; secondly, that possession did not accompany the deed.

As to the first, I cannot think it sustained by any thing that appears in the cause. It is not every voluntary conveyance to a wife or child that is to be taken to be fraudulent. I admit it is said that as to creditors a voluntary conveyance is *prima facie* fraudulent. *George v. Milbanke*, 9 Ves. 194. But such a conveyance, made \*by a person not at all indebted, is certainly neither fraudulent nor void as to subsequent creditors, and the better opinion seems to me to be, that although the grantor may be somewhat indebted, yet if he be not embarrassed, or so greatly indebted as to afford evidence of fraudulent intent, the deed shall not be held void as to subsequent creditors. *Hopkirk v. Randolph*, 2 Brock. R. 132. It cannot be sustained against antecedent creditors indeed, according to the opinion of very able judges, though others have thought otherwise. In the case of *Salmon v. Bennett*, 1 Day's Connect. Rep. N. S. p. 525, the chief justice is reported to have said that "if there be no fraudulent intent, and the grantor be in prosperous circumstances, unembarrassed, and not considerably indebted, and the gift a reasonable provision for a child, leaving ample funds unincumbered for the payment of the grantor's debts, the voluntary conveyance to the child will be valid against existing debts." In these sentiments I fully concur, believing them to be the true exposition of the proviso of our statute which excepts from its operation conveyances upon good consideration and bona fide. If therefore the case required it, I should think it proper to look into this doctrine thoroughly, and to suggest to my brethren

the propriety of settling, once for all, whether it really be the law of this land that no man can make a valid gift to a child, or settlement upon his family, which shall prevail against subsisting creditors, whatever may be his wealth or his unembarrassed condition. But that question does not, I think, necessarily arise in this case, although the full handed situation of Clendenin when he made the gifts might bring him within the principles of the decision of *Salmon v. Bennett*, and although the actual and apparently voluntary execution of an instrument giving a lien for the debt on 3000 acres of land, satisfactorily proves the fairness and bona fides of Clendenin throughout these transactions.

160 \*Without resting the case on these points, the length of time which has elapsed since the gift to the daughters, is, in my estimation, an insuperable barrier to the investigation of the alleged fraud in the conveyances. There is no principle more cherished in a court of equity than that which reprobates the entertainment of stale and antiquated claims. An equitable claim of 20 years standing is now considered as barred by length of time; and if the principle be just in relation to accounts and equities where there is no fraud alleged, it is still more just and proper where fraud is charged upon a defendant. It is not reasonable that after the lapse of 37 years a party should be called upon to answer to such a charge, unless it has been kept from view by his own cunning and contrivance. 2 Sch. & Lef. 634; 2 Eq. Ca. Abr. 10, pl. 11. It has been strongly and truly said, indeed, that no time will prevent the "unkennelling of fraud;" but the pursuit must be prompt, or it will prove unsuccessful. It is not reasonable to call upon a party to explain a transaction, when the evidences of its fairness may have been swept into oblivion by the lapse of more than the third of a century. I am of opinion that the rule established both at law and in equity, which requires the party who charges the fraud to proceed within a given time after its discovery, is a just and proper rule, equally demanded by policy and a fair analogy to the statute of limitations, and equally applicable to cases of constructive fraud as to cases of actual fraud. I shall content myself with a simple reference to some of the cases on this subject, without making extracts from them; though the remarks of the chancellor, 2 Sch. & Lef. 633-639, are strikingly opposite to this case. *Bree v. Holbeck*, 2 Doug. 656; 3 P. Wms. 143; 4 Bro. P. C. (by Tomlin) 163; 2 Sch. & Lef. 607; *Mitford's Plead.* 212; (4th ed. 269;) 2 Eq. Ca. Abr. 10, pl. 11, and 4 Leigh 474, where the cases are cited by the bar in the argument.

161 \*Now in this case the conveyances were made by the father to his daughters 37 years before the charge of fraud is brought forward, and 30 years after Clendenin himself was in his grave. It is not alleged in the bill that the fraud was recently discovered, nor is it possible so to conceive. The deeds of gift were recorded, and upon the death of Clendenin



in 1797, his children took possession, and part of the property at least was carried out of the state. If, as the law presumes, the creditor trusts his debtor upon the faith of the property which he sees in his possession, we must take it that the creditor here knew that Clendenin lived and died in the continued possession of this property, which he looked to for the satisfaction of his debt, and that immediately upon his death that property was removed from the hands of his personal representative, and claimed, held and eloiigned by his children as their own. Pressed as Huston was by this claim,—committed as he was to close custody, and breaking jail as his only means of liberation, it is scarcely credible that he should not have diligently scrutinized the state of Clendenin's property, and asserted his claim to charge these slaves at an earlier period, had he not been conscious that the transaction was fair and meritorious. Cantril, in his answer, alleges that there was a valuable consideration for the gift to his wife. Thirty-seven years ago this might perhaps have been proved, though it would be wonderful indeed if to this late day the testimony as to that fact has been preserved. I am therefore of opinion that it is now too late to question the transaction, and that after such a lapse of time it must be taken to have been unimpeachable.

This view of the case applies with not less force to the second ground of fraud alleged in the bill, namely, the fraudulent retaining of possession by the grantor in the deeds. That might have been accounted for 37 years ago, in various ways, however difficult it may be to 162 \*explain it now. What right could Cantril's wife (then a small child) throw upon the transaction? In his lifetime, Clendenin might have shewn that there was a valuable consideration for the gift, in which case the retaining possession by him for his children would have been held good, according to the case of *Braxton v. Gaines & others*, 4 Hen. & Munf. 151. But at this late day, such proof cannot be expected, and it would be unreasonable to demand it. It cannot be, that such a fact can be made the subject of examination at any period however remote.

It is said, however, that there is no manner in which the party sued as executor de son tort can protect himself at law from the creditor's claim by relying on the lapse of time. I cannot assent to this. In the scanty materials which the books afford upon this subject, the question does not seem to have occurred, nor does there appear to be any precedent of a plea of the statute in such a case. I do not think such a plea could be sustained. But when, to the plea of no executor, the plaintiff replies that the defendant has taken possession of the goods of the decedent, the issue is made up on the question whether they are indeed his goods; and on the trial of that question, after a great lapse of time and an uninterrupted possession of the property, it would be competent and proper for the court to instruct the jury, that they might and ought to presume the delivery of possession, or an adequate excuse for its

nondelivery. This principle of presumption from length of time has not been confined to the case of a bond or a mortgage: it has been extended even to the presumption of a deed or a patent, and among us, to the new and unprecedented case of a presumed compliance with the requisitions of our law against the importation of slaves into this commonwealth from adjoining states. *George v. Parker*, 4 Rand. 659. It

is a principle of universal application, and essential to the "protection of all rights which have been long and uninterruptedly enjoyed. The right to this protection cannot depend upon the form of action which the plaintiff may select. It must avail the defendant, in some form or other, in every suit which may be instituted against him, assailing a right which he has held without question, until the evidence of its validity has been lost by the lapse of time.

For these reasons I am of opinion that the supplemental bill was properly dismissed, and indeed that it ought never to have been permitted to be filed.

"The court is of opinion that there is no error in the decree dismissing the supplemental bill: but the court is of opinion that the heirs of the obligors in the bond from Clendenin and Huston to John Mayo jr. in the proceedings mentioned, not being bound to the obligee, they are not bound to Huston the surety who paid the debt and seeks to be subrogated, except under some specific lien which may have been given upon the lands; and the instrument giving the lien in this case providing expressly that the lands shall not be sold for a less price than one dollar per acre, the said Huston or his representatives cannot avail themselves of this lien, unless they or some other person will give an average of one dollar per acre for every acre in the tract. Therefore it is decreed and ordered that the said decree dismissing the supplemental bill be affirmed," with costs to the appellees. And cause remanded to the circuit court of Augusta, "with directions to set aside the decree directing a sale of the land, and to direct a resale on the conditions above mentioned, and also to set aside so much of the decrees as directed an account of the other real estate of Clendenin which descended to his heirs; and to be proceeded in to a final decree."

164 "This decree was subsequently, during the same term, set aside on the motion of the appellant: and on his further motion, and suggestion of diminution in the record sent to this court, a writ of certiorari was awarded; upon the return of which it appeared, that in the transcript of the record originally certified, the following proceedings had been omitted—

On the 18th of June 1823, it was ordered, on the motion of the plaintiff, that if he should become the purchaser of the land directed to be sold by the former decree, the bond and security for the purchase money, required by that decree, might be dispensed with by the marshal, who was required to receive the bid of the plaintiff without such bond and security.



On the 20th of December 1823, on the motion of the defendants by their counsel, and by consent of the plaintiff, it was ordered as follows: "that the marshal of the superior court of chancery holden at Lewisburg, at any time before the next term, at the request of the defendants and at their proper costs and charges, make sale of the lands in the proceedings mentioned, in such lots or parcels as the said defendants may direct, for ready money, having advertised the time and place of such sale in such manner as directed by the decree made in this cause, or for such time and in such manner as the defendants may direct." But it was understood and agreed "that the plaintiff shall be at liberty at the next term to take the benefit of such sale or sales, if he thinks proper, provided the whole land shall sell for less than the amount due to him, and if the whole product of all sales shall not be equal to the amount, the said marshal shall, instead of receiving the amount of the respective purchases from those who shall become the highest bidders, in money, take bonds with sufficient security from them respectively,

to pay the sums of money due from 165 them, when their titles \*shall be confirmed by the decree of this court, and not otherwise." And it was further ordered, by consent of the parties, "that the present cash prices of crop tobacco in the Petersburg market shall be the standard by which the sum due to the plaintiff shall be ascertained," and that certain persons of the city of Richmond should determine such price, that is to say, determine at what price the quantity of tobacco due to the plaintiff could, at the date of the order, be purchased in the Petersburg market.

The following certificate of three mercantile firms of Petersburg was filed in the cause: "We hereby certify that a parcel of Petersburg passed tobacco might have been purchased in this market about the 28th of December last, say from 10 to 35,000 pounds, at 3 dollars and 50 cents per hundred pounds. Petersburg, 31st day of March 1824."

On the 24th of July 1824, by consent of the parties, the privileges granted the defendants by the order made on the 20th of December 1823, were continued until the next term.

To the marshal's report, and to the sale made by him, the defendants excepted on two grounds: 1st, because the land was sold in Greenbrier, and not in Nicholas, the county in which it lay; 2dly, because the marshal did not furnish proof that the requisitions of the decree directing the sale had been complied with.

On the 19th of July 1827, the cause came on to be heard on the marshal's report, and the defendants' exceptions thereto; when the court overruled the exceptions, confirmed the report, and decreed that the marshal convey the land to the heirs of George Huston deceased.

The cause was again argued in April 1840, by Johnson for the appellant and Leigh for the appellees, before a court consisting of Tucker, P., and Brooke, Cabell, Parker and Stanard, J.

166 \*The questions mainly discussed

at the bar, though not decided by the court, were, 1. Whether, supposing that the deeds from Clendenin to his daughters were voluntary and fraudulent as to creditors, the donees can avail themselves of the statute of limitations as a defence against the claim made by the supplemental bill? 2. Whether, under the circumstances of this case, the lapse of time, considered independently of the statute, will operate as a bar of the claim? On the first of these questions, the following authorities were cited and examined: Roberts on Fraud. Conv. 593; Hawes v. Leader, Cro. Jac. 270; S. C. Yelv. 196; Stamford's case, 2 Leon. 223; Bethell v. Stanhope, Cro. Eliz. 810; Stoke's case, 3 Leon. 57; Read's case, 5 Co. 34a; Anonymous, 1 Salk. 313; Anonymous, Dyer 256a; 11 Vin. Abr. Executors, F. a. pl. 9, p. 219; 13 Id. Fraud. C. pl. 5, p. 517; 1 Roll. Abr. C. 1, pl. 3, p. 549; Edwards v. Harben, 2 T. R. 587; Pierce v. Turner, 5 Cranch 154; Chamberlayne &c. v. Temple, 2 Rand. 384; 1 Williams on Ex'ors, pt. 1, bk. 3, ch. 5, p. 136, 9, 141, 2; 2 Saund. on Plead. 5, 6, 8, 9, [507, 510.] 104, [642, 3]; Rastall's Entries, p. 322; Osborne v. Rogers, 1 Wms. Saund. 264, and note 2, p. 265; Duppa v. Mayo, 1 Wms. Saund. 282, and note 2, p. 283; 1 Chitt. Plead. 422; 2 Id. 105, note a.; 3 Id. 941, 2, and notes l. m. n. o.; 3 Id. 1162, 3; 2 Rob. Prac. 251, 2, and cases there cited; Rice v. White, 4 Leigh 474; Western v. Cartwright, 2 Eq. Ca. Abr. 10, pl. 11; Booth v. Earl Warrington, 4 Bro. P. C. (by Tomlins) p. 163; South Sea Company v. Wymondsell, 3 P. Wms. 143; Elam v. Baas's ex'ors, 4 Munf. 301; Garland v. Enos, 4 Munf. 504; Spotswood v. Dandridge &c., 4 Hen. & Munf. 139; 11 Vin. Abr. Executors, F. a. 4, pl. 1, 2, p. 223. The cases referred to on the second question were the following: Hilary v. Waller, 12 Ves. 266-7; Prevost v. Gratz &c., 6 Wheat. 481; Ricard v. Williams, 7 Wheat. 59, 109, 115; Carr's adm'r &c. v. Chapman's legatees, 5 Leigh 164; Hayes &c. v. Goode &c., 7 Leigh 452.

167 \*Another question argued by the counsel was, 3. Whether the deeds from Clendenin to his daughters were in truth fraudulent as to Huston? But this point also was left undecided by the court.

The other questions discussed were, 4. Whether the ground on which the chancellor dismissed the supplemental bill, namely, that the deeds were made valid by the subsequent marriage of the donees, was correct? 5. Whether, upon this appeal from the decree dismissing the supplemental bill, the original bill and the proceedings thereon were properly examinable by the court? And if so, 6. Whether the obligation executed by Clendenin and Huston to Mayo bound the heirs of the obligors? 7. Whether the letter of attorney from Clendenin to Huston was revoked by the death of the grantor; or operated, notwithstanding that event, as a lien in equity on the land which Huston was thereby empowered to sell?

On the fourth question, the authorities referred to were those cited in the opinion of Carr, J., (delivered on the first argument of this case;)-on the fifth question, Madden v. Madden's ex'ors, 2 Leigh 377;

*Lomax v. Picot*, 2 Rand. 247, and the other cases cited in 2 Rob. Pract. 433,—on the sixth question, 3 Bac. Abr. Heir and Ancestor, F. p. 458-9,—and on the seventh question, *Paley on Agency*, p. 133, [p. 186, 2d American, 3d London ed.;] *Clayton v. Fawcett's adm'rs*, 2 Leigh 19; *Hunt v. Rousmaniere's adm'rs*, 8 Wheat. 174; 1 Peters 1, and *Lepard v. Vernon*, 2 Ves. & Beam. 51.

STANARD, J. The propriety of the decree dismissing the supplemental bill depends on the solution of the following questions:

Were the conveyances made by Clendenin in trust for his daughters fraudulent in respect to existing creditors?

168 \*If they were, has the property conveyed by them, or the responsibilities therefor, been discharged by the statute of limitations acting on the possession of the property, and on the appellant's right of action against the donees, and thereby protecting the donees' rights therein from the appellant's claim; or by the marriage of the donees supplying a valuable consideration, and thereby giving validity to the conveyances; or by the length of time that elapsed since the claim of the appellant accrued, and before the assertion of it against the donees by the supplemental bill?

I have no doubt that the conveyances were fraudulent in respect to the existing creditors of Clendenin whose claims cannot be satisfied without a resort to the property conveyed thereby; and the fullest proof that, at the time those conveyances were made, Clendenin had ample property (exclusive of that so conveyed) to pay all his debts, would not protect the donations from the claims of the then existing creditors. I fully assent to the doctrine deduced by chancellor Kent in the case of *Reade v. Livingston*, 3 Johns. Ch. R. 481, from the many cases on the subject, upon a careful review of them; which doctrine is thus stated by him: "The conclusion to be drawn from the cases is, that if a party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such debts," (that is, debts existing at the time of the settlement) "and no circumstance will permit those debts to be affected by the settlement, or repel the legal presumption of fraud. The presumption of law in this case does not depend upon the amount of debt, or the extent of the property in the settlement, or the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing if not dangerous to the rights of creditors, and prove an inlet to fraud. The law therefore wisely disables the debtor from making any voluntary settlement of his estate to

169 \*stand in the way of existing debts. This is the clear uniform doctrine of the cases." Such too is the doctrine of the court of appeals in the case of *Chamberlayne &c. v. Temple*, 2 Rand. 384.

My opinion further is, that the property and the responsibilities therefor were not discharged in either of the modes suggested.

1st. The act of limitations does not protect it from the claim of the appellant.

It has been a concession in the argument, that a party holding property under a voluntary conveyance which may be avoided by a creditor of the grantor, may, on the death of the grantor, be sued by the creditor as executor de son tort. On the assumption that such suit may be brought, the limitation applicable to suits for the recovery of personal property, it is contended, is applicable in this case, and commences to run from the time such action might be brought; and when time has elapsed sufficient to protect the adverse possession of personal property from a suit to recover it, that time consummates the title of the donee in respect to the creditor, and the donee no longer holds the property, or is chargeable in respect of it, as executor de son tort. To this I cannot assent. The liability as executor de son tort does not subject the party to an action of detinue or trover by the creditor: the liability is to the action that the creditor might have against the rightful executor—the action of assumpsit or debt, if on a simple contract, of debt if on a specialty or judgment: and having incurred a liability to such actions, the only limitation by which he can protect himself from such liability is that which applies to the action to which he is so liable. The claim of the appellant could not have been barred by the statute of limitations, and the statute cannot give protection to the appellees.

2ndly. The marriage did not supply a valuable consideration, giving validity to the voluntary conveyance, 170 \*and exonerating the donees from the responsibility that existed previous to the marriage. The title that accrues to a husband in the personal property of his wife, by force of the marital right, has not the stability and strength of that of a purchaser for valuable consideration. The husband is invested, by force of the marital right, with the rights of property that his wife may have had in the personality that he reduces to possession. His rights in such property are measured by hers. If acquired by her by covin, and that covin be secret, she might pass a good title to a purchaser for valuable consideration without notice; but the marital right would not protect the property. A secret trust, or an unrecorded mortgage, which would not protect it from the claim of such purchaser, would certainly not be defeated by the marital right. Marriage is an absolute gift to the husband of all the goods and personal chattels and estate which the wife was actually and beneficially seized or possessed of at that time in her own right, and of such other goods and personal chattels as came to her during marriage. 1 Roper on Husband and wife, p. 169. The husband is not a purchaser of the personal chattels of the wife. 7 Ves. 174. Again, the wife, at the time of her marriage, was liable to the action of the creditor. Her marriage cannot per se absolve her from that action. If, by force of the marriage, the title in the property be so changed as to protect it from specific charge, more certainly would a sale of it

by the donee, for valuable consideration, to a purchaser without notice, have that effect. Yet in the latter case it would hardly be pretended that the donee, by selling the property in respect to which she was chargeable as executrix de son tort, would absolve herself from such liability. In either view the liability to the creditor would continue.

3dly. The lapse of time should not deprive the appellant of redress. It was  
171 proper for the appellant to \*seek satisfaction out of the estate of the debtor, rather than attempt to obtain it out of the property conveyed to the donees. If he could have sued at law, charging the donees as executors in their own wrong, I think, with the appellant's counsel, that proof of the insufficiency of Clendenin's estate to pay his debts, unless aided by the property conveyed to the donees, formed an indispensable part of his case. The creditor resorting to a court of equity might have made the donees parties; but this he could not have done so effectually, unless he had charged that Clendenin's estate, unaided by the property conveyed to the donees, was inadequate to satisfy his claim. Without such an allegation, it would not appear that he was hindered or defrauded by the conveyances, and that they were therefore void as to him; and the donees might have demurred. Now, at the time the suit was instituted, there was every probability, according to the view the parties took of the liabilities of Clendenin's estate, that it would prove adequate; up to the order confirming the sale of the land; it was not ascertained to be inadequate, and during this time, the creditor was seeking to get satisfaction out of the subject that in equity ought to have been primarily charged for the protection of the donees. Though the creditor might, on the suggestion of the insolvency of Clendenin's estate, have made the donees parties, he was not, against his own belief and the ostensible probabilities of the case, bound to do so, at the hazard of being subjected to costs to the donees, as I suppose he would have been, had the result shewn (as he had reason to expect it would do) that Clendenin's estate was not insolvent, and his claim been satisfied out of that estate without touching the donations. The responsibility of the donees in equity was secondary and eventual, and the time consumed in the attempt to fix the charge on and procure satisfaction out of the estate primarily chargeable, and which  
was believed to be adequate,

172 \*cannot be computed in order to sustain the objection founded on the lapse of time, which operates only as evidence of satisfaction, or of abandonment or acquiescence. The donees cannot complain that that effort was made. It was necessary to fix the title of the creditor to a decree against them; and though they might have been made parties at an earlier date, had the creditor, against the probabilities of the case, thought proper to hazard the suggestion that Clendenin's estate was insolvent, yet that fact not being ascertained or believed, the creditor was not bound to suggest it, and conse-

quently not bound to make the donees parties at that time. I know of no case, or doctrine deducible from analogies, which would justify the discharge of an eventual responsibility, on the length of time consumed in the diligent pursuit of satisfaction from the fund primarily chargeable. Were an executor to assent to and deliver legacies without leaving funds to satisfy debts, the creditors might embrace the legatees in a suit against the executor, by making that suggestion. Yet it never has been supposed that if the creditor pursues his claim against the executor, and at the end of a tedious litigation it is ascertained that he has not assets or ability to pay the debt, the time consumed in this pursuit could be used to repel the suit against the legatees, instituted within reasonable time after such abortive pursuit. I forbear to extend the argument in support of my opinion that the supplemental bill ought not to have been dismissed, as the other judges, on different grounds, dissent from it.

The resulting questions are, 1st. Can the court, on this appeal from the dismissal of the supplemental bill, examine the previous decrees, and correct them if they be erroneous? and 2dly. If this can be done, are those decrees erroneous?

The cases referred to in 2 Rob. Prac. 433, leave no doubt that the first question must be answered in the affirmative.

173 \*The solution of the second depends on the effect of the power of attorney, and of the obligation of the bond given by Clendenin to Mayo.

The obligation of the bond does not, in my opinion, extend to the heirs of the obligor, and the creditor therefore cannot charge the real estate, unless the power of attorney has given him a lien on the 3000 acres mentioned in it.

The case of Hunt v. Rousmaniere's adm'r's, 8 Wheat. 174, which has been recognized by this court in the case of Clayton v. Fawcett's adm'r's, 2 Leigh 19, is, I think, sound law, though in this case I apply it with the more reluctance, seeing that by it the creditor will be deprived of a security which he and the court below, and one at least of the defendants, supposed to exist. Assenting to the law of that case after the fullest deliberation, the result is that the power of attorney expired with the life of Clendenin, and gave no lien after his death.

The decree therefore for the sale of the 3000 acres of land was erroneous, and all proceedings under it must be set aside, the land restored to the heirs of Clendenin, the conveyance of the marshal, made on the confirmation of the sale, cancelled, and a release or reconveyance, with special warranty, by Huston or those claiming under him as heirs, devisees or grantees, decreed to be made to the said heirs of Clendenin.

BROOKE, J. I concur with the president in the opinion he is about to deliver; and I concur also in the opinions of judge Carr and judge Brockenbrough, (delivered on the first argument of this case) upon the act of limitations. That act, as regards slave property, has been often applied to the right as well as the remedy. Five years possession has been held not only to

protect the right of a defendant, but to entitle a plaintiff to recover the slaves, even against one having a prior title. In the case before us, to hold that such a possession will "not protect the property against the creditor of the donor, would be to prefer the right of the creditor to the right of the true owner; which I think would be (where there is no lien on the property) to prefer the less to the greater right, and violate the object of the act of limitations; especially in a case in which the rights of the defendants accrued more than 27 years before the filing of the bill.

TUCKER, P. I have carefully reconsidered this case, and reexamined the opinion I delivered at the former hearing (to which I beg leave to refer), and I find no reason to depart from the conclusion at which I then arrived. My mind has been fortified in the belief that a fraudulent donee, sued at law as executor de son tort, cannot protect himself by the statute of limitations by way of plea, but that he may do so by moving an instruction to the jury to presume from lapse of time that every thing was fair. For if, to the plea of ne unques executor, the plaintiff replies that the defendant had administered by taking possession of the property of the deceased, the question at once arises whether it was the decedent's estate, and this would depend upon the question whether the conveyance impeached was or was not fraudulent; and in the decision of this question a jury ought, after great lapse of time, to presume every thing to have been right. And if the donee could so protect himself at law, it would seem a fortiori, that where, as in this case, the length of time is relied on in equity, he should receive its protection. It is perfectly well settled that in case of actual fraud the statute of limitations is a good bar, both at law and in equity, or rather it operates as such in equity by analogy to its effect at law. Why then should a mere constructive fraud, implied from transactions oftentimes most praiseworthy and amiable, be denied the protection of a principle which has been established 175 by the legislature, and \*followed by the chancellors, for the purpose of protecting rights long uninterruptedly enjoyed, and for discountenancing that greatest mischief to the republic, the hunting up and the assertion of stale and antiquated claims? I cannot perceive; and I am therefore of opinion that a party may protect himself by length of time, from the attempt to charge him as a fraudulent donee. In this case I am satisfied that Huston might, as early as 1800, after he paid the debt, have instituted his action, either at law or in equity, against the appellees as fraudulent donees, if they were really such, and that of course the lapse of time should be computed from that period. If so, 27 years elapsed before the institution of the present proceeding, which for the first time puts the defendants upon the proof of the fairness of a transaction 37 years old, with the circumstances of which they cannot reasonably be supposed to have any acquaintance. Though the deeds are appar-

ently voluntary upon their face, yet parol evidence would be admissible to prove a valuable consideration to support them, and rebut the fraud. Sugden on Vendors 473, (american ed. of 1836, vol. 2, p. 200); Chapman v. Emery, Cowp. 278. Now if this might be established by evidence, it may be presumed from lapse of time, which supplies the place of evidence.

With these views, I am still of opinion to affirm the decree in the supplemental cause. But some other questions have been pressed upon me, which I waived upon the former hearing as unnecessary to be decided, but which it seems desirable to pronounce upon, as we are not unanimous upon the point which I have discussed.

The question as to the effect of the marriage of the voluntary donees is the first that I shall notice. It has been very satisfactorily treated by my brother 176 Parker,\* and \*by our former able associate, judge Carr. They have shewn, that upon principle and authority, the intermarriage with a voluntary donee renders the transaction valid. Their able views will render unnecessary any thing more than a few general remarks on the subject.

Marriage, from the earliest times, has been considered in law a valuable consideration. On the part of the husband it is peculiarly so, as he is responsible for the debts of the wife. Hence it is beyond question that if a father makes a gift to his daughter in marriage, the property given shall forever after be protected against the creditors of the father, how much soever he may have been indebted, provided it was under no specific lien. If, for instance, the slaves in question had been given by Clendenin to his daughters upon their marriage, Huston could have no pretension to charge the property itself, or them or their husbands in respect of it. The real question then is, whether, if the marriage would protect the gift out and out against a creditor, it will fail of that effect in relation to that partial interest which, in contemplation of law and by the operation of the statute, is, in case of a voluntary gift, left in the donor for the benefit of creditors? Upon the reason of the thing, there would seem to be little room for doubt. So long as the whole shall be held to be greater than a part, so long must it be held that marriage with a fraudulent donee must extinguish the creditor's right to charge the property, if a gift out and out at the time of the marriage would be protected by it. Upon authority the matter seems to have been long and well settled. Thus, in *Prodgers v. Langham*, 1 Sid. 133, the father created a trust to raise a fund to support his daughter till marriage, and to portion her if she married one Poulson. She did not marry him, but another, unacceptable to the father. The father then sold the land, thus charged, to a third person. It was decided that if he had sold before the marriage, the trust in

\*JUDGE PARKER died before this report was prepared, and his opinion never came to the reporter's hands.—Note in Original Edition.

177 favour \*of the daughter would have been held void; but that although it was void in its creation as to purchasers, yet as the marriage had taken effect, the first settlement no longer remained voluntary, as it was in its creation, but was upon valuable consideration and unavoidable, since the marriage was an advancement of the daughter, and of him who should be induced to marry her by that provision. This is a leading case, and said in 9 Ves. 193, to have been long considered good law. So in *Kirk v. Clark*, Prec. in Ch. 275; 3 Bac. Abr. 317, a voluntary settlement on a son, followed by a subsequent marriage, was held to be thereby made good and valid, and it was declared it ought to be considered as made at the time of the marriage. So in *East India Company v. Clavell*, Prec. in Ch. 377; 3 Bac. Abr. 315, a voluntary settlement for raising a portion for a daughter, though in its creation invalid, yet was held to be rendered valuable and unavoidable by a subsequent marriage. See also *Brown v. Carter*, 5 Ves. 862. In *Sterry v. Arden*, 1 Johns. Ch. R. 261, affirmed unanimously by the court of errors, the cases are reviewed by chancellor Kent, and he comes to the same conclusion. There the deed to the daughter was voluntary; but it was held that her subsequent marriage "changed the character of the previous settlement, and placed her in the light of a purchaser for valuable consideration." Principle and authority thus seem to me to concur in sustaining the proposition that the marriage of the daughters in this case rendered the gifts, if voluntary before marriage, good and unsalable afterwards.

It is said, however, that if the fraudulent donees had sold the slaves before marriage, they would have become personally responsible for the value; and that if marriage is a purchase, they must *pari ratione* be responsible, as by their act they have placed the property beyond the reach of the 178 creditors: and then it is said \*the husbands, having taken them cum onere, are bound for the value of the property thus slipped from the grasp of the creditors. If this be so, the principle which protects the marital rights is of no value: "it keeps the word of promise to the ear, and breaks it to the hope." If the property is protected against creditors by the marital rights on the one hand, the husband is made liable to its value on the other. What then does he gain by it? Of what value is the institution of these perplexing enquiries, if in every event he must be charged with the debt?

But is the principle such as is contended for? Does the daughter become debtor by the marriage? Is she considered as selling, and the husband as purchasing the property from her? By no means. She is considered as purchasing from her father by the act of marriage. The valuable consideration enures to make that conveyance valuable which before was voluntary. The property may not be, from some cause, in the wife's possession at the time of the marriage. If they sue for it, the suit is brought by both, as in *Sterry v. Arden*. If she dies,

her husband must administer, and recover in the character of administrator, as in *East India Company v. Clavell*, before cited. He, then, is not a purchaser from his wife: she has not parted with her right but by operation of law, and has not therefore incurred any responsibility whatever, for the protection afforded to the property by the marital rights.

Upon the whole, I am of opinion that on this ground also the supplemental bill was properly dismissed.

Another question has been made as to the power of attorney, and its effect as an equitable mortgage. As to that, I shall only say that as this court seems to have recognized the case of *Hunt v. Rousmaniere's adm'rs*, I shall of course bow with deference to its decision. It is, however, in entire conflict with my own opinions.

179 \*As to the bond, it clearly does not bind the heirs, and as this is not a bill to marshal assets, the enquiry as to the real estate was unnecessary and erroneous. These errors occur in the proceedings in the original cause, which should therefore be herein corrected.

The decree entered by the court of appeals was as follows:

"The court is of opinion that whatever might have been the character, in its origin, of the transfer of the slaves sought to be subjected to the plaintiff's demand by the supplemental bill, it was rendered good and available against creditors and purchasers upon the marriage of the daughters, who thereupon were to be considered as purchasers by relation for valuable consideration. The court is therefore of opinion that there was no error in dismissing the supplemental bill; but considering that by the appeal of Huston's administrator the original proceedings, as well as the supplemental bill, were brought up to this court, and proceeding to examine the same, they are further of opinion that there is error in the said original bill and the proceedings thereupon, in the following particulars: 1st, In considering the power of attorney in the proceedings mentioned, as having the effect of an equitable mortgage, and as creating a charge upon the land; this court being of opinion that the said power, not having been carried into effect in Clendenin's lifetime, was utterly revoked by his death, and that all the proceedings for subjecting the 3000 acres of land in Greenbrier to the payment of the plaintiff's demand were erroneous, and should be set aside, and a reconveyance to the heirs decreed. 2dly, In directing an account of the real estate; as the bond did not bind the lands, and the bill does not seek to marshal assets. Such an account therefore could avail nothing, and involved the parties in unnecessary costs. Therefore,"

180 \*so much of the decree as dismisses the supplemental bill affirmed, and the proceedings in the original cause, so far as above declared to be erroneous, reversed, with costs to the appellees as the parties substantially prevailing. And cause remanded for further proceedings pursuant to the foregoing opinion and decree.

**Grove &c. v. Little &c.**

April, 1840, Richmond.

(Absent PARKER, J., and TUCKER, P.\*)

**United States Officers—Sureties—When Lands Liable—Advertisement of Sale.**—Under the act of congress approved May 15, 1820, allowing a warrant of distress against a delinquent officer and his sureties, the lands of a surety are only to be sold in the event of there not being goods and chattels of such officer or his sureties sufficient to satisfy the warrant; and they must be advertised for at least three weeks prior to the time of sale, in not less than three public places in the county or district where the lands are situate.

**Same—Lands of Surety without Due Advertisement—Effect upon Title of Purchaser.**—If the marshal, instead of levying and collecting the sum due by distress and sale of goods and chattels (when there are such) belonging to a surety, shall proceed to sell the lands of a co-surety; or if the lands of a surety be sold without being duly advertised, the conveyance of the marshal will not give a valid title to the purchaser, and a bill will not lie for such a purchaser to set aside a prior conveyance by the surety whose lands were sold, upon the ground of its being fraudulent as to creditors.

On the 16th of August 1823, William P. Craighill entered into a bond with Nathaniel Craighill, William Little, John Griggs, William Grove, William Vestal and  
181 \*Richard Duffield his sureties, payable to the United States, in the penalty of 50,000 dollars, conditioned for his faithfully discharging the duties of paymaster and military storekeeper at the United States army at Harper's ferry.

William P. Craighill died the 24th of March 1824, and on a settlement the 14th of June following, a balance was found due from him to the United States of 9232 dollars 66 cents.

Under the act of congress, approved May 15, 1820 (3 Story's Laws U. S. 1791), the agent of the treasury issued a warrant of distress; but it was not directed to the marshal of the district in which the delinquent officer had resided, or in which his sureties resided. Their residence was in the western district of Virginia, and the warrant was directed to the marshal of the eastern district.

On the 18th of March 1826, the agent of the treasury addressed a letter to the marshal, stating that Little, one of the sureties, had been to Washington and solicited a stay of proceedings for a short time, to enable him to fulfil a contract with the war department, then in a course of execution, the proceeds of which were to be applied to the payment of the debt; and to raise whatever might be deficient from that source, it had been determined to allow the sureties a period of four months from that date, for paying the whole amount of the debt and closing the account.

On the 31st of July following, the agent of the treasury addressed a second letter to the marshal, requesting him to suspend further proceedings on the warrant until the 1st of August 1827, upon the parties to the bond paying the costs.

\*JUDGE PARKER made the final decree in the court below, and JUDGE TUCKER sat in the cause in its previous stages.

The payments by Little on account of the debt were made in December 1824, February, May and October 1825, and June 1827, and amounted altogether to 3428 dollars 87 cents. There was still a balance due the \*United States from William P. Craighill of 5803 dollars 79 cents.

In the 28th of September 1827, a warrant was issued to the marshal of the western district of Virginia, commanding him to proceed immediately to levy and collect the said amount of 5803 dollars 79 cents by distress and sale of the goods and chattels of William P. Craighill deceased, or of his legal representatives; and should there not be found sufficient goods and chattels to satisfy the same, then to levy and collect the said sum of 5803 dollars 79 cents, or so much thereof as might be due and unpaid, by distress and sale of the goods and chattels of Nathaniel Craighill, John Griggs, William Little, William Grove, William Vestal and Richard Duffield, sureties of the said William P. Craighill; and should there not be sufficient goods and chattels of the principal or of the sureties, then to levy upon and expose to sale at public auction, for ready money, to the highest bidder, the lands, tenements and hereditaments of the said William P. Craighill; and should there not be found sufficient lands, tenements and hereditaments of the said William P. Craighill, then to levy upon and expose to sale, in like manner, the lands, tenements and hereditaments of the said sureties.

On the 10th of November 1827, the agent of the treasury addressed a letter to the marshal, stating that the sureties of William P. Craighill, who were then in Washington, had applied for six months indulgence, in order not only to enable them to make up the money for which they were bound, but to afford them time to try the experiment of making the whole or a part of the debt from the landed property of Craighill their principal; and under the circumstances of the case as detailed by them, which appeared to be one of hardship, he (the agent of the treasury) felt no hesitation in granting the indulgence solicited, provided the marshal  
183 \*should consider the debt perfectly safe, or if not, then provided they would secure it to his satisfaction.

On the 5th of February 1828, the agent of the treasury requested the marshal to suspend proceedings under the warrant against Grove and Duffield, two of the sureties, for 1 and 2 years, and proceed without delay against the legal representatives of the principal, and the other sureties.

In reply to a letter from the marshal, the agent of the treasury wrote to him on the 27th of March 1828, as follows: "Mr. Richard Duffield and Mr. William Grove, two of the sureties of William P. Craighill, having pledged themselves to me to pay the entire debt with interest of Craighill in 1 and 2 years, the personal and real property of Craighill and the other sureties is to be sold under the warrant in your hands, for their benefit, and on such terms and conditions as they shall prescribe: provided, however, they take upon them-

selves the responsibility of guaranteeing the sale to the purchaser or purchasers. The United States are not responsible in any event for the consequences which may result from the sale, and you will make this known at the time of the sale."

The marshal made a return upon the warrant, in these words: "Made 755 dollars from the estate of W. P. Craighill, 1524 dollars 54 cents from the estate of William Vestal, and 1000 dollars from the estate of Nathaniel Craighill. Richard Duffield and William Grove were the purchasers for the above amounts, for their own benefit, agreeably to the directions from the agent of the treasury."

The return of the marshal and his deed to Duffield and Grove, bore date the 29th of April 1828. The deed recited that the marshal levied the warrant upon a tract of land claimed to belong to Nathaniel Craighill, situate in the county of Jefferson, and described particularly in the deed by 184 metes and bounds, "and having \*duly advertised the time and place of sale of the said land according to law, proceeded to sell the same at public auction at Charlestown on the — day of —, at which sale Richard Duffield and William Grove became the purchasers, being the highest bidders, having bid therefor the sum of 1000 dollars."

In the mean time, to wit, on the 20th of August 1827, a deed had been made by Nathaniel Craighill to John E. Paige, conveying the same tract of land, upon certain trusts therein expressed.

Grove and Duffield, after purchasing the land of Nathaniel Craighill thus previously conveyed, filed their bill in the superior court of chancery at Winchester in July 1828, impeaching the deed of the 20th of August 1827 as fraudulent and void, and setting forth, that under colour of this deed, William Little was in possession of a saw mill on the premises, and woodland adjacent, and was engaged in cutting down, sawing, and disposing of the timber. The bill made defendants Nathaniel Craighill, John E. Page, William Little, and others who might claim under the deed of August 20th 1827, to wit, the children of William P. Craighill, the children of William Little, the Farmers and Mechanics bank of Georgetown, and Samuel J. Cramer. And the prayer was, that the said deed might be annulled; that the plaintiffs might be put in full possession of the land which they had purchased; and, until the merits of the case should be decided on, that an injunction might be awarded to restrain waste.

An injunction was awarded accordingly.

There was filed with the bill, as an exhibit, a transcript of the record in an action brought by John Grove against Nathaniel Craighill and William Little. By this record it appeared, that judgment was obtained in this action on the 20th of April 1813; that after the death of John Grove a scire facias issued on behalf of William

Grove as his administrator, to revive 185 the judgment, upon \*which scire facias execution was awarded the 19th of September 1820; that a forthcoming bond was given, with Samuel J. Cramer as

surety, upon which judgment was rendered the 17th of April 1821; that on the 31st of August 1826 a scire facias issued to renew the judgment, upon which execution was awarded the 24th of August 1827; and that a writ of *capias ad satisfaciendum* issued the 12th of September 1827, under which Craighill was committed to jail, Little took the oath of insolvency, and Cramer was admitted to the bounds.

The bill mentioned the fact that Nathaniel Craighill was confined in jail under this *ca. sa.* at the time of the sale by the marshal, and at the time of filing the bill. And the circumstance of the *scire facias* being on the docket at the time of making the deed of the 20th of August 1827, was relied on to shew the fraudulent intent of making that deed. But the bill did not assert any lien on behalf of Grove's administrator by reason of the judgment.

In the answer of William Little it is stated, that besides the land of William P. Craighill which the complainants bought for 755 dollars, they purchased under the same warrant several negroes belonging to his estate, for 580 dollars. It is admitted by the respondent that of the sums paid by him to the United States, about 1300 dollars was paid out of the funds belonging to Craighill's estate; but having paid for Craighill's estate more than 2000 dollars since his death, he claims to be considered as having paid to the government the whole amount credited as paid by him. This amount was equal not only to his own quota as surety, but to that of Nathaniel Craighill also, and he was willing to have it considered that he had paid Craighill's quota as well as his own. The land of Nathaniel Craighill, it is therefore insisted, should be regarded as discharged from the claim on account of which it was sold. It is farther insisted that the deed 186 \*sale under the warrant was not made in a fair and proper manner.

In the answer of Nathaniel Craighill it is stated, that William P. Craighill left personal estate which ought to have been applied to the payment of the debt due the United States; that this respondent's land was not duly advertised, and that the sale thereof was not fairly and properly made. These answers were afterwards amended. Nathaniel Craighill, by his amended answer, insisted that the sale was altogether irregular, in consequence of the failure of the marshal to have the warrant of distress recorded in the district court; and that it was illegal to sell any real estate, until all the personal estate, as well of the sureties as of the principal, was exhausted. He relied upon the fact of indulgence having been granted, without his assent, to William Little one of the sureties, and upon the stay of execution allowed as to the complainants; a stay allowed, as he said, under the belief of the agent of the treasury that the respondent was the principal and not merely a surety.

It appeared by an additional return of the marshal, enclosed in a letter from him of the 23d of May 1828, that he sold three slaves the property of William P. Craighill, for 597 dollars, to Richard Duffield, who



paid, for the marshal's fees and the expenses of surveying four tracts of land, 283 dollars 95 cents, leaving a balance of 313 dollars 5 cents.

By a report from the agent of the treasury to the secretary of the treasury, it also appeared that when the agent allowed a stay of proceedings as to the complainants, to give them time to subject the land of Nathaniel Craighill, he was under the mistaken impression that Nathaniel Craighill was the principal debtor. Grove and Duffield assumed the payment to the United States of the entire debt with interest, and at the date of the report (June 10, 1829) more 187 than half of it had been \*paid by them. By an account from the treasury department subsequently filed in the cause, it appeared that Grove and Duffield paid 3000 dollars on the 9th of February 1829, and 3320 dollars 22 cents the 4th of February 1830, in full of the debt and interest.

On the 29th of April 1830, on the motion of the plaintiffs, leave was given them to amend their bill, and the amendment was directed to be made in 60 days. It was never made.

On the 9th of December 1830, the court, being of opinion that, to do justice to the parties, the defendants Craighill and Little should have leave to file a cross bill against the plaintiffs, asserting the pretensions of the defendants as stated in their answers, gave them leave to file such cross bill.

The cross bill was accordingly filed, and an answer thereto put in by Grove and Duffield. In this answer it was mentioned, among other things, that Nathaniel Craighill had taken the oath of insolvency at the suit of Grove's administrator, and that, at the sale by the sheriff, the plaintiff Grove became the purchaser of Craighill's interest in the land at the price of 1505 dollars. Along with the answer was exhibited a copy of the sheriff's account of sales, and a copy of the deed from the sheriff to Grove.

The children of William Little and of William P. Craighill filed an answer to the original bill, insisting, among other things, that the warrant was not lawfully issued against the representatives of William P. Craighill, and that it could not be levied on any real estate until all the personal estate, as well of the sureties as of the principal, had been exhausted; and alleging that Grove, Duffield and Griggs had, at the time of the levy and sale, a large and valuable personal estate.

There was filed a copy of the account of sales of the personal estate of William P. Craighill by William Grove his administrator, and a copy of the administration 188 account, \*whereby it appeared that the administrator had received 745 dollars 66 cents, that the funeral expenses, charges of administration, and commissions amounted to 289 dollars 49 cents, and that the balance and more was disbursed in paying executions against the deceased, debts binding his heirs, and due bills and accounts.

It was proved that at the time of the sale of Nathaniel Craighill's land by the marshal, Grove and Duffield had considerable

personal property, consisting of negroes, horses, cattle &c. Indeed, in their answer to the cross bill, they stated the fact that the warrant of the 28th of September 1827 was levied on their personal property in November of that year. The sale of it was prevented by the arrangement made by Grove and Duffield with the agent of the treasury.

There was evidence tending to shew the insolvency of Griggs, and that the land of Nathaniel Craighill was not duly advertised. And there was also much evidence in relation to the conduct of the parties. It was the object of Grove and Duffield to shew that Nathaniel Craighill's deed was fraudulent, and that the funds out of which Little made payments to the United States were not his own.

The causes being removed to the circuit court of Jefferson, came on to be heard in that court the 10th of April 1833, upon the bills, answers, depositions and exhibits: on consideration whereof, the court decreed that the injunction granted in the first case be dissolved, that both the original bill and the cross bill be dismissed, and that the plaintiffs in each case pay to the defendants in each case their costs.

On the petition of Grove and Duffield, an appeal was allowed them.

Leigh, for the appellants, admitted the general principle that a creditor at large cannot come into equity to set aside a fraudulent conveyance by his debtor. But, 189 he \*said, where it is competent to an officer of the treasury to issue a distress warrant for the sale of lands to satisfy a debt, quoad such debt the United States cannot be considered creditors at large. As the lien of a judgment is the mere result of the capacity to sue out an elegit to take the debtor's lands, so the lien, in the case of a debt to the United States for which a distress warrant lies, results from the capacity to issue the warrant. And a surety paying a debt to the United States is entitled, on general principles, to be subrogated to the rights of the United States against the principal debtor and cosureties. *Enders &c. v. Brune*, 4 Rand. 438. On this ground alone the plaintiffs might have been entertained in equity; and if the bill is not suited to their case, they should have been allowed to amend it.

Supposing the claim of the plaintiffs to be merely as purchasers, the question is whether the marshal's deed passed title, without proof of his compliance with all things which the statute makes prerequisites to the sale. Is this question to be determined by analogy to the case of a sale by a marshal or sheriff for taxes, or to the case of a sale by such officer under execution? If the analogy be to sales for taxes, it must be conceded, upon the authority of *Christy v. Minor*, 4 Munf. 431; *Chapman v. Bennett*, 2 Leigh 329, and *Williams &c. v. Peyton's lessee*, 4 Wheat. 77, that the plaintiffs shew no title. But the analogy is properly to sales under execution; and in such cases, though the officer is liable if there be irregularity, yet his conveyance passes title. It is said that according to the words of the statute,



the conveyance only gives title to lands "sold in pursuance of the authority aforesaid;" and upon the previous words, declaring that the amount due shall be a lien upon the lands from the date of a levy and a record thereof, the objection is taken that here there was no such record as the statute contemplates, and so there never was any lien; and the further objection is \*taken that the land was not duly advertised. But is it the fair interpretation of the statute, that objections of this kind shall avail here? There may have been malfeasance or nonfeasance by the marshal, for which he may be liable to make compensation, and yet it may not avoid the sale and conveyance. Redress may be had in such case by injunction, and a court of the United States is the proper forum. As to the objections that the personal property had not been exhausted, and that N. Craighill's proportion of the debt had been satisfied by Little, it is enough to say, as to the former, that there was no personal property besides that levied on, and as to the latter, that the payment was out of the funds of the principal.

In any point of view, there is a clear ground of relief by force of Grove's judgment and execution. Moreover it was improper to dismiss the bill in toto, without any reservation of the rights of the sureties for money paid.

Robinson for the appellees. The constitutionality of the act of congress under which the warrant issued was much discussed in Randolph's case, 2 Brock. R. 447. It was said in that case, that to sustain the validity of the statute, the agents, in its execution, must be regarded as purely ministerial, and the authority strictly pursued, and the act, in its construction, be confined to the letter. Such agents, it is said, "cannot act on other persons or on other subjects than those marked out in the power, nor can they proceed in a manner different from that it prescribes." (p. 480.) Thus regarding the statute, the court will find itself relieved from the necessity of considering its constitutionality, for the case will be found to be one in which the statute has not authorized the warrant to issue.

By the terms of the statute, the agent of the treasury is to proceed against "such delinquent officer." There is no authority at all to proceed except where 191 \*the officer is alive. To allow such a proceeding against the estate of a dead person would be most unwise. For want of proper information on the part of the decedent's representative, he might be certified to be a debtor to a much greater amount than was really due. Before a representative qualified, the whole estate might be sacrificed. And even if there were a qualification on the estate, the proceeding is so summary that the sacrifice might be made before the assets were collected. Infant heirs might have the whole of their lands sold for a small portion of their value. It ought not to be supposed that the legislature intended to authorize a proceeding so injurious to the creditors, heirs and distributees of a decedent, when there is nothing in the act itself to shew

any such intention. On the contrary, it is manifest that it contemplated proceedings where the delinquent officer was alive. The warrant is to be directed to the marshal of the district in which such delinquent officer and his sureties shall reside. And the marshal is to proceed to levy the money by distress and sale of the goods and chattels of such delinquent officer. This provision cannot be complied with, where the goods and chattels of the officer have come to the hands of an administrator and been sold by him. And yet there might be assets in the hands of the personal representative of the officer, equal to the whole amount of the debt. In this very case there is an account of sales of the personal estate of the officer, made by William Grove his administrator, to a considerable amount; and though, by the administration account, the proceeds appear to have been disbursed, yet the debts paid must have been of inferior dignity to that due the United States. Again, the statute provides that if the goods and chattels of the officer be not sufficient, his body may be taken; that notwithstanding the commitment of the officer, or if he abscond, the goods of the sureties may be 192 taken; that \*the amount due shall be a lien upon the lands of such officer and his sureties from the date of a levy; and that all moneys which may remain shall be returned to such delinquent officer or his sureties. All these provisions are incompatible with the issuing of a warrant after the death of an officer. How can the amount due be a lien upon the lands of the officer, when the officer is dead and has no lands? The decision in *Glassford v. Hackett*, 3 Call 193, in which a motion was denied against executors under the act in 1 Rev. Code, ch. 113, § 2, p. 447, is in point.

II. Though the warrant were regarded as legally issued, still the sale of the lands of Nathaniel Craighill, one of the sureties, was wholly illegal. 1. The marshal should have proceeded to raise the money by distress and sale of the goods and chattels of the delinquent officer. Passing by the fact that there was money in the hands of Grove his administrator (the very party who procured the warrant to issue), there was no levy upon any goods of the officer until after the lands of Nathaniel Craighill the surety had been sold. 2. The provision of the law requiring the money to be raised by distress and sale of the goods and chattels of the sureties, was wholly disregarded. Grove and Duffield had a large personal property, and yet, without selling this property at all, the land of Nathaniel Craighill a cosurety was taken and sold. On this point, the case of the *United States v. Graves &c.*, 2 Brock. R. 379, is decisive. It was a case under the act of 1813 (2 Story's Laws U. S. p. 1381, § 6), but the principle is strictly applicable. 3. Until a record, in the office of the clerk of the district court, of a levy in pursuance of the warrant, there was no lien upon the lands; and no such record appears to have been made. 4. The provision of the statute requiring an advertisement for at least three weeks, in not less than three public

places in the county or district where the real estate is situate, \*does not appear to have been complied with; the recitals in the marshal's deed not being even prima facie evidence. Jackson v. Shepard, 7 Cow. 88. If the argument were sound, that the decision should be by analogy to a sale under execution, the analogy is not to a sale of goods, but to a sale of lands under execution, in relation to which the rules are more strict. Thus in Louisiana, the statute requires that the judgment, on which execution issues, should be recited in the deed of sale given by the sheriff; and it has been declared that the omission of that recital prevents the transfer of the title to the buyer. 4 Kent's Comm. 434, citing Dufour v. Camfranc, 11 Martin 607, and Durnford v. Degruys, 8 Id. 222. But in truth there is no analogy to the case of a sale under an execution, or a sale under a decree, for the party has no day in court. The remedy given in the 4th section is an injunction to stay proceedings on the warrant. No means are given by the statute for enquiring into the regularity of the sale. It must of necessity be enquired into when a party comes into court, claiming under the sale. The statute is to be construed by analogy to sales for taxes. 5. The lands of Nathaniel Craighill could only be sold to raise what he was bound for. The principle is, that if, by any arrangement between the creditor and a surety, his cosurety would, after making payment, be unable to enforce a claim to contribution, he is thereby discharged. 1 Suppl. to Ves. jun. p. 512, in note on Ex parte Gifford, 6 Ves. 805; Pothier on Oblig. pt. 3, ch. 1, art. 6, § 2, p. 332, 3 of am. ed. Applying this principle to the facts appearing in this cause, Nathaniel Craighill was bound for nothing. In another point of view nothing was due from him. According to the administration account on the estate of the delinquent officer, his administrator has received 745 dollars 66 cents, and his allowances for funeral expenses, charges of administration, and commissions, amount to 289 dollars 49 cents, leaving 456 \*dollars 17 cents.

To this add 597 dollars for the three slaves of the principal, and 755 dollars for his land, and the sum of the principal's credits is 1808 dollars 17 cents, which deducted from 9232 dollars 66 cents, left 7424 dollars 49 cents. Now there were originally six sureties, but of these John Griggs was insolvent. Dividing the sum last mentioned into five parts, the portion of each was only 1484 dollars 89 cents; so that what Little had paid was equal to his portion and that of Nathaniel Craighill. Nor were there any portions of others for which the land of Nathaniel Craighill could be sold. Vestal's portion was made from the sale of his land, and the portions of Grove and Duffield were discharged. Even if no credit be given to Little for his payments, there was very little due from Nathaniel Craighill. Considering 1300 dollars of those payments as made out of the funds of the principal, and adding that amount to the 1808 dollars 17 cents, there will be a sum of 3108 dollars 17 cents to be deducted from the 9232 dollars 66 cents, which will leave 6124

dollars 49 cents, one fifth of which is 1224 dollars 89 cents. In any point of view, only so much of the land of Nathaniel Craighill should have been sold as was necessary to pay the sum last mentioned. But instead of selling only a small part of the tract for a small part of the debt, the whole tract was sold for the whole debt, which was not only unjust and oppressive, but illegal. Stead's ex'ors v. Course, 4 Cranch 403.

III. The ground taken, that the plaintiffs have a right to come into equity even though the sale were illegal, cannot be sustained. 1. The bill asserts no claim of the plaintiffs except as purchasers at the marshal's sale. 2. When the suit was commenced, no other claim could have been asserted, because the plaintiffs had paid no money whatever. 3. If, before commencing this suit, they had been creditors for money paid as sureties, entitled to contribution from their cosureties, still, 195 being \*mere creditors at large, they could not come into equity to set aside the conveyance. But it is said that the United States are something more than creditors at large, and the sureties, by subrogation, more also. The argument is, that as, before an elegit issues, there is a lien because of the capacity to sue out an elegit, so, before the distress warrant issues, there is a lien because of the capacity to sue out the warrant. The fault of the argument is this—When the elegit issues, it relates back, in terms, to the date of the judgment. Not so with the warrant. There can, from the very nature of it, be no lien before it issues. And if a surety pays the debt before the warrant issues, he can have no lien upon the lands of a cosurety. The surety has the benefit of such lien as exists at the time of the payment, and no more. If, for example, the surety of a sheriff or other debtor to the commonwealth pays off a debt before the commonwealth proceeds, the surety cannot move in the general court, nor can he sue out execution to sell the lands of the principal. The case of Enders & C. v. Brune is perfectly consistent with this view; so too are the cases of The United States v. Preston & C., 4 Wash. C. C. R. 446, and Pollock v. Pratt & C., 2 Wash. C. C. R. 490.

IV. As to the judgment of Grove's administrator, it is, in the first place, questionable whether his separate claim could have been united with the joint claim of Grove and Duffield. But if it could have been so united, it has not been. No claim is asserted under the judgment. The bill itself states that at the time of filing it, Craighill was in execution under a ca. sa. upon the judgment; and in such a state of things a creditor has no right to come into equity. Moreover, since the suit was brought, Craighill has taken the oath of insolvency, the property mentioned in his schedule has been sold, and the judgment stands as satisfied.

V. Leave was given to amend the bill; but the amendment was never made, 196 and three years elapsed \*after the leave thus given, before the bill was dismissed. There was no occasion for any reservation in the decree, of the rights of

the sureties for money paid. The decree in their case as purchasers would be no bar to a proceeding for money paid by them as sureties.

Leigh, in reply. The main question is, in what light is the proceeding under the act of congress to be regarded? Whether as a proceeding purely ministerial in its inception, progress and consummation, in which the agent of the treasury, in issuing the warrant, and the marshal in executing it, acted in utter exemption from all direct control or correction of the courts of the United States, like a marshal or sheriff selling lands for taxes, so that the regularity of their respective proceedings can be nowise directly brought in question and their acts avoided, but only enquired into collaterally when a claim is asserted under those acts? Or whether the proceeding is not rather to be regarded as analogous to proceedings of a marshal or sheriff in sales of property under execution or decree, in which, though the officer acts ministerially and exercises a naked power, yet his acts are subject to examination and correction by the court in a direct proceeding for the purpose, and can only be so corrected, and, if consummated, cannot be questioned afterwards collaterally? If the first view be correct, the decree is right, if for no other reason but the want of proof of due advertisement; and then all the other objections are supererogatory. But if the last view be correct, then all those objections may safely be admitted, and yet it is too late now to urge them; neither is this a proper case, nor this the proper forum, in which the defendants can avail themselves of them. The proceeding is certainly anomalous, but its constitutionality can hardly be doubted in respect to officers and their sureties who incur responsibility under and in reference to the act; neither, in respect to such, is it a harsh or unjust,

though it is a summary proceeding.  
197 \*The regularity of the proceedings might have been directly called in question in the federal courts, and they were the proper and the only jurisdiction to examine and correct them. Can it be doubted, that if this be a case in which the agent of the treasury had no right to issue a warrant, the marshal might have been arrested in his execution of it by application to the federal court? Or that if the marshal proceeded to levy on the property of sureties before exhausting the process against the principal debtor, or on lands before exhausting the process against the goods, the federal court would have been open to redress the wrong? Under the provision of the 4th section of the act of congress, an application for an injunction would have been proper on each and every ground urged here. And if resort could have been had to the federal court, that was the proper remedy, and that the proper forum. Congress have authority to execute their own laws of revenue and finance, and the federal courts have exclusive jurisdiction to enforce them.

If the proceeding be regarded in analogy to sales under executions or decrees, then the Louisiana decisions present no difficulty. They are cases of sales under ex-

ecution, in which the statute required the judgment to be recited in the instrument of conveyance. It is exactly as if the statute had required a conveyance by instrument under seal, and the conveyance had no seal.

STANARD, J. The claim asserted by the original bill of the appellants is, that they have purchased a tract of land at a sale made by the marshal of the United States under the authority of a treasury warrant issued against Nathaniel Craighill the former owner of the land, and other sureties of William P. Craighill. Their complaint is that before such sale the land in question was fraudulently conveyed by N. Craighill to some of the defendants, for the benefit of others of them, and the  
198 relief sought is a decree to set aside the said fraudulent conveyance, and to give them possession of the land.

The title to the relief depends, 1st. on the establishment of the validity of the title of the appellants under their purchase at the marshal's sale, supposing the previous conveyance of Nathaniel Craighill had not been made; and 2dly, on convicting that conveyance of the imputed fraud, or of some other infirmity which deprives it, or ought in the judgment of a court of equity to deprive it, of any efficacy in respect to the antagonist title from the sale and conveyance.

The title of the appellants under the sale and conveyance has been objected to on various grounds: and the first enquiry is that presented by the proposition, to the maintenance of which the force of the able argument of the appellant's counsel was mainly directed, to wit, that the court cannot, in this litigation, take cognizance of objections to the title claimed under the sale and conveyance of the marshal, founded on the irregularities of that officer in the levy and sale, but that such objections could only be urged in the federal court, under the fourth section of the act of congress authorizing the proceeding by distress warrant.

To this proposition I cannot assent. The remedy given by the 4th section is against the warrant as issued, and is intended to protect from injury that might result from the undue emanation of the process, or excess in the amount for which it might emanate; not to redress injuries resulting from the undue or irregular execution of it.

It is insisted, further, that the proceedings under the warrant are analogous to those under an execution from a court of record, and that irregularities in the proceedings of the officer must be corrected by application to the authority from which the process emanates, and cannot be urged in another forum against the title derived from the execution of the process.

199 The analogy is not a sound one. In case of the warrant, the process does not issue from a court; and though the act directs that a record of the levy shall be made in the officer of the clerk of the district, it gives the court no cognizance over it, nor does it direct that the marshal shall make return, or record of any kind, of his proceedings in further execution of the warrant. The party then had no day

in court to urge objections to the undue levy and sale under the warrant. The sale under the warrant bears a stricter analogy to one for the nonpayment of taxes, than to one under an execution issuing from and returnable to a judicial authority. The whole proceeding in both is ministerial; all the functionaries are ministerial, executing power conferred by law; and the title is derived under the law, only in cases in which it appears that the authority which the law gives has been strictly pursued. Like power derived from the conventions of individuals, it cannot displace or transfer property from one to another, unless it be pursued: and to the title claimed under it, the due execution of the power, according to the provisions which direct and limit its exercise, is as necessary as the power itself. Title is the offspring of the conjoint operation of the power and the due exercise of it; and he who asserts it is equally bound to shew the one as the other.

The title of the purchasers under the sale and conveyance of the marshal is, I think, liable to be repelled by shewing that the levy and sale were not duly and regularly made; especially by parties holding the attitude of defence: and in this case the purchasers have not only failed to prove that in the levy and sale the directions of the act were observed, but the defendants have affirmatively shewn a deviation from them in several respects. Under the mandate of a warrant issued in pursuance of the act, the lands of a surety were not liable to be levied on and sold, but in defect of the goods and chattels of the principal  
200 and sureties; and \*yet, in this case, no such want of goods and chattels appears. On the contrary, it affirmatively appears that two of the sureties (Grove and Duffield) had large personal estates. It does not appear that the sale was advertised as directed by the act. There are other objections to the sale; but it is unnecessary to enumerate or further consider them. Indeed, the counsel of the appellants almost conceded, that if in this litigation the court could take cognizance of the objections to the regularity of the levy and sale, to defeat the conveyance of the marshal, the title of the appellants as purchasers could not be sustained: and such is my opinion, without any concession of counsel. The nullity of the appellants' title under the sale and conveyance renders it unnecessary to decide the question whether the conveyance of Nathaniel Craighill be or be not fraudulent.

It is further insisted on behalf of the appellants, that though they may not be entitled as purchasers, yet they have, by their payment of the purchase money, discharged the claim of the United States; that that claim was a lien on the land in question; and that they, by substitution, are entitled to charge the land, to the extent of the amount paid on their purchase. No such claim is asserted by the appellants in their pleadings; and their counsel, conscious of this, insists that it appears in the proofs, and that it was the duty of the court below to have authorized or directed an amendment of the pleadings, for the pur-

pose of giving the appellants relief on this ground of claim.

It is sufficient to say, that it was not the official duty of the court to direct the amendment, and that the omission of the appellants to ask leave, or to use the leave to amend, cannot in this court be objected as an error of the court below. Nay more, I think it is matter at least of grave doubt, whether such an amendment ought to have been authorized by the court. The parties

had been engaged in a tedious and  
201 expensive litigation of a \*title asserted by the appellants. That litigation had swelled the record to a considerable size. The title litigated had failed, and the claim to be asserted by an amended bill was distinct from, and even incompatible with, that involved in the previous litigation. To permit the new and inconsistent claim to be brought forward by an amended bill, would have blended the new with the old controversy—would have incumbered the record with the volume of matter belonging to exploded and abortive litigation, and would have exposed the parties to the costs of embodying all that useless matter in the record relative to the new claim: this useless expense to the parties producing only annoyance and inconvenience to court and counsel, especially in the event of appellate proceedings. And what advantage could result from this course of proceeding? Time would not be saved, because it would take as much time to mature the suit on the new claim asserted by an amended, as though asserted by an original bill. The only effect would be to save the plaintiffs from a decree for the costs of the suit touching their abortive claim: and this is an effect which certainly does not recommend such a proceeding to the favour of the court.

The cross bill is but a pendant to the original, the object and function of which is to qualify or modify the relief that is sought by the original bill. But as that relief would not be granted though the cross bill had not been filed, the cross bill is supererogatory, and ought to be dismissed.

I am of opinion to affirm the decree.

The decree of the court of appeals was entered in the following terms:

"The court being of opinion that whatever claim the appellants, or either of them, have by substitution to the rights of the United States, or as co-sureties of N. Craighill, or under the judgment, on an  
202 execution on \*which N. Craighill was taken, or on the purchase by the appellant Grove of the interest of N. Craighill in the land, at the sheriff's sale of the property surrendered by him on his discharge, pending this suit, as an insolvent debtor, those claims cannot be adjudicated in this case, they not being embraced by the pleadings, and will remain without prejudice from the decree of the court below, or the affirmation thereof by this court; and being further of opinion that there is no error in the said decree;" the same is affirmed, with costs.

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**\*Dunn v. Price.**

April, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

**Pleading and Practice—Bonds\*—Assignment—Action against First Assignor by Second for Benefit of His Assignee.**—Assumpsit is brought in the name of S. D. for the benefit of E. V. against a defendant as assignor of a bond. The defendant pleads, 1. that after her assignment to the plaintiff, and before the bond became due, the plaintiff assigned unto one E. V. all his right, title and interest in and to the bond, by reason whereof no right of action against her as assignor was in the plaintiff, but the right of action against her was in the said E. V.; 2. that after her assignment to the plaintiff, and before the commencement of this action, the plaintiff, being charged in execution, took the oath of insolvency and was discharged as an insolvent debtor, by reason whereof all the estate belonging to him became vested in a sheriff, and no right of action against her as assignor remained in the plaintiff. On a demurrer to these pleas, HELD that neither of them is sufficient to bar the plaintiff from maintaining the action.

**Same—Appellate Jurisdiction—Reversal as to One Count—Affirmance as to Another.**—To a declaration in assumpsit containing two counts, the defendant pleads the general issue. Afterwards he files two additional pleas to the first count. Upon a demurrer to these pleas, the circuit court, holding both of them to be good, enters judgment for the defendant upon the first count. At a subsequent day, the issue is tried on the second count, and verdict and judgment rendered for the defendant on that count. Upon a supersedeas, the court of appeals is of opinion that there was error in overruling the demurrer: HELD nevertheless, the defendant is entitled to the benefit of the verdict and judgment on the second count.

In the circuit court of Henrico, at August rules 1830, a declaration in assumpsit was filed in the name of Samuel Dunn, otherwise called Samuel Dunn administrator of David Holloway deceased (who sues for the benefit and at the costs of Edward Valentine), against Lucy Price. The first count alleged that Joseph Carter, on the 7th of November 1822, made his writing obligatory whereby he acknowledged himself bound unto Lucy \*Price in the sum of 989 dollars 30 cents, with a condition for the payment of 494 dollars 65 cents on or before the 7th of December 1825; that the defendant afterwards, on the first of January 1824, by an endorsement in writing on said bond, for value received by her from the plaintiff, assigned and transferred all her right, title and interest therein to the plaintiff, by the name and style of Samuel Dunn administrator of David Holloway deceased; that the plaintiff cannot and could not recover the amount mentioned in the condition of said bond, of the said Carter, he the said Carter having, before the said sum of money became due and payable according to the tenor and effect of said bond and the condition thereof, become, and continuing to be, wholly and notoriously insolvent and unable to pay the same or any part thereof;

\*Bonds.—See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

Assignment.—See monographic note on "Assignments" appended to Ragsdale v. Hagy, 9 Gratt. 400.

and that Carter has absconded and left the county aforesaid, and gone to parts without the limits of this commonwealth. By reason of which premises the defendant became bound to pay the plaintiff the sum of money mentioned in the condition of said bond, with all interest due thereon, and being so liable, the said defendant, in consideration thereof, undertook and assumed upon herself and promised to pay the plaintiff the same.

The second count alleged that the defendant was indebted to the plaintiff in the sum of 1000 dollars, for money lent and advanced to, and paid, laid out and expended for the defendant, and in the further sum of 1000 dollars, for money had and received to and for the use of the plaintiff, and being so indebted, the defendant, in consideration thereof, undertook and promised the plaintiff to pay him the same.

A trial being had upon the general issue, the jury failed to agree, and a juror was withdrawn and the cause continued.

The defendant afterwards filed two additional pleas to the first count of the declaration. One of them alleged

205 \*that after she assigned the bond to Samuel Dunn, by the name and style of Samuel Dunn administrator of David Holloway, and before the bond became due, to wit, on the 24th of March 1824, the said Samuel Dunn, by the name and style of Samuel Dunn administrator of David Holloway deceased, assigned unto one Edward Valentine all the right, title and interest whatever of him the said Samuel Dunn, as administrator aforesaid or otherwise, of, in and to the said bond; by reason of which assignment no right of action against the said Lucy Price, as assignor of the said bond, was in him the said Samuel Dunn at the time of the commencement of this suit, but all right of action against the said Lucy Price as assignor aforesaid was, at the time of the commencement of this suit, in him the said Edward Valentine.

The other plea alleged that after the defendant assigned the said bond to the said Samuel Dunn, by the name and style of Samuel Dunn administrator of David Holloway, and before the commencement of this action, he the said Samuel Dunn, being then charged in execution in a suit commenced and prosecuted in a court of record within this commonwealth, was brought before two justices according to law, and thereupon subscribed and delivered in a schedule of his estate, and made oath and swore in such manner as is prescribed by law for the relief of insolvent debtors, and after delivering in such schedule and taking such oath, was discharged by warrant from the said justices; by means whereof all the estate belonging to the said Samuel Dunn became vested in a sheriff, and no right of action against the said Lucy Price, as assignor of the said bond, remained in him the said Samuel Dunn at the time of the commencement of this suit.

To these pleas the plaintiff demurred, and the defendant joined in the demurrer.

On the 15th of May 1833, the matters of law arising upon the demurrer being argued, the circuit court held \*that each of the pleas demurred to was

sufficient to bar the plaintiff from maintaining his action as to the first count, and judgment was entered that he take nothing by that count. As to the second count, the cause was retained on the docket for a trial to be had of the issue joined.

During the same term, to wit, on the 6th of June 1833, a jury was sworn to try the issue, who returned a verdict that the defendant did not assume upon herself, as in pleading she had alleged; and judgment was entered that the plaintiff take nothing by his bill, and that the defendant recover her costs.

On the petition of the plaintiff, a super-seas was awarded.

Johnson for the plaintiff in error. The judgment is erroneous because neither of the special pleas presented any bar to the action on the first count. If the assignee had even sued the obligor, there is an express authority of this court to prove that an assignment by him is no answer to the action. *Garland v. Richeson*, 4 Rand. 266. But there is no pretence for saying that an intermediate assignee may not maintain an action against his immediate assignor. At common law, a remote assignee could have maintained no action against any assignor except his own immediate assignor. And the act of assembly, which gives the action against the remote assignor, does not take away the action from the immediate assignee. The holder has a right to strike out all the assignments but that on which he chooses to rely.

Robinson for defendant in error. It is conceded in *Garland v. Richeson*, that if the obligee in a bond were to transfer by assignment his whole right, legal as well as equitable, to his assignee, no suit could afterwards be maintained in the name of the obligee. It is because the obligee is considered not to transfer the legal

207 \*right to his assignee, but only an equitable right, that an action may be maintained in the obligee's name after the assignment. And it is because the statute has given to the assignee of the equitable right a capacity to sue in his own name, that he may sue on his equitable right. If then the assignee has only an equitable right, and the capacity to sue in his own name arises entirely from that equitable right, surely when that equitable right is transferred, the capacity to sue, arising from it, is gone also. And is not that the case here? The assignment by Dunn, if it passed any thing at all, passed his equitable right; and that being passed away, there is nothing to sustain a suit in his own name. Dunn never having had the legal right, and his assignment of his equitable right being valid, his assignee could maintain an action in his own name against the obligor; but while a right of action existed against the obligor on behalf of Dunn's assignee, it could not exist at the same time on behalf of Dunn himself. It is clear, then, that upon the facts presented by the first plea, no suit could have been maintained by Dunn against Carter. And if the obligor could not have been held liable to an assignee who had assigned away

his right, how can the assignor be held liable to such assignee? The assignor is understood to pass to the assignee every right founded on the bond which he himself possesses. And among the rights so passed by an intermediate assignor is his right of action against his own assignor. If indeed, upon the obligor's proving insolvent, Dunn had made payment to his assignee, then he would have been reinvested with all his original rights on the bond, and would have been entitled to demand payment from Mrs. Price, his assignor, in like manner as was done in *Goodall v. Stuart*, 2 Hen. & Munf. 105. But until he makes such payment, he cannot sue his assignor, not even for the benefit of his assignee. If

he could, then the course adopted in 208 *Riddle & Co. v. Mandeville & Co.*, 5 Cranch 322, of a suit in equity by the second assignee, claiming to be substituted in place of the first, was very unnecessary; and the statute of 1807, 1 Rev. Code, ch. 125, § 6, p. 484, was equally so.

In the case of the bankruptcy of a person who is beneficially as well as legally interested in the performance of a contract made before the act of bankruptcy, the action should be brought in the name of his assignees. 1 Chitty's Pl. 15, (p. 25 of 7th american ed.). So too the legal interest of an insolvent debtor in a contract is, by the provisions of the insolvent acts of England, vested in the persons to whom his estate is assigned, and they are empowered to sue. 1 Chitty's Pl. 17, (p. 29 of 7th american ed.). Chitty gives forms of pleas of the plaintiff's bankruptcy; see 3 Chitty's Pl. 919, the form in assumpsit, and p. 971, the form in debt on bond. The same rule exists under the laws of the United States; *Richards v. Maryland Insurance Company*, 8 Cranch 85. So in Pennsylvania; *Cooper & Co. v. Henderson*, 6 Binn. 189; *Kennedy v. Faris & Co.*, 5 Serg. & Rawle 394; *Stoevers v. Stoevers & Co.*, 9 Serg. & Rawle 434.

If the circuit court was wrong upon the demurrer, still the defendant is entitled to the benefit of the verdict and judgment upon the second count.

Johnson in reply. A verdict is never set aside in part, and the judgment, if erroneous in part, is to be reversed in toto. It is not shewn, upon the plea of insolvency, that the right of action vested in the sheriff, for the cases of bankruptcy are not analogous. And as to the other plea, there was, before the statute, a right of action for the assignee against his assignor, and this right did not pass to a second assignee.

TUCKER, P. This was an action brought in the name of the first assignee, for the benefit of the last 209 \*assignee, against the first assignor, to recover back the amount paid for a bond, the obligor having proved insolvent. The defendant pleaded the assignment to the last assignee in bar of the action, and the court below sustained the plea. This I think was erroneous.

Before the act of 1807, which gave to the last assignee a right to maintain an action at law against a remote assignor, his

remedy was either in equity (Riddle & Co. v. Mandeville &c., 5 Cranch 322), or he was entitled to institute an action at law for his own benefit, in the name of his assignor, against the remote assignor. 1 T. R. 26, 619; 4 T. R. 340; Garland v. Richeson, 4 Rand. 268. The act of 1807 does not take away or impair that right. It only provides that "hereafter the assignee shall be entitled to recover from any previous assignor or assignors." It does not follow, because he is entitled to recover in his own name under this statute, that he can no longer sue in the name of his assignor for his own benefit. The case of Garland v. Richeson, 4 Rand. 266, is pregnant with proof that a party may proceed under the statute or as at common law. The argument in that case is a fortiori in this: for although it has been much doubted whether the assignment of a bond did not pass the legal title to it, it cannot be supposed that an assignment can pass a legal title to the implied contract between the assignor and assignee. It is not perceived how such implied contract could be the subject of such legal transfer. The right is, after all, but equitable, though it is authorized by statute to be enforced by action at law. I think, therefore, it is in the election of the last assignee to sue either in his assignor's name, and for his own benefit, or in his own name under the statute. If he pursues the former course, the court of law will take notice of his equitable right, will permit the action to proceed in the name of the assignor, for his benefit, and will protect it against the interference of the

210 assignor. 4 Rand. 268. \*Upon the same principles, it will not permit the assignee's rights to be defeated by the plea of a title outstanding, not in another, but in himself. In Winch v. Keeley, 1 T. R. 619, the defendant pleaded that the plaintiff was a bankrupt, and that the balance due from him to the plaintiff was payable to his assignees, and so he was not entitled to sue. The plaintiff replied that before his bankruptcy he had transferred this balance to one Searle, and that the suit, though in his name, was for Searle's benefit. Judgment for the plaintiff: from which it is clear that a court of law will look to the person really entitled in equity to the debt, and will protect his rights accordingly. So too in Bottomley v. Brooke, cited 1 T. R. 621, to debt on bond the defendant pleaded that the bond was given in trust for one E. Chancellor, and that before action brought E. C. was indebted to the defendant more than the amount of the bond. The plaintiff demurred, but withdrew his demurrer by advice of the court. So in Rudge v. Birch, and Webster v. Scales, cited 1 T. R. 622, it was decided that the interest of a trustee did not pass as part of a bankrupt's effects. All these cases are recognized in Winch v. Keeley, and in Master v. Miller, 4 T. R. 341. According to them, the defendant might have pleaded that the last assignee, for whose use the suit was brought, was indebted to her more than the amount of the plaintiff's demand; and if so--if she would be entitled to consider him as plaintiff, she ought not

to have been permitted to treat him as a third party holding a title adverse to the demand in that action. The plea therefore should have been overruled.

The second plea falls within like objections, and must share the same fate.

Lastly we come to consider what judgment shall be entered. There were two distinct judgments in the court below; the first, for the defendant upon the demurrer, which we deem erroneous; the last, 211 upon a verdict \*for the defendant on the trial of the issue on the second count. As to this, there is no error assigned, nor do we perceive any. I am therefore of opinion to affirm the judgment on the second count, and reverse that upon the first count, entering judgment for the plaintiff upon the demurrer, and sending the cause back for a trial upon the plea to that count, and such further proceedings as may be found proper. And this upon the authority of Everard v. Paterson, 6 Taunt. 645; S. C. 2 Marsh. 304, and Campbell v. French, 6 T. R. 200.

The following entry was concurred in by all the judges:

"The court is of opinion that the judgment of the circuit court, in so far as it was considered that the second and third pleas of the defendant, pleaded to the first count in the declaration, were good and sufficient in law to bar the plaintiff's action on the said count, and that the plaintiff take nothing by his first count, but that the defendant go thereof without day; and also in so far as it was considered that the defendant recover against the plaintiff her costs by her about her defence in that behalf expended, and that the said plaintiff take nothing by his bill, but be in mercy &c. is erroneous. And the court is further of opinion that so far as respects the second count in the said declaration, there is no error in the proceedings thereupon, and that the defendant was entitled to her judgment upon the said count, that the plaintiff take nothing by his said count, but without costs. Therefore it is considered by the court that the said judgments be reversed and annulled," with costs. "And this court proceeding to give such judgment &c. it is considered by the court that the plaintiff take nothing by the second count in his declaration, but that the defendant go thereof without day. And as to

212 the demurrer of \*the plaintiff to the defendant's second and third pleas to the said first count in the declaration, it appears to the court here that the said pleas, and the matters therein contained, are not sufficient in law to bar the plaintiff from having and maintaining his action against the defendant on his said first count: Therefore it is further considered that the plaintiff's demurrer to the said pleas be sustained, and that those pleas be overruled. And the cause is remanded to the said circuit court for further proceedings therein upon the issue in fact already made up on the said first count of the declaration, or such other issue or issues as may be made up between the parties, in case the pleadings should be amended by leave of the court, for good cause shewn."



213 \*Segar v. Edwards and Wife.

April, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

**Fiduciaries—Fraudulent Purchase of Agent from Principal—Case at Bar.**—A claim to the land bounty to which a pilot in the revolutionary war was entitled, being established by his heirs, they employ an agent to do the best he can with the warrant, and write to him, stating that a far better price than 75 cents per acre was expected, but as it has been left to him, he must act for them. A sale is afterwards made, through the agent, at 75 cents per acre, and a conveyance is made to T. G. as the purchaser. On a bill filed by the heirs against the agent and T. G. it appears that T. G. had authorized the same agent to purchase warrants, and agreed to allow him, for his trouble, one half of any profit that might be made after refunding the purchase money and interest; that the agent had informed T. G. that a pilot warrant was offered at 75 cents per acre, and enquired whether that price should be given; and that T. G. did not know whose warrant was the subject of the treaty till after the purchase had been concluded. The circuit court, holding that the agent ought not to have been concerned in the purchase, decreed against him for so much of the profit resulting therefrom as he had received; and the court of appeals affirmed the decree.

Thomas Butler having been a pilot in the navy of Virginia during the revolutionary war, and Mary the wife of Giles Edwards being his heir, Joseph Segar was employed on behalf of Edwards and wife, as their attorney or agent to prosecute their claim to such land bounty as Butler was entitled to, and it was stipulated that Segar should receive for his services one third of what might be recovered.

The claim was established before the executive of Virginia prior to the 28th of June 1832, that being the date of a letter from Segar to Edwards communicating the fact, and stating that he would proceed immediately to Richmond and take out the warrant. The warrant being issued by the

register of the land office of Virginia,  
214 \*was forwarded to Washington by Segar, to be commuted for scrip.

Segar wrote to Edwards soon afterwards, and Edwards, in reply, wrote to him on the 15th of August 1832 as follows: "You will do the best you can with the warrant, and after satisfying yourself, send me the balance by the first opportunity; though I expected to have got a far better price than 75 per acre; but as I have left it to you, you must act for me. As it respects an heir on the eastern shore, I know not where he came from; and when he or she proves their right to claim, then they can come in for shares. Settle it as soon as you can."

On the 30th of August 1832, Edwards executed a writing under his hand and seal, acknowledging that he had borrowed of Segar 130 dollars, which he bound himself

to return whenever scrip should issue upon the warrant, and declaring that if, from any cause, the warrant should not be converted into scrip, he was responsible to Segar for the amount so borrowed.

On the 19th of September 1832, a deed was executed by Edwards and wife to Thomas Green for 1778 acres of land scrip due upon the warrant, in consideration of the sum of 1130 dollars paid in hand to Edwards and wife, and the farther consideration of 200 dollars more to be paid to Edwards when the scrip should have been issued. In this deed Edwards and wife bind themselves that they will defend their title to the scrip; but it is stated that they "are to incur no risk or sustain no loss by the reduction of the price of public lands."

Afterwards the following letter, dated Hampton, November 25, 1832, and post-marked Hampton, December 18, was written by Segar to Edwards: "I am sorry to inform you that the claim of Thomas Butler is contested and suspended on several grounds, which the department at Washington will not communicate. One is, however, that other persons are entitled; and whether this be true or not, the claim must be much embarrassed.

215 \*I hope you will make enquiry of all the old persons who can give information on the subject of the heirship, and communicate with me. So soon as the claim shall have been safe, I will pay you the remaining 200 dollars."

This letter was followed by one from Mrs. Edwards to Mr. Haywood, of the general land office. Mrs. Edwards received from Mr. Haywood the following reply, dated the 11th of January 1833:

"Madam, In compliance with your request of the 5th inst. I inform you that scrip amounting to 3333 dollars, equal to 2666 acres of land, was issued in your name as only heir of Thomas Butler, and delivered to Mr. Segar on the 15th of November last. I am not enabled to say whether you are entitled to other moneys as heir of Butler, but I presume you could obtain information as to the fact from the state authorities in Richmond."

At July rules 1833, Edwards and wife filed their bill in the circuit court of Norfolk county against Segar, charging, that "notwithstanding the perfect security of the claim (as they have since understood), the said Segar, regardless of the duties attaching to his agency, taking advantage of the knowledge he had acquired in that character, and bent upon turning that knowledge, and the ignorance and necessities of the complainants, to the utmost possible advantage of himself, induced the complainants, by falsely representing that the claim was in jeopardy, to assign, by indenture executed in the month of September last (the exact date not remembered), the said claim to him for the sum of 1330 dollars, 1130 dollars of which was settled for at the execution of the indenture; the remaining 200 dollars was paid afterwards. This contract, the complainants aver, was entered into under a belief, arising from the representations of the said Segar, that the female complainant was not the sole heir of said Butler, and that obstacles had

\*Fiduciaries—Purchase of Trust Subject.—On this question, see the principal case cited in foot-note to Bailey v. Robinsons, 1 Gratt. 4; foot-note to Wellford v. Chancellor, 5 Gratt. 30; Newcomb v. Brooks, 1 W. Va. 59, 60; Feamster v. Feamster, 35 W. Va. 13, 13 S. E. Rep. 57.



been thrown in the way at the land office at Washington; representations entirely at variance with "the truth of the matter, as the complainants have since ascertained."

Segar answered, that finding Edwards determined to sell, and not feeling himself at liberty, as his agent, to disregard his instructions, he applied to Thomas Green of Richmond, the only purchaser of land warrants known to him, to whom he sold the interest of Edwards for 75 cents per acre, which was all that he could procure; that the complainants executed to Green, and not the respondent, a deed for their interest, which was read both to Edwards and his wife, and her privy examination duly taken; and that after the execution of the deed, he drew an order on Green for the 1130 dollars, and the amount of the order was received by the complainants. He "positively denies that he made any misrepresentations, at any time, to induce the said complainants to sign the deed executed to Thomas Green. He suggested no difficulties, and said not a word about the female complainant not being the legal heir of the said Thomas Butler. He had candidly communicated to the said Edwards the male complainant, as he was in duty bound to do, all the difficulties threatening his claim, long before the sale was made; but so far from using these as expedients to induce the sale of the warrant, he advised them, whenever consulted, most strenuously against it; first, because, as their agent, he was bound to make the best sale of it for them he could, if entrusted with the management of it; and secondly, because his interest would not be promoted in any way by the sacrifice of it." The respondent then proceeded to state the facts in relation to the delivery of the scrip, and the letter written by him on the 25th of November 1832. On or about the 15th of November 1832, he received the warrant from the chief clerk of the land office, for the purpose of making the proper assignment of the same to the purchaser. It was then returned to the land office for 217 the final certificate \*of the commissioner, and detained some days. As a letter had been received at the land office, requesting the commissioner to delay the delivery of the warrant until evidence should be furnished to shew that the persons in whose name the scrip was made out were not the true heirs of Butler, he feared that the detention was in consequence of this letter, or that, during the detention, evidence adverse to the claim might arrive, and determined to leave Washington and prepare himself with fuller evidence of the title of the complainants. On his arrival at Hampton, he wrote the letter of the 25th of November 1832. For the manner in which this letter was delayed, he cannot account. He then went to the eastern shore, and a few days after his arrival there, received a letter from Henry Stanberry, which is filed with the answer. The letter from Stanberry to Segar bears date the 25th of November 1832. "The day" (says he) "after you left, I received your scrip on the Butler and Williams warrants, and it is now in the far west,

beyond the reach of all difficulty and interference."

Segar, in the conclusion of his answer, says that the scrip was purchased by Stanberry from Thomas Green at the price of 1 dollar 12 cents, or 1 dollar 15 cents; "that this respondent received no portion of the money, except for his own compensation, the one third of the 2666 $\frac{2}{3}$  acres, which this respondent sold to the said Henry Stanberry at the price of 1 dollar 10 cents."

The plaintiffs, by leave of the court, filed an amended bill, alleging "that they were entirely ignorant that the conveyance of September 1832, mentioned in their original bill, was taken by the said Segar in the name of Thomas Green; for they aver that that gentleman, who resides in Richmond, was never mentioned to them as the purchaser of the said scrip. Whether the conveyance however was in mr. Green's or mr. Segar's name, they are advised 218 does not vary the true aspect \*of the case, except so far as to require of your complainants that they should make Thomas Green a party to this suit. They are advised that the purchase of the said scrip, though in the name of mr. Green, was equally a fraud on the rights of your complainants, and as inconsistent with the duties arising out of the agency of Joseph Segar as if the conveyance had been taken in his own name. For your complainants charge that at that very time, and long before, the said Thomas Green and Joseph Segar were and had been connected, either as partners or as agent and principal, in the recovery and purchase of revolutionary claims, and that the name of Thomas Green, instead of Green and Segar, or Segar alone, in the conveyance from your complainants, was inserted merely to give colour of fair dealing to a transaction which otherwise on its face might have been void."

The answer of Green stated, that "in December 1831, mr. Segar and this respondent did make an agreement by which this respondent was to be interested in the claims and agencies procured by said Segar, expecting certain cases; and when the claim of Thomas Butler, a pilot, was allowed and converted into scrip, the whole compensation for establishing it was received by said Segar, as being among the exceptions. Not a cent was ever received by this respondent. The purchase of the 1778 acres, which was made of the complainants, was made under the following circumstances. This respondent had authorized mr. Segar to purchase warrants that might be in market. On the 20th of August 1832, mr. Segar informed this respondent that a pilot warrant for 1800 acres was offered at 75 cents per acre, and enquired whether that price should be given. This respondent's reply to the enquiry was, 'I reckon you would not do amiss to purchase the 1800 acres at 75 cents, provided the warrant be already registered at 219 Washington, or \*can be so registered in a few days after you get this. There is some danger, but I think the purchase would be judicious.' On the 20th of September 1832, mr. Segar informed this respondent of the purchase, as made the

day before, at 75 cents, of Giles Edwards, whose wife was the sole heiress of Thomas Butler, pilot, as he stated." In answer to special interrogatories, the respondent states "that he had authorized mr. Segar to purchase warrants, and agreed to allow him for his trouble one half of any profit that might be made after refunding the purchase money and interest, the purchases being considered as respondent's, though in fact the interests were joint. This respondent did not know from whom the purchase was to be made, till it was actually concluded." He then believed, and was afterwards confirmed in the belief, that there was a hazard of nearly a total loss of the purchase money. The opinions of the different members of the executive had undergone repeated changes about the right of pilots to claim the 2666% acres of land bounty. They finally settled down into a determination that pilots were not entitled to draw more than 200 acres. And the probability is that this claim would have been defeated, if that determination had been made known at Washington before the scrip issued. It was however received, and sold for 1 dollar 16 or 1 dollar 17 cents.

The affidavit to Green's answer bears date the 25th of October 1834. Segar's second answer was sworn to the 8th of November 1834.

After denying that the complainants could have been deceived in relation to the person to whom the deed was executed, and stating the understanding between him and Green in relation to the prosecution of military claims, as Green had done, and the fact that Green had no share of the compensation in this case, he proceeds

220 ceeds \*as follows: "This respondent was also authorized and empowered by said Green to purchase land warrants for him, who agreed to allow this respondent, for his trouble, one half of the profits accruing from the purchases after repaying the purchase money and interest. Under this regulation the claim of Thomas Butler was purchased, this respondent being entitled to one half of the profits in this as in all other cases of purchases made by him. This respondent did not intend to be understood, from any thing contained in his original answer, as intimating that he had no interest whatever in the purchase of the land warrant of Thomas Butler. He did have an ultimate interest depending upon the contingency of the final success of the purchase. At the time of said purchase, he had had no settlement with Thomas Green, and had received not one cent from him in consideration of the purchase. A settlement took place between this respondent and said Green in December 1833, when said Green accounted to said Segar for his share of the profits in all cases of purchases made by this respondent, among them that of Thomas Butler, his compensation in which case amounted to between 300 and 350 dollars according to the best recollection of this respondent. The interest of this respondent was not such as to disqualify him from acting as the agent of the vendors. He acted as the instructed agent of the complainants, having given them his best advice to take the

chances of obtaining the whole amount of their claim. This respondent did not consult with Thomas Green until he had applied to every purchaser known to this respondent; and it is due to Thomas Green to say, that he did not even know whose warrant he had through this respondent's purchase. According to the recollection of this respondent, said Green was not informed that the warrant to be purchased was that of Thomas Butler."

221 \*James Wilkins deposed, that in August 1832 he went with Edwards to the house of Segar; that Edwards went for the purpose of selling to Segar his land claim, and manifested very great anxiety to sell it; that he offered to sell it to Segar, but Segar declined purchasing, saying that he was averse to purchases of that kind; that upon Edwards remarking he was in want of money, Segar offered to lend him, and Edwards accepted the offer; and that he understood Segar distinctly to advise Edwards not to sell his claim until the scrip should be obtained, unless he could obtain at least one dollar per acre, and put all risk upon the purchaser.

Henry Stanberry deposed, that in August 1832, he contracted with Segar for all the scrip of which he might have the control, or to which he then was or might be entitled under the then existing appropriation. For a part of this scrip (in which part the scrip to be issued to Thomas Butler's heirs was not included) he paid Segar in advance at the rate of one dollar per acre, he guaranteeing the delivery of the scrip, and against a reduction in the price of public lands. Segar also agreed to sell him his proportion of his other cases, including his proportion of the Butler scrip, at the rate of 1 dollar 10 cents per acre, to be paid on the first delivery of the scrip, subject to the same provision as to the reduction of the public lands.

Stanberry further deposed, that in November 1832 (about the 10th, he thought) Segar came to Washington; that it was understood the scrip issuable on the Butler warrant had been suspended, but how long or for what cause he does not recollect; that Segar remained in Washington about a week; and that while he was there, to wit, on the 16th of November 1832, they stated an account of their scrip transactions, the substance of which is stated in the deposition.

One of the items in the account is "Butler's case, 2666% acres, before the commissioner, of which 1777 78-100

222 \*acres belong to mr. Green, and the balance to mr. Segar, viz. 888 88-100 acres." The scrip sold at a higher price than 1 dollar per acre embraced 3961 87-100 acres, of which it is stated that Stanberry was to have 777 66-100 acres at 1 dollar 10 cents per acre, amounting to 855 dollars 42 cents, and 3184 21-100 acres at 1 dollar 15 cents per acre, amounting to 3661 dollars 84 cents, making together 4517 dollars 26 cents. Of this, it is stated, 2000 dollars, was paid by Stanberry to Segar the 16th of November 1833, and the balance due Segar, viz. 2517 dollars 26 cents, was payable after delivery of the scrip, on demand. The part of the scrip put at 1 dollar 15

cents per acre was so much as Segar informed Stanberry was beyond his own proportion of the cases; and Stanberry agreed to allow him for this part 1 dollar 15 cents, that being the then market price at Washington.

Stanberry further deposed, that at the departure of Segar from Washington, the scrip issuable on the Butler warrant was before the commissioner of the general land office, for his certificate to the validity of the assignment. Shortly afterwards, it was handed to him (Stanberry) at the land office, which was the delivery contemplated in his contract with Segar. The balance of 2517 dollars 66 cents before mentioned was paid by him to Segar in February 1833. For the 1777 78-100 of the Butler scrip, Thomas Green drew upon him (Stanberry) on the 19th of November 1832, at 60 days, and his draft was retired on the 21st of January 1833.

Vespasian Ellis deposed, that after Thomas Butler's claim was allowed and before the scrip was received, he was employed to attend to the interests of persons who claimed to be the heirs of Butler; that he wrote to Segar on the subject, giving information of his being so employed; and he believed that a letter was written to the commissioner of the general land office, asking a suspension of the scrip.

223 \*The allegations in the answer of the defendant Green, as to the fluctuating decisions of the executive of Virginia in relation to the quantity of land to which pilots were entitled, and the consequent hazard in purchasing such claims, were proved by several witnesses.

On the 18th of November 1834, the cause was heard. The circuit court was of opinion that, upon the principles of equity applicable to contracts between the agent and his *cestui que trust*, the defendant Segar was to be considered as holding the fund, which he acknowledged he received as his portion of the sales of the scrip, as a trustee for the plaintiffs, and that he should be held responsible for the same: but as the defendant Green appeared, from the papers and proofs in the record, to be a purchaser without notice of the fraud implied by law as the consequence of the contract between the plaintiffs and the other defendant, the court was farther of opinion that no decree should be made against that defendant. Whereupon the court, valuing the 1778 78-100 acres, which belonged to the plaintiffs, at 1 dollar 15 cents according to the deposition of Stanberry, and fixing the 31st of December 1833 as the period when the defendant Segar, according to his answer, settled with Green, decreed that the plaintiffs recover of the said defendant Segar the sum of 357 dollars 21 cents, with interest thereon from the 31st of December 1833 till payment, and the costs of this suit, and that the bill be dismissed as to the defendant Green, with costs.

From this decree, an appeal was allowed on the petition of Segar.

Johnson for the appellant. The judge of the court below appears to have been satisfied that the sale was fair in fact, yet he has adjudged it fraudulent in law. In this he has gone beyond the decisions in Vir-

ginia, which have modified the doctrines of the english courts. Thus in England it is laid down as a general principle

224 \*that persons acting in a confidential character are disqualified from purchasing. But the courts of Virginia have refused to act on this principle against executors whose conduct in all other respects has been fair. *Anderson &c. v. Fox &c.*, 2 Hen. & Munf. 245; *M'Key executor of Fuqua v. Young*, 4 Hen. & Munf. 430. Chief justice Marshall has reviewed the authorities applicable to such a sale as this, in the case of *Teakle v. Bailey*, 2 Brock. R. 43, and has come to the conclusion that a contract between an agent and his employer is not void *per se*, but watched with considerable jealousy. It is desirable, he says, that the circumstances attending the transaction should be so clearly stated, as to leave no doubt that the principal entered into the agreement with full knowledge of them, or at least of such of them as were essential to the contract into which he had entered. But what information could Segar possess that his clients did not possess? None whatever that was essential to the contract. Although then the court shall look with jealousy upon the purchase made by Segar, yet when it finds that the purchase was fair, and for a price which at the time was adequate, it must refuse to set aside the sale.

Robinson for the appellees. It is not necessary to examine the cases cited by the appellant's counsel as to sales by executors, publicly and fairly made, at which they purchased. This is a private sale by Segar as agent for Edwards, to Segar as agent for Green; Segar having besides an interest not to act faithfully to Edwards: as to which the doctrine in 2 Tuck. Comm. 458-60, and the opinion of judge Carr in *Carter &c. v. Harris*, 4 Rand. 204, are applicable. Judge Carr cites with approbation the case *Ex parte James*, 8 Ves. 345, 348. The authorities are examined by chancellor Desaussure in *Butler &c. v. Haskell*, 4 Desauss. 702, and by chancellor Kent in *Davoue v. Fanning*, 2 Johns. Ch. Rep. 255-271. To the authorities which

225 they have cited may \*be added *Woodhouse v. Meredith*, 1 Jac. & Walk. 213, 218, 224. In the case of *Teakle v. Bailey*, 2 Brock. R. 43, cited on the other side, judge Marshall (p. 51) uses this strong language: "That an agent to sell cannot be himself the purchaser under the power to sell, is well settled. Such a purchase is absolutely void." The doctrine of the chief justice, applied to this case, is this: that if there be a sale by Segar as agent of Edwards, and Segar himself purchases, or is interested in Green's purchase, the purchase is absolutely void. The only part of the opinion on which the appellant's counsel can rely, is that applicable to a contract between the agent and his employer. Now here Segar had been employed by Edwards to sell, and he professes to have acted as Edwards's agent when the sale was made to Green; it is not pretended in his answer that the relation of principal and agent had ceased. But if it had, still it must appear affirmatively that the agent had furnished his principal with all the knowledge ac-

quired by the agent, and that the confidence reposed in him has in no respect been abused. It has been asked, what information could Segar possess that his clients did not possess? He possessed information as to the value of the subject. He had sold his third of the scrip at 1 dollar 10 cents, and might have informed his clients of that fact. It is incumbent on him to prove that he did inform them; and there is no such proof. The inference is, that when he got them to sell their part for 75 cents, he had never told them that he had sold his for 1 dollar and 10 cents; and that the sale would never have been made, if that information had been given. It is then very clear that Segar has abused his trust; and upon the very principles laid down in the case which his counsel relies on, he can derive no benefit from his purchase. But even if Segar had taken no advantage of the confidence reposed in him, had done no injury to the party who trusted him, 226 it is enough that \*he had an opportunity of taking such advantage and doing such injury. The ground taken by lord Wynford (formerly chief justice Best) in *Rothschild v. Brookman*, 5 Bligh N. S. 190, is, that mr. Rothschild had an opportunity, from the nature of his employment and the manner in which he conducted himself, of taking advantage of the person with whom he was dealing, if he was disposed to take that advantage; and though lord Wynford was willing to say that he did not believe mr. Rothschild to be capable of doing that, yet, he said, the court must deal with him as it would with any other individual, and say that he ought not to have been concerned in such transactions, under such circumstances.

PER CURIAM, Decree affirmed.

227 \*Mason v. Nelson.

May, 1840, Richmond.

(Absent PARKER, J.)

**Bonds—Judgment—Relief Where Obtained by Surprise\***

—Case at Bar.—A. & B. execute their joint bond for 300 dollars to C. & D. who endorse that the whole amount is to be paid to C. and to him it is accordingly paid by A. who takes his receipt therefor, but does not get in the bond. A. individually executes another bond to C. for 168 dollars. A writ of *capias ad respondendum* in debt on bond 200 dollars, being sued out in the names of C. & D. against A. (without mentioning his co-obligor B. who is then dead) is served upon A. who suffers judgment in the action to pass against him by default. Afterwards a suit in equity, for relief against the judgment, is brought by A. against C. and a third person, M. to whom the bond for 200 dollars had been transferred, and for whose benefit the action had been prosecuted: in which suit A. shews that his payment of that bond to C. was made without notice of its transfer to M.; alleges that C. at the time of such payment, promised to deliver up or destroy the bond; and, for failing to make defence at law, assigns the excuse,

\**Chancery Practice—Fraud—Surprise.*—The principal case is cited in *Holland v. Trotter*, 23 Gratt. 130, 141, and *foot-note*; *foot-note* to *Byrne v. Edmonds*, 23 Gratt. 200; *foot-note* to *Parrill v. McKinley*, 9 Gratt. 1; *Ferrell v. Allen*, 5 W. Va. 45; *Knapp v. Snyder*, 15 W. Va. 441.

that he was led by the circumstances of the case to believe, and did believe until after the judgment, that the action was founded on the bond for 168 dollars, which was justly due. On appeal by M. from decree perpetuating injunction to the judgment, *HELD* (dissentiente BROOKE, J.), the case made by the appellee entitles him to relief in equity; but M. will be entitled to receive the amount of the bond for 168 dollars, and the injunction must be dissolved as to that amount and the costs of the action at law (but without damages), unless the appellee shall establish that the said bond has been paid by him to C. before notice of M.'s interest in the transaction, or assigned by C. to some third person having title superior to that of M.

In the circuit superior court of Orange, at October rules 1832, James Nelson junior filed a bill in equity against Landon Lindsay and Daniel Mason, setting forth, that some time in —, he executed to Lindsay a bond for —: that afterwards, jointly with W.

L. Hume, he executed to Lindsay 228 another bond, for —: \*that on the —, he paid to Lindsay the full amount of this last bond, and took his receipt for the same: that shortly thereafter he was served with a writ, in the name of said Lindsay, for debt: that, supposing the action to be founded on his individual bond to Lindsay, he made no defence, and a judgment was obtained against him: that he has since found that the judgment was for the amount of the paid bond, which has been assigned to Mason, though the plaintiff, at the time of the payment, had no notice of that assignment: and that, until after the judgment was recovered, the plaintiff did not know that the suit was in the superior court, but supposed it to be in the county court. Wherefore he prayed an injunction to restrain the defendants from proceeding on the judgment.

An injunction was granted according to the prayer of the bill.

On behalf of the defendants respectively, demurrers were filed to the bill, as not shewing any title of the plaintiff to relief.

In this state of the cause, the plaintiff, by leave of the court, filed an amended bill, setting forth his case somewhat differently, and more in detail. This bill stated, that on the — day of —, the plaintiff executed to Landon Lindsay and Lewis Lindsay jointly, or to Landon Lindsay individually, a bond for a debt due from him individually. That on the 21st of January 1828, one W. L. Hume (since deceased) and the plaintiff, who had been partners in business, executed to Landon and Lewis Lindsay their joint obligation for 200 dollars, payable on the 25th of December ensuing; on the back of which an endorsement was made in these words—"The whole amount of the within is to be paid to Landon Lindsay, on account of the extra improvements which he put at the springs after the partnership was dissolved. March 1, 1828." (Signed)

"L. & L. Lindsay." That the plaintiff afterwards paid to \*Landon Lindsay the full amount of the last mentioned bond, and took his receipt for the same. That at the time of the payment, Lindsay said he had not the bond with him, but promised to deliver it up to the plain-

tify, or destroy it. That, instead of complying with this promise, it since appears he transferred the bond to the defendant Mason. That a suit was instituted in the circuit court of Orange, in the names of Landon Lindsay and Lewis Lindsay, upon the bond which had been paid; and when the writ, which was against "James Nelson junior," and not against James Nelson junior as surviving obligor of W. L. Hume and James Nelson junior, was served upon this complainant, he supposed that the suit was brought upon the bond given for his individual debt; under which impression, and knowing that debt to be justly due, he made no defence to the suit, but suffered judgment to pass by default. That he had no notice of the transfer of the bond to Mason, at the time of paying the amount thereof to Lindsay; nor did he know or suspect, until after the judgment was obtained, that the bond so paid had been transferred, or had not been destroyed, or that it was the subject of the action.

The bond for 200 dollars with the endorsement thereon, the receipt for the amount of that bond, and the writ of capias ad respondendum, referred to in the amended bill, were exhibited therewith. The receipt bears date the 1st of November 1831, and the signature was proved to be the handwriting of Landon Lindsay. The individual bond of the complainant, also referred to in the amended bill, was produced in evidence. It bears even date with the receipt for the amount of the other bond, namely, the 1st of November 1831, and is executed to Landon Lindsay individually, for 163 dollars 71 cents, payable on demand.

To the amended bill, neither answer nor demurrer was put in by either of the

230 defendants: and it appearing \*that Landon Lindsay was not an inhabitant of the commonwealth, an order of publication was entered and executed against him. As to Lindsay, both the bill and amended bill, and as to Mason, the amended bill, were taken pro confesso.

W. S. Frazer, a witness examined in the cause, deposed, that on the 2d of January 1832, the deponent, as deputy sheriff of Orange county, served a writ upon the complainant Nelson, at the suit of Landon and Lewis Lindsay, which suit was brought to recover the sum of 200 dollars. This was the only writ he ever executed upon Nelson. Nelson expressed some surprise at the amount, and told deponent that he had executed his bond to Landon Lindsay, but for a less sum than 200 dollars, somewhere about 160 or 170 dollars, and he supposed that was the bond on which the suit was brought, as it was the only debt he owed Lindsay; but, he said, he might be mistaken in the amount. Deponent thinks he did not shew the writ to Nelson, but only informed him that he had a writ against him for the amount of 200 dollars.

The deposition of Mann A. Page, another witness examined in the cause, is in the following terms: "The deponent, being sworn, deposes and saith, that he was employed by James Nelson senior to prosecute a suit upon an injunction bond, in his name as executor of Henry Wood, against Landon Lindsay and Launcelot Lindsay; that he obtained

judgment, and by direction of Richard Richards agent for James Nelson senior, who employed him to bring the suit, he allowed said bond as a credit to the execution in the name of Wood's executor against Lindsay, which this deponent did, and said bond is now in his possession; which bond is in the following words and figures, to wit:" (Here the complainant's individual bond to Landon Lindsay for 163 dollars 71 cents was copied.)

231 \*The cause coming on to be heard upon the bill, amended bill, demurrers to the bill, exhibits and depositions, the court overruled the demurrers, and directed an issue to be made up, and tried by a jury at its own bar, to ascertain whether or no the plaintiff did pay to Landon Lindsay the amount of the bond for 200 dollars, before notice of the assignment thereof by Lindsay to Mason. A jury being accordingly impaneled at a subsequent term, found that the plaintiff did make such payment, before notice of such assignment.

The cause was finally heard the 2d of October 1835, on the papers formerly read and the verdict of the jury: on consideration whereof the court decreed that the injunction awarded the plaintiff be made perpetual, and that the defendants pay him his costs of this suit.

On the petition of Mason, an appeal was allowed from the decree.

Patton for the appellant: there was no counsel for the appellee.

TUCKER, P., and CABELL and STANARD, J., concurred in the following entry: BROOKE, J., dissented.

"The court is of opinion that the case made by the bill, and sustained by the proofs, entitled the appellee to relief in equity. But the measure of that relief depended upon the state of facts in regard to the bond for 163 dollars 71 cents, which ought to have been ascertained by proper proceedings before final action upon the case. The appellee in his bill admits, that at the time of the institution of the action at law, that debt was justly due, and supposing that to be the subject of the suit, he designed no defence to it. Although therefore the 200 dollar bond had been paid, Nelson still owed Landon Lindsay 163 dollars 71 cents, to which Mason was equitably entitled. And unless Nelson had paid that sum to Landon

Lindsay before notice of Mason's 232 interest \*in the transaction, or unless the bond had been assigned by Lindsay to some third person without notice of Mason's rights, he must still be liable to Mason for that amount. By the pleadings and proofs, it neither appears that the bond for 163 dollars 71 cents has been paid by Nelson, nor that it is not still in Lindsay's hands. The confused and almost unintelligible deposition of Page would seem to indicate, indeed, that Lindsay had disposed of the bond; but when or how, does not appear. In this state of the case, the court is of opinion that it was erroneous to perpetuate the injunction as to the whole amount of the judgment, since, upon the pleadings as they now stand, Mason would appear to be entitled to this 163 dollars 71 cents, as Nelson states it was unpaid when suit was brought, and neither alleges subsequent

payment, nor assignment by Lindsay to a third person. The court is therefore of opinion that the said decree is erroneous. Therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee do pay unto the appellant his costs by him expended in the prosecution of his appeal. And it is ordered that the cause be remanded to the circuit superior court, with instructions to dissolve the injunction as to the sum of 163 dollars 71 cents, with interest thereon at the rate of six per centum per annum from the 1st day of November 1831 till paid, and the costs of the action at law, without damages, unless the appellee, by proper proceedings, shall establish to the satisfaction of the court that he hath paid the amount of the said bond before notice of Mason's interest in the transaction, or that the bond hath been assigned by Lindsay to some third person, who hath title to the same superior to the equitable right of the said Mason."

### 233 \*Fairfax's Adm'r v. Lewis.

May, 1840, Richmond.

(Absent BROOKE and PARKER, J.)

**Pleading—Demurrer to Evidence—When Proper to Set Aside—Case at Bar.**—In covenant, issue being joined on the plea of covenants performed, and a demurrer to the evidence being filed by the plaintiff, judgment thereon is given for the defendant, which is reversed by this court, on the ground that the evidence does not shew performance by the defendant, though the facts shewn, if properly pleaded, may amount to a substantial defence to the action: and this court proceeds to enter judgment that the plaintiff recover his damages sustained by occasion of the breach assigned in the declaration, and remands the cause for a writ of enquiry of those damages to be executed: **Held**, notwithstanding such judgment of this court, it was competent, and in this case it was proper, for the court below to set aside the demurrer to evidence, and allow the defendant to file additional pleas.

**Same—Case at Bar.**—By agreement under seal between three parties, A. B. and C., A. assumes to pay B. 8333 $\frac{1}{3}$  dollars in land, at two dollars per acre, out of a tract which T. L. was bound to convey to him, and warrants the land to be clear of

all claims for taxes: B. binds himself to procure a proper conveyance of the said quantity of the tract to C. from T. L.: and A. engages to procure from T. L. a conveyance of the whole tract to C. To declaration by C. against B. assigning breach of B.'s covenant aforesaid, defendant pleads, that the plaintiff took on himself to procure, and did procure from A. an order on T. L. for a conveyance of the whole tract to the plaintiff, under which order the plaintiff procured a conveyance to himself to be made and delivered by T. L. of the whole tract: plaintiff replies, that T. L.'s wife was living at the time of the said conveyance, and she survived him, and never relinquished to the plaintiff her dower interest in the land, nor did T. L. ever execute to the plaintiff any deed containing any covenant that the land was free from all claims for taxes, nor did the plaintiff ever accept from T. L. any conveyance of the land in satisfaction of defendant's covenant: on general demurrer to the replication, **Held** (dissentiente TUCKER, P.) the plea is sufficient, and the replication naught.

This is the continuation of the same controversy which was before this court in 234 November 1823; reported \*2 Rand. 20.

The case, so far as material in reference to the subsequent proceedings, was thus—

On the 26th of April 1804, Philip Fitzhugh, Joseph Lewis junior and Ferdinando Fairfax entered into an agreement, by which Fitzhugh purchased of Lewis a tract of land in Loudoun county, called Clifton, and after stipulating for the payment of a part of the consideration in other ways, assumed to pay "the balance, of 8333 $\frac{1}{3}$  dollars, out of a tract of about 19200 acres of land upon Bacon creek of Green river, Kentucky, which he the said Fitzhugh holds the obligation of Thomas Lang to convey in due form, when required by the said Philip Fitzhugh, and which land the said Fitzhugh hereby warrants to be clear of all claims for taxes or public dues; rating said land at two dollars per acre, on an average." Then Lewis bound himself "to procure a proper conveyance of the said part of the said Green river land, to the amount of 8333 $\frac{1}{3}$  dollars at two dollars per acre as aforesaid, to the said Fairfax from the said Thomas Lang;" for which Lewis agreed to receive and Fairfax to make payment, in the manner particularly specified in the articles. "And should the above agreement take effect, the said Fitzhugh engages to procure from the said Thomas Lang a conveyance of the whole of said Green river tract of land to the said Fairfax, according to said Lang's obligation to convey the same; and to receive in payment" certain lands particularly described in the articles. It was further agreed between the parties, that the contract should take immediate effect when Fitzhugh should determine to take the Clifton estate, he having the option to accept or refuse the same upon actual inspection. The agreement was signed and sealed by Fitzhugh, Lewis and Fairfax: and a writing thereto subjoined under the hand and seal of Fitzhugh, bearing date the 3d of May 1804, stated, that after viewing the Clifton estate, he thereby ratified the contract.

235 \*Upon this agreement, Fairfax brought an action of covenant against Lewis, in the late superior court of law for Loudoun county, assigning the breach, that

\***Pleading—Special Demurrer—Matter of Form.**—In *Norfolk & W. R. Co. v. Ampey*, 93 Va. 122, 36 S. E. Rep. 226, it is said the objection for duplicity relates to form only, and does not go to the substance of the pleading: it being an objection to the form not to the substance of the declaration, it could only be availed of, even at common law, with all of its rigid rules of pleading, by special demurrer: the party demurring was required to lay his finger upon the very point, citing 4 Minor's Inst. pt. 2, 939; 5 Rob. Pr. 306; *Fairfax v. Lewis*, 11 Leigh 243; *Ken-naird v. Jones*, 9 Gratt. 189; *Cunningham v. Smith*, 10 Gratt. 257; *Smith v. Lloyd*, 16 Gratt. 310, 318; *Grayson v. Buchanan*, 88 Va. 251, 13 S. E. Rep. 457. See also, citing the principal case, *Hunter v. Snyder*, 11 W. Va. 218; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 587, 2 S. E. Rep. 893; *Burns v. Morrison*, 36 W. Va. 426, 15 S. E. Rep. 68; *foot-note* to *Cunningham v. Smith*, 10 Gratt. 255. See generally, monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364; monographic note on "Demurrers" appended to *Com. v. Jackson*, 2 Va. Cas. 501.

Lewis had altogether failed to procure a proper conveyance of the said part of the Green river land, to the amount of 8333½ dollars at two dollars per acre, to the said Fairfax from the said Thomas Lang, and that the said Thomas Lang had not, at the time of the execution of the agreement aforesaid, or ever after, a good, sure, perfect and indefeasible estate in fee, in and to the said Green river tract of land, whereby he could convey by a proper conveyance to the said Fairfax the aforesaid part of the said tract.

The defendant pleaded a general plea of covenants performed, on which an issue was made up. At the trial, the plaintiff filed a demurrer to the evidence, in which the defendant joined; and the jury was thereupon discharged, with the assent of the parties. Upon the demurrer to evidence, the court gave judgment for the defendant: and to that judgment Fairfax obtained a superseas, pending which he died, and the cause was revived in this court in the name of William Herbert his administrator.

This court being of opinion that the evidence stated in the demurrer was not adapted to the plea of covenants performed, and on that ground holding that it was not sufficient in law to maintain the issue joined on the part of the defendant, reversed the judgment of the superior court, entered judgment that the plaintiff recover against the defendant his damages sustained by occasion of the breach assigned as aforesaid, and remanded the cause with a direction that the said damages should be enquired of by a jury.

After the cause got back to the superior court, the defendant moved the court to set aside the demurrer to evidence, and allow him to file additional pleas; to  
236 \*which motion the plaintiff objected, insisting that the court had no right or power, in that stage of the cause, to set aside the demurrer and allow additional pleas to be filed. Having taken time to consider the motion, the court set aside the demurrer, and allowed the defendant to file four additional pleas tendered by him, which were filed accordingly. To which opinions and proceedings of the court the plaintiff excepted, and his exceptions were made part of the record.

Of the additional pleas thus filed, it is only necessary to notice the first and second. The first (after setting out the agreement upon oyer, and protesting that no demand of performance was ever made by Fairfax on the defendant) averred, that after the contract took effect, Fitzhugh did procure from Lang a conveyance of the whole of the Green river tract of land to the said Fairfax, at his request, according to the terms of the said articles. To this plea the plaintiff filed a general replication, and issue was thereupon made up.

The second additional plea (after oyer of the agreement, and protestation that no demand was made by Ferdinando Fairfax on the defendant to procure a proper conveyance of the said part of the Green river land to the said Ferdinando from the said Thomas Lang) averred, "that he the said Ferdinando took on himself to procure, and did procure from the said Philip Fitzhugh, an order on the said Thomas Lang for a conveyance to be made to him the said Ferdinando of the

whole of the said Green river tract of land, according to the terms of said articles, under which said order the said Ferdinando procured a conveyance to him to be made and delivered by the said Thomas Lang of the whole of the said Green river tract of land, that is to say, on the 30th day of September 1804."

To this plea the plaintiff (protesting that no order was ever given by the said Philip Fitzhugh upon the said Thomas Lang for the conveyance of the said Green  
237 \*river land upon any terms or conditions other than those upon which the said conveyance was stipulated to be made by the articles of covenant) replied, "that the said Thomas Lang, at the time that the said conveyance is alleged by the said defendant to have been made by him the said Thomas Lang to the said Ferdinando Fairfax, that is to say, on the 30th day of September 1804, was a married man, and his wife was then living, and that she survived the said Thomas her husband, and that by the laws of the state of Kentucky, where the said land was situated, she the said wife of the said Thomas Lang would have been entitled to dower in the said land, and that no deed was ever executed by the said Thomas Lang and his wife to the said Ferdinando Fairfax of the said Green river land or any part thereof, in and by which the dower interest of the wife of him the said Thomas Lang was relinquished, nor did the said wife of the said Thomas Lang ever relinquish her dower interest in the said Green river land or any part thereof to him the said Ferdinando, nor did the said Thomas Lang ever make and execute to the said Ferdinando any deed containing any covenant or stipulation that the said land was free from all claims for taxes or public dues, and that he never did accept from the said Thomas Lang any conveyance of the Green river land in satisfaction of the covenant on the part of the defendant, in the said articles contained, whereby the said defendant bound himself to procure from the said Thomas Lang a proper conveyance to the said Ferdinando Fairfax of the said part of the said Green river land."

To this replication the defendant demurred generally, and the plaintiff joined in the demurrer. The court held that the law upon the demurrer was for the defendant, and gave judgment that the plaintiff take nothing by his bill, and that the defendant re-  
238 cover his \*costs about his defence expended: from which judgment the plaintiff appealed to this court.

R. C. Nicholas for appellant.  
Johnson and Leigh for appellee.

STANARD, J. On the first and main question, that involving the enquiry whether or no the former judgment of this court in this case, adjudging the law on the demurrer to evidence in favour of the demurrant, and awarding a writ of enquiry, deprived the court below of the power to allow an amendment of the pleadings, my opinion is that that judgment was not an insuperable impediment to the allowance of such amendment, and that the court below, having the power to allow the amendment of the pleadings, possessed the consequential power to set aside the demurrer to evidence. My opin-



ion is, that as a general proposition, an interlocutory judgment of this court, which, if originally rendered in the court below, would have left that court, at any subsequent term, while the judgment remained interlocutory, at liberty to allow an amendment of the pleadings, would not necessarily preclude the allowance of such amendment: and if I doubted on this question as a general proposition, I should think that it should be the law of this case, seeing that the law on the demurrer to evidence was decided in favour of the demurrant, not on the merits of the defence presented by the evidence, but on its supposed incoherence with the plea,—not because the defence was not good, but because in effect it was not admissible under the plea, as that plea was construed by the court; and that the judge who delivered the prevailing opinion, did so, not doubting that when the case returned to the court below, that court might, on adequate grounds, allow an amendment of the pleadings, if asked for.

239 \*My opinion further is that the power to allow an amendment of the pleadings was rightly exercised in this case.

I am further of opinion that the demurrer to the replication to the second additional plea was rightly sustained.

If that plea was good, then the replication is manifestly bad. The plea, according to the pretensions of the appellee, alleges Fairfax's procurement from Lang of a conveyance of the whole land. If this be true, then Lewis was prevented by Fairfax from performing the covenant to procure a proper conveyance to Fairfax of a part, and is no longer liable to him on the covenant to procure such conveyance. Assuming this to be the construction of the plea, the replication attempts to involve in the issue on that plea, the extrinsic question, whether the deed of conveyance contained a covenant against taxes? (a covenant for which Lewis had not stipulated); and secondly the collateral and irrelevant question, whether the conveyance has been accepted in satisfaction of Lewis's covenant? on which Lewis could not take issue without an entire departure from his plea. Indeed, that the replication was good, has been but faintly maintained. The more serious and doubtful question is, was the plea good on general demurrer? For if it be bad, the demurrer reaches the first error in the pleading, and Fairfax is entitled to judgment though his replication be bad.

After the most anxious consideration, I have come to the conclusion that the plea, especially when coupled with the replication, is good on the general demurrer to the replication.

I assent to the proposition of the appellee's counsel, that when a plea states facts which amount to a valid defence, the omission to state the conclusion of law, shewing *quo modo* the facts operate in bar of the action,

240 does not necessarily render the plea bad on general demurrer. \*If Fairfax procured from Lang a deed passing to him a good title to all the land, Lewis was necessarily discharged from his covenant to procure a proper conveyance from Lang to Fairfax of a part. This, I think, is substantially alleged by the plea; and is admitted

by the replication, except as to the dower right of Mrs. Lang.

The plea alleges that Fairfax procured a conveyance of the whole land from Lang.

The term conveyance is sometimes used to signify the instrument or act by which a title is professed or attempted to be passed; sometimes as the effect produced, by the operation of such act or instrument, on the thing and the title to it. Land is conveyed, only when the title to it passes. A deed for land may be made without passing a title therein. When the plea alleges that Fairfax procured a conveyance of the land from Lang, it in effect affirms that he has procured from Lang a deed passing a title in the land; and in that is implied every thing necessary to produce that effect, and among other things Fairfax's acceptance of the deed. If there was in this respect ambiguity in the plea, that is cured by the replication, which admits the conveyance, but controverts its efficacy in passing the title as to the dower right only. Had the replication stopped there, it might have been a good avoidance of the plea as a full and complete bar, and a general demurrer to it might not have been sustained; but by adding other matter, not responsive to nor in avoidance of the plea, and on which the defendant could not take issue without a departure from it, the replication is vitiated, and is, as I before said, bad on demurrer.

CABELL, J., concurred.

TUCKER, P. It cannot be doubted, since the cases of *Tomlinson v. Blacksmith*, 241 7 T. R. 132, and *Storer v. \*Gordon*, 2 Chitty 27, 18 Eng. C. L. R. 237, that of late years amendments are very liberally permitted where the justice of the case requires it, even, after a verdict has been rendered between the parties. In the former case, the plaintiff was permitted to amend his declaration by increasing the damages laid, according to the truth of the case as found by the jury; and in the latter, the proceedings were set aside, and the defendant was permitted to put in a new plea, the justice of the case appearing to demand it. It would seem then well established that a defendant may, for good cause shewn, even after a verdict against him, be permitted to have that verdict set aside, and to make a new defence upon the merits of the matter in controversy. If this be so, it is not perceived why an equal latitude is not allowable in cases of demurrer to evidence. As judge Roane well observes in *Taliaferro v. Gatewood*, 6 Munf. 320, the power to set aside the proceedings, for the purposes of justice, exists a fortiori in cases of demurrer to evidence, which are under the control and superintendence of the trying court: nor have I ever doubted that while the proceedings are yet in fieri, it is just as much within the legitimate authority of that tribunal to grant a new trial to either party after a demurrer to evidence, as after a general and unconditional verdict of a jury. It is not indeed good cause for such new trial, that the party demurring has discovered that it would have been safer for him to go before the jury (*Green v. Judith &c.*, 5 Rand. 1); for he has made his choice—he has taken his chance, and he must abide it. But if he has been taken by surprise, or has any other cause for his application which would be



held sufficient ground for new trial after general verdict, it would, I apprehend, be sufficient after demurrer. The fact that he has ventured to rest his case upon the law will not exclude him from the privilege of setting aside the demurrer for the purpose of amending, if justice requires it. Of

242 \*late years, parties are not held rigorously to abide by their pleadings. He who demurs, is often permitted to withdraw his demurrer, even after it has been argued and the matter has stood over for judgment, and to plead or reply de novo, in order to let in a trial of the merits. *Tidd's Pract.* 766, (p. 657 of 2d american ed.). And he whose pleadings is demurred to may in like manner waive his joinder in demurrer and ask leave to amend. Now it is not perceived why greater rigour should prevail in relation to demurrers to evidence, where it is obvious that the justice of the case requires them to be set aside.

Taking then the powers of the court to be the same on demurrers to evidence as in other cases, there can be no doubt that it was competent to the court in this case, for good cause shewn, to allow new pleas to be filed, and to set aside the judgment, writ of enquiry, and demurrer, unless that power was taken away by the fact that the judgment here was a judgment of the court of appeals.

Was there good cause shewn? Clearly so. I think, upon the face of the record. The evidence produced and set out in the demurrer, furnished, as this court thought, a good defence, but two out of three judges thought it did not fit the plea. The third judge inclined to think it did. Here then a good defence was excluded, because the pleader erroneously supposed it would be proper under the plea pleaded; in which opinion a most learned judge concurred. What case could more imperatively call for the exercise of the privilege of amendment? None whatever. It is a stronger case than those cited at the bar, and justice would indeed merit reproach, if, when a complete defence appears upon the record, it should not be made available to the party, because his plea is not technically proper, although he prays to be permitted to make it so.

243 \*It only remains, on this branch of the case, to enquire whether the right to set aside the judgment and writ of enquiry, together with the demurrer to evidence, is to be denied because that judgment was rendered by this court? I think not. An inferior court cannot indeed call in question, or controvert, or overrule a judgment of this court; but it may, while the cause is still in fieri, unquestionably set aside an interlocutory judgment of this court, for matter not in conflict with it. Where the judgment is final, indeed, this cannot be, for then there can be nothing further done; but where it is interlocutory, and something remains to be done, the case being within the power of the court below, it is competent for that court, for any cause not impeaching the judgment itself, to set it aside. It is in effect its own judgment, being made so by the provisions of the statute. Of this we have a parallel instance in chancery causes, in which though a jot or tittle of the decree of this court cannot be varied for any matter which was in the record

here, it may yet be reviewed and reversed for new matter, precisely as the decree of the chancellor himself might be. Cases at law indeed have not hitherto occurred, but it does not therefore follow that they ought not to rest upon a like principle. Upon the whole, therefore, I am of opinion that there was no error in setting aside the demurrer, and giving leave to the defendant to file his additional pleas.

This brings us to the consideration of these additional pleas. Only one of them, with the replication to it, requires examination. It is the second plea, which alone seems to have been held good by the court, and upon which a judgment was rendered in bar of the plaintiff's action. That judgment, I think, was erroneous; the plea being, as I conceive, although imperfect and insufficient.

The first objection to it is its uncertainty and duplicity: (though this is only 244 ground for special demurrer). \*I found myself at a loss to determine what was the point on which the defendant rested his defence. The facts set forth in the demurrer to evidence might have suggested any one of three several grounds of defence: 1st. that Fairfax discharged Lewis from the duty of procuring the conveyance, by undertaking to procure it himself; 2. that Lewis was disabled from procuring it, because Fairfax had procured the conveyance of the whole tract; and 3. that Fairfax had actually acquired such a conveyance as he was entitled to by the contract. Now this plea would cover, sustain and justify any one of these defences as well as another, and hence it is double and therefore bad. No one of the defences, indeed, is perfect in itself: but it is not essential to duplicity, that the matters pleaded should be well pleaded; though imperfect, if more than one issuable matter is tendered, the plea is double. *Stephen on Pleading* 1st ed. 271, 2; 5 *Bac. Abr.* 445. As where defendant pleaded justification and a release, without alleging the release to be by deed, yet the plea was held double. So here, the fact that Fairfax took on himself to procure the deed from Lang if properly pleaded, would itself have been a bar, whether he did procure it or not; for if he took upon himself to do it, and discharged Lewis from doing it, he could have no cause of action. Yet if the plaintiff had taken issue on that fact, he would have been told that the gist of the plea was the disabling of Lewis from performance; or that he had himself procured such a conveyance as he was entitled to. From the mode of pleading adopted, the plaintiff is at a loss what the material point is which he ought to traverse; and this is a principal objection to duplicity in pleading. 5 *Bac. Abr.* 444. Whatever he does traverse may be declared to be the wrong point, and the defendant may shift his position as soon as he finds his adversary intends to assail it. Of this we have had an evidence in the argument. Though

245 the defendant's \*counsel deny that the plea is double, yet they differ themselves as to the defence it offers. One considers it a plea that Lewis was excused from performing; the other, a plea that the plaintiff had got his title. The excuse implies that the deed was not made;

while in the other aspect the plea avers that it was made. It is not wonderful that the plaintiff was at a loss to reply, or that he has not replied so as to meet the views of both counsel. His reply goes mainly to the fact of his getting the title he contracted for; and accordingly the replication is assailed for not answering the plea in the other aspect.

I think, however, we may safely take it that the defence which this plea is designed to offer is, that by procuring the conveyance from Lang, Fairfax had put it out of Lewis's power to procure it. This is indeed the only plausible mode of considering the plea: for it could not be good as a plea that the plaintiff had taken upon himself to procure the deed, and had absolved and discharged the defendant from his duty to do it, without an express averment to that effect; nor could it be good as a plea that the plaintiff had got a good title (which the defendant was bound to procure) or a title with which he was satisfied, because one or the other of these facts should have been averred, in order to make the plea good in this aspect. Let us then see what are the essentials to make this a good plea of prevention, and whether prevention is of itself a sufficient answer to the breach assigned in the declaration. I think it is not.

The ground upon which the plea in this aspect rests is, that as, through Fairfax's agency, Lang had parted with the title, Fairfax had rendered it impossible for the defendant to procure a proper conveyance according to his contract. Now as one of the constituents, or rather as the very gist of this defence is, that the deed from

246 Lang to Fairfax passed the title out \*of Lang, so the plea ought to have averred every fact which was essential to make the deed effectual. It was not enough to say that Fairfax had procured a conveyance to him to be made and delivered by Lang, but it should have been also averred that it had been accepted by Fairfax. To say nothing of the defect in the plea in not alleging to whom the conveyance was delivered, it would seem that delivery does not of necessity imply acceptance. Delivery, in one sense, may be made to a stranger for me, or to my agent not authorized to accept; and if I do not accept afterwards, the deed is ineffectual. 4 Cruise's Dig. 11, 30. It is true that the title passes immediately upon the execution and delivery, provided there is subsequent assent on the part of the grantee (*Ibid.*) but otherwise not. Now the essence of the defence here is that Lewis could not procure a conveyance, because the title was in the plaintiff by the operation of Lang's deed. To give it that effect, it must have been accepted by Fairfax. The acceptance was rightly regarded by all the judges on the former appeal as an essential fact in the defence upon this point. In considering the demurrer to evidence, judge Green thought the fact of acceptance sufficiently proved; but the question now is, not whether the defendant may not be able to prove the fact, but whether, in making out his defence by plea, he should not have averred it. I am of opinion that he should, and that the omission is a defect in substance, which renders the plea bad upon general demurrer.

Again, it was not enough to aver that a

deed had been made by Lang, but the plea should have alleged the execution of a proper conveyance; that is (as judge Green very properly interprets the contract) of a conveyance of a good title. The covenant, he says, "was substantially a covenant to procure a good title; for if Lang had no title, his deed could pass nothing, and could not therefore be called a conveyance. And in

247 \*like manner, if his title was in any degree imperfect or incumbered, his conveyance would be to that degree imperfect and unavailing." 2 Rand. 38. And I will add, if the conveyance itself was imperfect; if it fell short of that which Lewis was bound to procure; if there was any thing undone which he ought to have done, and from doing which he has not been disabled by the plaintiff's act, he has broken the covenant, and is liable to damages commensurate with the breach. In order therefore to make out this defence, his plea should have averred that Lang had made a proper conveyance, that is, a conveyance of a good title. If his conveyance does not pass a good title, it is still Lewis's duty to procure him to make such conveyance. If he has no title, it has not been Fairfax's act that has prevented Lewis's compliance. If he has an imperfect title, and there is some outstanding title in another, the conveyance of the imperfect title by Lang to Fairfax can be no barrier to Lewis's procuring Lang to acquire and convey the outstanding title. And lastly, if the conveyance be an improper conveyance; if it be ineffectual to convey such right as Lang had; if it be ineffectual to bar the dower of his wife, there is still something undone which Lewis under his covenant is required to do, and which he is not prevented from doing by the imperfect or defective conveyance. What, for instance, hinders his procuring a release of the widow's dower, and extinguishing that claim which he was by contract bound to see extinguished? What hindered his compelling Lang in his lifetime to remedy the omission of the general warranty in the deed, either by the surrender of the old, and the execution of a new deed with proper covenants, or by some other equivalent means? Unless therefore the conveyance was of a good title, there was still something undone which Lewis might yet have done, and to which the deed from

Lang to Fairfax could form no barrier. 248 Hence the necessity \*of averring the deed to have been a proper conveyance, which would exclude at once every inference that something remained to be done, beyond execution of an imperfect and ineffectual deed.

It may be said, indeed, that Fairfax's conduct may have absolved Lewis, because he took the matter on himself. Very possibly: but that would not prove that he had a right to make this defence, but only that he might perhaps successfully have made another.

The plea, however, is further defective in not answering the whole breach. The breach is not only that Lewis had failed to procure a proper conveyance from Lang, but also that Lang had not good title whereby he could convey. This was within the covenant, if, as judge Green says, and as I think, it was substantially a covenant to procure a good title. Now to this allegation there is

no reply. It stands unanswered by the plea, and is therefore admitted. Consequently, as Lang had no title, his conveyance operated nothing, (as judge Green has very properly decided,) and it cannot therefore have prevented the performance of his contract by Lewis.

We come now to the replication. Admitting the plea to be good, does not the replication offer a good avoidance in substance, which will be sufficient on general demurrer? Whether the replication be or be not double, is unimportant, as the defendant did not demur specially. But in truth he was bound to reply double, as the plea was double; for where that is the case, if the party does not demur for doublet, he is obliged to answer both parts. 1 Ventr. 272; 5 Bac. Abr. 445.

The question, however, is whether this replication denies or avoids the matter of the plea, considered in either aspect. Divested of technicality, the defence of the plea is twofold: 1. that the title having been procured from Lang by Fairfax. Lewis was disabled from compliance; 2. that Fairfax had such a conveyance as

249 \*he was entitled to. To these allegations it is answered, that Lang was a married man, and that the widow's dower was not relinquished; and moreover, that Fairfax never had accepted any conveyance of the Green river land in satisfaction (that is, as I understand it, in compliance with, or in fulfilment) of the defendant's covenant to procure a proper conveyance from Lang. Now this I take to be a full answer to the whole plea. It negatives the fact that the title was no longer in Lang, by denying that the deed was ever accepted; and it further negatives the inference that Lewis was prevented from complying with his covenant in all things by Fairfax's act, since it shews that there was an unconveyed right of dower, which Lewis was bound to procure to be relinquished, and which he might have procured to be relinquished if he had chosen to do so. So much for the first aspect of the plea. Then, as to the second, the allegation of the outstanding right of dower completely negatives the assertion that the plaintiff had got such a deed as he was entitled to. It is said, indeed, that the replication does not aver that the widow is still living. To this, several replies present themselves. First, it was unimportant; for though she be now dead, that does not excuse the defendant from failure to procure her relinquishment, that failure having been a breach for which the plaintiff was entitled at least to nominal damages. Secondly, when a party is shewn to be living at one time, the continuance of life is presumed until the contrary is proved. The death subsequently, is a fact that must come out from the other side, if it will avail any thing. For if the proof of the death of any person known to be once living is incumbent on the party who relies on the death (Starkie on Ev. part 4. p. 457; Wilson v. Hodges, 2 East 312), it would seem to follow that where the plaintiff alleges that the person was living on a given day, if the defendant

250 \*relies upon his subsequent death, it is incumbent on him to plead it. Upon a full view of the whole matter, I think that judgment should be given against the defendant upon the second plea, and that

the cause should go back for trial upon the original plea, which was never withdrawn, and upon the first additional plea, on which there is an issue made up, and which seems to me to offer a fair defence and to bring the merits fairly forward for trial. It is very clear in this case that the plaintiff contracted for a good title, and gave a valuable property for that which he expected to get in return. It is very probable he has been overreached, and that what he purchased may be worth but little after he gets it, as he seems to have attempted to prove that the land was not worth the taxes. Be this as it may, he is entitled to have what he contracted for, and the court should endeavour to see the pleadings so moulded as that justice shall be done to both parties. Hitherto this desirable object seems not to have been attained.

I am of opinion to reverse the judgment. Judgment affirmed.\*

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\*Vaughn &amp; Co. v. Garland.

July, 1840. Lewisburg.

(Absent BROOKE and PARKER, J.)

**Pleading—Interrogatories—Case Approved—**A plaintiff in an action at law, wishing a discovery from the defendant, files written interrogatories under the statute, to which answers are given. At the trial, the defendant offers to read to the jury, as evidence, the interrogatories and answers, to which the plaintiff objects. Nevertheless the circuit court permits the same to be read, and a verdict and judgment are rendered for the defendant. The court of appeals, approving the decision in *M'Farland v. Hunter*, 8 Leigh 499, reverses the judgment of the circuit court, and awards a new trial, with direction that the answers to the interrogatories are not to be read, unless introduced on the part of the plaintiff.

In an action of assumpsit in the circuit court of Fayette, between Clement Vaughn & Co. plaintiffs and William V. Garland defendant, the defendant having pleaded the general issue, the plaintiffs, on their motion, had leave to file written interrogatories to the defendant. At the trial, the defendant offered to read to the jury, as evidence, the interrogatories and the answers thereto, and the plaintiffs objected to the reading of the same. But the court overruled the objection, and permitted the said interrogatories and answers to be read by the defendant. To which the plaintiffs excepted.

A verdict being found for the defendant, and judgment rendered thereupon, on the petition of the plaintiffs a supersedeas was awarded.

Price for the plaintiffs.

Wethered for the defendant.

TUCKER, P. This case presents essen-

\*BROOKE and PARKER, J., heard the argument of the case, though they were not present at the decision: and by a note furnished to the reporter by the president, it appears, that PARKER concurred with the three judges who were present at the decision, and BROOKE dissented from them, as to the propriety of setting aside the demurrer to evidence and allowing additional pleas to be filed; and that BROOKE concurred with STANARD and CABELL, J., as to the sufficiency of the second additional plea, and the insufficiency of the replication, while PARKER expressed no opinion on those points.—Note in Original Edition.

tially the question decided in *M'Farland v. Hunter*, 8 Leigh 489. \*In that case, it is true, the question raised by the bill of exceptions was not as to the admissibility of the interrogatories and of the answers to them, but as to their conclusiveness. This court however went into the question whether it was competent to the respondent to the interrogatories to introduce them, in invitum, as evidence in his favour. After two arguments, and taking twelve months to consider, a court of three decided unanimously in the negative. I have carefully reexamined the opinions in that case, and am fully satisfied with the decision. The result must therefore be a reversal of the judgment, and the award of a new trial, on which the answers of the defendant to the interrogatories filed in the cause are not to be read, unless introduced on the part of the plaintiffs.

PER CURIAM, Judgment reversed and new trial awarded.

# 253 \*M'Clintic v. Lockridge.

July, 1840, Lewisburg.

(Absent BROOKS and PARKER, J.)

**Escapes—When Escape Warrant Does Not Lie—Statute.**—The statute, 1 Rev. Code, ch. 136, § 1, which, "for the more effectual retaking and securing persons who escape out of prison," enacts that "if any person committed, rendered or charged in custody, in execution or upon mesne process, to any county or corporation prison or to the jail of any district, shall thence escape," a justice of the peace may issue an escape warrant, does not authorize such warrant in the case of a person who escapes out of the custody of a sheriff, before being committed to prison; and if a person be taken and detained in custody under an escape warrant which shews on its face that the escape was not from any prison, but merely from the custody of the sheriff, he may be discharged by writ of habeas corpus.

At a circuit court held for Rockingham county on the 16th of May 1835, Robert Lockridge was brought before the court by the jailor of Augusta county, in obedience to a writ of habeas corpus issued for the purpose, and the said jailor made a return on the writ, stating that Lockridge was a prisoner in his custody by virtue of a certain escape warrant, which he exhibited. This warrant was issued on the 23d of April 1833, by a justice of the peace for Bath county, and recited that complaint had that day been made to the said justice, upon oath, by Moses M'Clintic, deputy sheriff for said county, that Robert Lockridge, who was charged in execution in the custody of said deputy sheriff (in certain cases specified in the warrant) did, on the 15th day of April 1833, "escape out of the custody of the said sheriff." On the warrant was an endorsement of the officer who executed the same, shewing that the same was executed, and Lockridge delivered to the jailor of Augusta county, on the 12th of October 1834.

254 \*The circuit court, being of opinion that Lockridge was illegally detained in custody, ordered that he be discharged. Whereupon M'Clintic, the deputy sheriff from whose custody he had escaped, petitioned for a writ of error; which was awarded.

The cause was argued here by Johnson for the plaintiff in error, and Stuart for the defendant in error. The warrant being issued under the statute 1 Rev. Code, ch. 136, § 1,\* p. 548, the question turned upon the construction of that statute.

Johnson referred to and examined the language of the original statute of 1748, § 12; 5 Hen. Stat. at large, p. 520,—of the statute 1 Rev. Code, ch. 134, § 31, p. 536, for the relief of insolvent debtors in execution, and of the statute 1 Rev. Code, ch. 165, p. 595, concerning prisonbreakers; and argued, that upon the just construction of the statute in question, whether with reference to its terms or its policy, a party lawfully in custody on mesne or final process was to be deemed a prisoner and in prison, as well before as after commitment to the walls of the jail. He cited *Stamf. P. C.* 30; 2 *Inst.*

589; 1 *Hale's P. C.* ch. 54, p. 607, 8, 9; 255 *Dyer* \*99a, 2 *Bac. Abr.* *Escape* in civil cases; *D. 3, H.* p. 524, 528. And with this construction, he said, the practice of the country in relation to escape warrants accorded. *Davis's Crim. Law* 625, 6.

Stuart cited 5 *Hen. Stat.* at large, p. 519, 20, § 11, 12; 2 *Tidd's Pract.* 1072, (2d amer. from 8th London ed.); *Hincheliffe v. Payne*, 1 *Str.* 99; *Fawkes v. Davison*, 8 *Leigh* 554; *Coleman adm'r &c. of Wernick v. M'Murdo*, 5 *Rand.* 51.

STANARD, J. The return in this cause to the writ of habeas corpus ascertains that the defendant in error was detained in the custody of the jailor of Augusta by virtue of an escape warrant, issued by a magistrate of Bath county, on the oath of the plaintiff in error, the deputy sheriff of that county, that the said defendant, who was charged in execution in the custody of the said deputy at the suit of sundry persons named in the warrant, had escaped out of the custody of the said deputy; and that he was not detained for any other cause. The legality of the detainer depends on the validity of the escape warrant; and that depends on the authority of the magistrate to issue it for the cause specified therein. That cause is the escape of the party out of the custody of the deputy sheriff of Bath, in which custody he was charged in execution at the suit of sundry persons. It is not denied (and if it were, it is perfectly clear) that according to the just interpretation of the warrant, the custody from which the alleged escape was made was

\*"For the more effectual retaking and securing persons who escape out of prison. Be it enacted, that if any person committed, rendered, or charged in custody, in execution or upon mesne process, to any county or corporation prison, or to the jail of any district, shall thence escape, it shall and may be lawful for any justice of the peace in the county or corporation where such prisoner was in custody, upon oath of such escape before him made by the sheriff, undersheriff, serjeant, jailor, or other credible person, to grant unto any one demanding the same, one or more warrants under his hand and seal, directed to all sheriffs, mayors, serjeants bailiffs and constables within this commonwealth, reciting the cause of such prisoner's commitment, and time of his or her escape, and commanding them, and every of them, in their respective counties, cities, towns and precincts, to seize and retake such prisoner so escaped or going at large."—Note in Original Edition.

that resulting from arrest by the officer, not that of commitment to and confinement within the walls of the prison of the county. The argument, therefore, has turned mainly on the question whether an escape warrant can issue against one who escapes from the arresting officer before he has been conducted to jail; and the solution of this question depends on the construction of the act of assembly concerning escape warrants, 1 Rev. Code, ch. 136, § 1, p. 548.

256 \*I assent to the proposition of the counsel of the plaintiff in error, that the statute ought to be fairly construed according to the intendment of the legislature, and that a literal construction of its awkward phraseology ought not to be adopted in disregard of its spirit and intent. Was it the intent of the act to authorize this warrant for an escape from the custody produced by the arrest only, though the party arrested had never been conducted or committed to, or confined in, the prison of the county, corporation or district? A negative answer to this question is, I think, justified by every principle of sound construction.

The act is manifestly taken from the statute of 1 Anne, st. 2, ch. 6, § 1, and all the awkwardness of its phraseology is imputable to the too literal adherence to that statute, without due attention to or allowance for the differences between the prisons and the keepers thereof to which that statute had reference, and the prisons and keepers thereof in this state. That statute was intended to provide for escapes from prisons not kept by the arresting officers, but by others, whose lawful custody must in every case commence within the prison, and be evidenced by the actual tradition of the person of the prisoner from the arresting officer to the keeper, or by some order of court. It industriously avoids to provide the remedy of the warrant for an escape from the sheriff or the arresting officer. This statute, the parent of the act of assembly, serves to ascertain its true lineaments, when rendered doubtful or obscure by ambiguous or awkward language, and is itself sufficient to limit the application of the act to escapes from the prison house of the county, corporation or district, unless the act explicitly had a wider scope. The argument of the plaintiff in error imputes to the legislature the intention of subjecting to the remedy of the escape warrant all persons escaping from the custody produced by an arrest on

257 mesne or final process. If \*that had been the intention, is it allowable to suppose that the legislature would have copied so literally a statute that sedulously excluded such escapes from its operation? Had such been the intention, would not the legislature, instead of using language made cumbrous by the purpose of limiting the remedy to escapes from jails, and keepers of jails, who were not arresting officers, to the exclusion of those from arresting officers, have used the plain, simple and unambiguous language that would have sufficed to indicate that intention? Had such been the intention, that act would most probably have been framed thus, or to this effect: "If any person, being lawfully in custody, in execution or on mesne process, whether by arrest, commitment, render,

charge or detainer, shall escape from such custody," &c. Again, the language of the act of assembly cannot, without the violation of just rules of construction, be interpreted to embrace the escape from custody resulting from arrest only. The argument is, that arrest is imprisonment, and the person arrested is a prisoner, and a prisoner is one in prison; and thus the case is made for the literal application of the act. I will not say that a statute speaking of one in prison, or committed to prison, may not, from its context, or from other considerations, be interpreted to comprehend those in legal custody though not within the walls of the building. Imprisonment is certainly predicable of one not within the walls of a prison or the limits of its rules. The question is, whether it is used in that sense in the act. That it is not, I think is manifest. The language of the act is, "If any person committed, rendered, or charged in custody, in execution or upon mesne process, to any county or corporation prison, or to the jail of any district, shall thence escape," &c. Now it is obvious that prison is used in a sense different from mere lawful custody. The party must be

258 committed to prison; he must be in custody before he is committed; \*and yet the argument is that a party in custody is in prison. If he is in prison by the arrest, then the arrest is a commitment to prison, and the legislature is convicted of using this language, taken from an act where it means no such thing, for the purpose of indicating a different meaning; and of doing this to the exclusion of the simple word which would have conveyed the meaning distinctly and free from doubt. That commitment to the prison is indispensable to the predicament in which the party must be in order to be subjected to the warrant, is further evinced by the requirement of the act that the warrant shall recite the cause (not of the arrest—not of the custody, but) of the commitment. In the act, custody and commitment are not treated as equivalents, but as distinct. It does not provide for the case of those that are in custody or committed, but of those in custody and committed; and to make custody equivalent to commitment, would make the act in part supererogatory or senseless.

I am for affirming the judgment, with costs.

CABELL, J., concurred.

TUCKER, P. I am of opinion that this judgment be affirmed. The case appears to me too plain for argument. The attempt, however ingenious, to make the custody of the sheriff a commitment to the county prison or district jail, within the meaning of the act of assembly, cannot prevail. That act was designed to embrace the case of prisoners actually committed to the walls of the jail, and escaping thence, and does not apply to the case of a party arrested, either on mesne or final process, and escaping from the custody of the sheriff before he has been committed.

In England, from whose statute book our act has been mainly taken, this question could never be permitted to be discussed.

For the statute of Anne only provides  
259 \*the escape warrant where the prisoner escapes from the marshal of

the king's bench, or the warden of the Fleet. But these were only jailors. No process was directed to them, none was served by them. The action of the party was commenced, it is true, in the courts of Westminster, but the *capias* was directed to the sheriff of the county, however distant, in which the defendant resided. It was executed by the sheriff, whose duty it was to commit the defendant to his county jail, where he remained, whether on *meane* or final process, until removed by *habeas corpus* into the king's bench prison, or the Fleet. He was thereby delivered over to the warden of the one, or the marshal of the other. It was then only that the statute had any application to the case of his escape. An escape from the marshal or the warden was all that was contemplated. There is not a syllable in the statute that can be tortured to apply to the sheriff, or even his county jail. From the time of the arrest till the prisoner was turned over to the marshal or warden, the only remedy in case of escape was recaption. The sheriff's security in the case of final process was the *posse comitatus*, which he was authorized to summon; and if he did not, he was responsible for the escape. And even on *meane* process, he had a right to call upon the *posse*, though he was not bound to do so. But the sheriff had never the power to sue out an escape warrant, upon the escape of the prisoner from his hands or his jail.

If this be so in England, upon what ground can this court, in violation of the plain words of the act, extend it to the case of escapes from the sheriff before commitment to actual prison? I cannot perceive. The act is made "for the more effectual retaking and securing persons who escape out of prison." It enacts "that if any person committed, rendered, or charged in custody, in execution or upon *meane* process, to any county or corporation prison, or to the jail of

260 any district, shall thence \*escape," &c. Here, throughout, every expression indicates place, instead of custody in its most enlarged acceptation; every phrase distinctly points to the walls of the jail, as in the contemplation of the legislature. What sheriff, what creditor, would have the hardihood to swear that Lockridge had been committed to the county prison of Bath, and that he had escaped thence, and was going at large? I feel well assured that the learned counsel could never have recommended such an oath. Yet it is upon oath of such escape only, that the warrant can issue. I think, therefore, that in this case it was illegal and void.

The argument, that, according to legal phraseology, every confinement under authority of law is an imprisonment, and every man so confined is in prison in contemplation of law, is to some intents most certainly true. But if the word prison, in its most general sense, means any confinement, yet in its more limited and confined, but more usual and familiar sense, it means the building in which prisoners are confined, and is convertible with jail. Thus in the statute concerning prisonbreakers, 1 Rev. Code, ch. 165, p. 595, provision is made for the case of a party "who, being in actual jail, breaketh prison." Could it be contended that a person in the

sheriff's custody, who breaks away from him, breaketh prison? I should think not. Statutes would be snares for the people if they could be so interpreted. In these, it is obvious that the word prison is made use of in its popular, and not in its technical sense, of which it is probable the draughtsman never dreamed.

I have perhaps already said more on this question than it would seem to merit; but I have done so in deference to the veteran and able counsel who has so zealously maintained the proposition I have controverted. It remains but to repeat that I am of opinion to affirm the judgment of the circuit court.

Judgment affirmed.

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**\*Wilson v. Spencer.**

August, 1840, Lewisburg.

(Absent CABELL and PARKER, J.)

**Bonds—Condition to Convey Land—What Is No Discharge of Such Condition.\***—In an action against a surety, on a bond with condition that the principal should convey a tract of land to the plaintiff, the defendant pleaded, that the principal had conveyed the land to B. W. and the defendant, and the plaintiff afterwards agreed with said B. W. and the defendant, that if they would convey to J. S. the said land (subject to a certain deed of trust given by the principal) he the plaintiff would accept of such conveyance as a full discharge of the bond; and the plea averred that the said B. W. and the defendant did afterwards convey to J. S. the said land, and the plaintiff received and accepted the said conveyance as a full discharge of the bond: HELD, the plea is naught.

**Appellate Practice—Rejecting of Evidence by Lower Court.**—Where the court below has rejected evidence offered in support of a plea which it had received, if an appellate court shall regard the plea as naught, it will, on this ground alone, hold that there was no error in rejecting the evidence, without considering the other objections to it.

**Contract to Convey Land—Breach—Measure of Damages.**—Though in general, for the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money he has actually paid, and interest thereon, (Thompson's ex'or v. Guthrie's adm'r, 9 Leigh 101,) yet this rule will not be applied where the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall, after his contract, disable himself to perform it by conveying the land to another, he will be held liable for the value at the time of the breach; and interest may be allowed on such value from that time.

**Bonds—Collateral Condition—Judgment—Immaterial Error.**—In debt on a bond with collateral condition, the jury who try the issues find the same for the plaintiff, and assess his damages, and allow interest thereon; and then judgment is entered for the damages so assessed, with interest and costs.

**\*Bonds—Discharge.**—In *Moore v. Johnson*, 34 W. Va. 679, 12 S. E. Rep. 921, it is said, the old common law was, that a specialty could not be discharged by a parol undertaking, citing *Wilson v. Spencer*, 11 Leigh 278. See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.

**†Chancery Practice—Irregular Proceedings—Correct Result**—See, citing the principal case, *Max Meadows, etc.*, Co. v. McGavock, 98 Va. 416, 36 S. E. Rep. 490. See also, *foot-note* to *Beery v. Homan*, 8 Gratt. 48.

instead of being entered for the penalty of the bond and costs, to be discharged by the damages, interests and costs. **Held**, though the judgment is not entered in proper form, yet the error in the form producing no injury to the defendant, the judgment will not be reversed therefor. **Accord**. *Pate v. Spotts*, 6 Munf. 394.

On the 10th of August 1816, Stephen R. Wilson and John Wilson jun'r, of the 262 county of Wood and state of \*Virginia, executed a joint and several obligation to William Spencer in the sum of 4000 dollars, with a condition in the following words:

"The condition of the above obligation is such, that whereas the above bound Stephen R. Wilson agrees to convey to the said William Spencer, by a good and sufficient deed in fee simple, clear of all incumbrances, all that tract or parcel of land lying and being in the said county of Wood and state aforesaid, situate adjoining and between the lands of Ichabod C. Griffin and Joseph Cook, containing 150 acres more or less, it being the same tract of land heretofore conveyed to the said John Wilson junior by Joseph Spencer, and conveyed by the said John Wilson junior to the said Stephen R. Wilson (reference being had to the said conveyances will more fully and at large appear) with these reservations, to wit: when the said William Spencer delivers to the said Stephen R. Wilson, his heirs or assigns, an article of agreement entered into between the said Stephen R. Wilson and William Smith, formerly of the city of Baltimore but since deceased, which said article of agreement was transferred to Joseph Spencer; and the said William Spencer is to have the said article of agreement transferred to the said Stephen R. Wilson, his heirs or assigns, and the same to be delivered by the said William Spencer, his heirs &c. within 60 days from this date; also two obligations given by the said Stephen R. Wilson to the aforesaid William Smith in the month of November 1803, for the payment of between 11000 and 12000 dollars, to be discharged and be delivered to the said Stephen R. Wilson before the said Stephen R. Wilson makes the aforesaid conveyance: Now if the said Stephen R. Wilson well and truly complies with the aforesaid condition on his part, then this obligation to be void, else to be and remain in full force."

Upon this obligation, Spencer brought an action of debt against John Wilson junior in the circuit court of Harrison. The time of commencing this action did not 263 \*appear by the record, but the declaration was filed at July rules 1832. The declaration demanded the sum of 4000 dollars, described the obligation without setting forth the condition, and alleged the nonpayment of that sum, to the damage of the plaintiff 4000 dollars.

The defendant craved oyer of the writing obligatory and of the condition thereof, and pleaded that the said Stephen R. Wilson had well and truly performed all the conditions of the said writing obligatory.

The plaintiff replied, that after the making and delivery of the writing obligatory and condition, and within sixty days after its date, to wit, on the 10th of September 1816, "the said William caused and procured the said Joseph Spencer to transfer in writ-

ing, to the said Stephen, the article of agreement entered into between the said Stephen and the said William Smith of the city of Baltimore, mentioned in the condition, which said article of agreement he the said William, on the day and year last aforesaid, had ready to deliver to the said Stephen, and from thence hitherto hath been, and still is, ready and willing to deliver the same to the said Stephen, and would have delivered the same to him within the 60 days, but the said Stephen, before the said 10th day of September 1816, departed from his place of residence in Wood county, Virginia, and went out and from the commonwealth of Virginia, and has from thence continually until the present time remained out of this commonwealth, in some distant state or territory of the United States, and by reason of the absence of the said Stephen as aforesaid, he the said William could not deliver the said agreement to the said Stephen within the said 60 days, or at any time since; which said agreement he the said William now brings here into court, ready to be delivered to the said Stephen." The replication further alleged, that after the making and delivery of the said writing obligatory and condition, the said William Smith departed

this life in the city of Baltimore 264 \*in the state of Maryland, having first made his will, wherein Robert Smith was appointed executor, and the said Robert Smith duly qualified as such in the state of Maryland aforesaid; and after he had so qualified, and before the institution of this suit, the said William Spencer caused to be paid to the said Robert Smith, executor as aforesaid, the amount due from the said Stephen to the said William Smith upon the two obligations mentioned in the said condition, and on the 4th of February 1830 the said Robert Smith, executor as aforesaid, delivered the said two obligations to the said William, and by indenture under his hand and seal released and discharged the said Stephen of and from all liability upon the said two obligations; "which indenture of release he the said William here produces to the court. And the said William Spencer saith, he hath discharged the said two obligations in manner aforesaid, and from the said 4th day of February 1830, continually until the present time, hath been ready and willing, and still is ready and willing, to deliver to the said Stephen the two obligations aforesaid, but the said Stephen, by absenting himself from this commonwealth as aforesaid, has prevented the said William from delivering the same to him; which two obligations the said William here brings into court (discharged as aforesaid) ready to be delivered to the said Stephen. And so the said William saith that he has fully performed and fulfilled all and singular the conditions of the said condition, to be by him performed in manner and form aforesaid. Yet the said Stephen hath not yet complied with or performed the condition to be by him performed as aforesaid, but so to do failed and neglected in this, that the said Stephen hath not conveyed to the said William Spencer the tract of land in the said condition mentioned, but so to do hath hitherto wholly failed and neglected."

The defendant rejoined, that the said



Stephen did not depart from and go out of this commonwealth within 60 days after the date of said writing obligatory.

265 \*Afterwards the defendant offered two additional pleas. By one of them he pleaded, that Stephen R. Wilson had, by good and sufficient deed, bargained, sold and conveyed said tract of land, in the condition of the said writing obligatory described, to a certain Benjamin Wilson jun'r and him the said defendant, and the title being so as aforesaid in the said Wilson and said defendant, the plaintiff afterwards, to wit, on the 10th of July 1816, agreed with said defendant and said Benjamin, that if they the said John and Benjamin would convey to a certain Joseph Spencer the said tract of land (subject to a certain deed of trust given by said Stephen R. Wilson to John G. Harness to secure a debt from said Stephen to a certain G. Harness) he the said plaintiff would accept of such conveyance from said Benjamin and John, as a full discharge of the writing obligatory on the part of the said John: and then he averred that the said Benjamin and John did, on the — day of — 1817, by a deed duly executed and delivered, convey to the said Joseph Spencer said tract of land, which conveyance, so as aforesaid made and delivered by said Benjamin and John, the plaintiff then and there received and accepted as a full discharge of and from said obligation.

By the other plea, the defendant pleaded that the plaintiff, after the execution of said writing obligatory, left the commonwealth, having previously thereto deposited said writing obligatory with a certain Joseph Spencer, whom the plaintiff then and there authorized and instructed to receive, from a certain Benjamin Wilson and the defendant, a conveyance to the said Joseph for the said land in the said condition described, as and for a full satisfaction and discharge, on the part of the said John, of all liability for or on account of said writing obligatory: and then he averred that afterwards, to wit, on the — day of — 1817, during the absence of said William as aforesaid, and while said Joseph

266 was \*in possession of said bond, authorized as aforesaid, the said Benjamin and John did, by deed of bargain and sale, duly signed, sealed and delivered, convey to said Joseph said tract of land in the condition of said writing obligatory described, who then and there, in pursuance of the authority so as aforesaid given, and while said bond was so as aforesaid in his possession, accepted and received said deed as and for a full satisfaction and discharge, on the part of said John, of all liability for and on account of said writing obligatory.

To the filing of the second of these pleas the plaintiff objected, but the court overruled the objection; and thereupon both of the pleas being filed, the plaintiff replied generally thereto, and issues were joined.

At the trial, the defendant offered to prove by witnesses, verbal or unwritten authority of Joseph Spencer to receive and accept, on behalf of the plaintiff, a deed to him the said Joseph, in discharge of said covenant so entered into by the defendant; and also offered to read in evidence a writing in the words and figures following:

"Memorandum of agreement between Joseph Spencer of Wood county, Virginia,

and John Wilson jr. and Benjamin Wilson jr. of Harrison county and state aforesaid, witnesseth that the said John and Benjamin agree to convey to the said Joseph all that tract of land which was heretofore conveyed by Stephen R. Wilson to the said John and Benjamin, described situate on the Ohio river and in Wood county, known by the name of the Mill Lots, containing 150 acres, more or less, adjoining lands of Griffin and Cook; subject to a deed of trust given by the said Stephen R. Wilson to John G. Harness, to secure a certain debt due from said Stephen to George Harness: and the said Joseph, on his part, agrees to release the said John from all liability to one William Spencer, who holds a certain title bond conditioned that the said Stephen shall convey the aforesaid land to the said William,

267 \*wherein the said John Wilson jr. is security: though it is expressly understood by the parties, that the said Joseph does not in any wise release the said Stephen from the aforesaid recited bond any further than that he has the title, and still will or wishes to hold the said Stephen liable for the incumbrance aforesaid. In testimony whereof we have hereunto interchangeably set our hands and affixed our seals this 16th day of July 1817.

Joseph Spencer [Seal.]  
J. Wilson jr. [Seal.]"

"Witness, Isaac Morris."

To the introduction of which evidence of witnesses to prove the facts aforesaid, and said memorandum in writing, the plaintiff objected.

The jury found a verdict for the plaintiff, and assessed his damages to 1950 dollars, with legal interest thereon from the 4th day of February 1830 till paid.

The defendant moved the court to set aside the verdict and grant a new trial, for the following reasons: 1. Because there was no proof of the actual consideration paid, and the damages should therefore have been nominal. 2. Because there should have been proof of a demand from the defendant, or notice of a demand to him, before suit brought. 3. Because interest is allowed from the time of the breach, instead of from the institution of the suit. 4. Because interest ought not to have been allowed by the jury.

"The court was of opinion that it was not necessary the actual consideration paid by the plaintiff should be proved by him; and as the consideration was not proved by the defendant, and as the plaintiff under his contract was entitled to the land, he has a right to recover the value thereof at the time when he could have required the conveyance. The court was also of opinion that demand or notice to the defendant was unnecessary.

268 \*The principal, upon whom the specific execution of the contract devolved, was, as appears by the pleadings and the evidence, absent from the commonwealth in parts unknown, at the time when the plaintiff had a right to call for the execution of the contract, and he has continued to be so absent: this constitutes a sufficient excuse for a failure to give notice to the principal. The court was also of opinion that it was proper for the jury in this case to allow



interest, and that the period from which interest was allowed was the true time. The court therefore overruled the motion for a new trial for the above causes. To which opinion of the court the defendant excepted."

The defendant also moved the court for a new trial because the damages found by the jury were excessive. The plaintiff proved by several witnesses that the land in question was in their opinion worth, at the time of the breach laid in the declaration, from 15 to 20 dollars per acre. The defendant proved by one witness, who had resided on the land, that it was worth from 10 to 15 dollars per acre; and also proved that about the same time a tract of land in the same neighbourhood, of equal quality, was sold at a judicial sale, on a credit of six, twelve and eighteen months, for about 7 dollars per acre. The court considered that the jury were fairly warranted by the evidence in the value at which they rated the land, and although it might be of opinion that the valuation of the jury was too high, yet it considered that this constituted no sufficient ground for a new trial. To which opinion the defendant excepted.

The defendant also moved for a new trial on the ground of surprise, and filed in support of the motion the following affidavit: "Spencer v. Wilson. The defendant John Wilson jun'r this day made oath before me, a justice of the peace for said county, that when the case aforesaid was called for trial, he had heard it reported that William

Spencer, the plaintiff in said action, \*had purchased said land in the proceedings mentioned from a man named Harness, who had acquired the same under a deed of trust. Affiant supposed the price at which said land was so as aforesaid purchased would have been known to David B. Spencer, a witness for the plaintiff, and, as affiant believes, his agent in the management of said suit. The said David, besides his attention to said suit for some years past, lives perhaps with—certainly near the plaintiff, and said tract of land. Affiant farther shews that it became material, as he believes, in the course of the trial, to ascertain the price at which the plaintiff had purchased said land of said Harness. To the surprise and astonishment of affiant, said David B. Spencer, when examined as to that point, though he stated he knew his brother had purchased, denied that he knew at what price. And affiant farther shews that on yesterday he learned that the price to be paid by said plaintiff was 1500 dollars, equal to 10 dollars per acre, for said land; that the purchase of the plaintiff from said Harness was made after the alleged breach of the covenant on the part of said Stephen R. Wilson, that is, since February 1830; and that, at the time of the trial, one of the plaintiff's witnesses (Shelton) was on his way to the residence of the said Harness, to pay him a large amount of the purchase money. This information affiant for the first time obtained on yesterday; and he is satisfied, if the truth had been known, and the jury had understood that the plaintiff had, within a few years, purchased the land for 10 dollars per acre, or about that sum, at a time when, as affiant believes, lands have greatly advanced in price in that quarter of the coun-

try, they would never have found a verdict estimating said land at 13 dollars per acre."

The court, being of opinion that the facts stated in this affidavit constituted no sufficient ground for a new trial, overruled the motion; and the defendant excepted to the opinion.

270 \*Or the 25th of May 1835, judgment was rendered for the plaintiff, for 1950 dollars the damages assessed by the jury, with legal interest thereon from the 4th of February 1830 till paid, and the costs.

To this judgment a supersedeas was awarded.

The cause was argued in this court by Johnson for the plaintiff in error, and Wm. A. Harrison and Price for the defendant in error. In the printed statement of the former, the following errors were assigned:

1. No material issue is joined on the plea of conditions performed: the point on which issue is taken being wholly immaterial.

2. The court erred in rejecting the evidence of a parol authority to Joseph Spencer to accept a deed in satisfaction of the obligation on the part of the defendant.

3. The court ought to have awarded a new trial, on account of the error of the jury in fixing the criterion of damages, and the time from which interest was to be allowed.

4. The judgment, under the act of assembly and by the common law, should have been for the penalty, to be discharged by the damages.

5. The plaintiff has averred no damage in the declaration by reason of the breach, and therefore can recover none.

Upon the argument, the counsel for the plaintiff in error waived the first and fifth errors assigned, but insisted on the second, third and fourth.

TUCKER, P. The plaintiff in error having waived, and very properly, the 1st and 5th errors assigned in his statement, the first question to be considered is the propriety of rejecting the parol evidence offered by him in support of his third and fourth plea. And

it has been contended that, in the consideration of this question, \*it is unimportant to consider whether the pleas themselves were good or not. This would indeed have been an argumentum ad hominem in the court below, to which it might plausibly have been said, "You have admitted the pleas as good, and why then should you reject the evidence to sustain them?" But in this court it is otherwise. If the inferior court has admitted an improper plea, notwithstanding the objections of the plaintiff, and has afterwards rejected the evidence in support of it, it has but remedied the first error by the commission of the second; and this court could with no propriety reverse the last act, and thereby reascitate the former error to the plaintiff's prejudice. The true question then is as to the validity of the pleas. Now, both of them appear to me utterly and radically defective. They offer no defence to the action, and if the evidence had been admitted, and a verdict found for the defendant upon these pleas, and there were no other pleadings, judgment must have been rendered against him non obstante veredicto. 1 Chitty's Plead. 634, (7th American from 6th London ed. p. 695,) cited 2 Tucker's Comm. 266.

The action is brought upon a bond with condition to convey a tract of land. The breach assigned is the failure to convey. In answer to this action, these pleas are filed; and as both are very much the same, except in a particular to be hereafter noticed, I shall confine myself in the first place to the first, which would seem the least objectionable.

This plea makes no pretence to the performance of the covenant. It must be taken to be either a plea of accord and satisfaction, or a plea of substitution of another agreement, which has been performed, for that which is sued upon, or as an excuse for non-performance.

As a plea of accord and satisfaction, it is naught throughout. For the accord and satisfaction is set forth as having been agreed on the 10th of July 1816, and

272 \*made and accepted in 1817, and by the assignment of breach it appears that the breach was not until 1830. Thus the accord and satisfaction must have been of the contract, and not of the damages; and no accord and satisfaction of a contract under seal, before breach, can be good without deed. 1 Taunt. 428; Com. Dig. Pleader; 2 V. 8, cited 2 Tucker's Comm. 28. And if it could only have been good by deed, the plea ought to have shewn that it was by deed. Moreover, if it was by deed, the deed ought to have been produced, that the court might see that it was a good and operative release and discharge of the first contract. For where either party pleads a deed under which he either claims or justifies, he must make profert of it to be shewn to the court and his adversary. 1 Chitty's Plead. 397. It must be pleaded and produced, that it may be answered by plea of non est factum, or by demurrer, if its legal operation does not amount to a discharge. These, and possibly other reasons, have concurred in inducing the learned counsel not to insist on the plea, as a plea of accord and satisfaction.

Next, is it good as a plea of substitution of another agreement, which has been performed, for that which is the subject of the action? This is to my mind the true light in which the transaction is to be considered. Let us examine it.

Stephen Wilson had bound himself to convey a tract of land to William Spencer. John Wilson was the surety. Stephen Wilson, instead of conveying to Spencer according to contract, conveys to John Wilson and one Benjamin Wilson, subject to a deed of trust to one Harness, given by Stephen Wilson on this very land. These facts appear by the plea itself. So that, by the defendant's own shewing, Stephen Wilson had disabled himself from performing his contract, by first subjecting the land to an incumbrance, and then conveying it to third persons, in the teeth of his covenant. It

273 is true, this did not \*operate as a breach of that date, since Spencer had not at that time entitled himself to performance, by performing the precedent conditions. The first part of the plea, then, distinctly sets forth that Stephen Wilson had disabled himself to convey the land directly from himself to William Spencer. He was so disabled when the agreement stated in the plea was made. What then was their agreement? It was, in substance, that if John and Benja-

min Wilson would convey the land to Joseph Spencer, subject to Harness's deed of trust, William Spencer would accept such a deed as a full discharge of the title bond. Here then is a distinct allegation of a new and entirely different agreement, which, when performed, was to be a full discharge of the first. It was the agreement to substitute the performance of one thing for another. Now a parol agreement for a substituted contract cannot be pleaded. 1 East 630; 3 T. R. 596, cited 1 Chitty's Plead. 524. This substituted contract, then, to be effectual, must have been under seal; and if under seal, it ought to have been so pleaded. Hence it is clear, that while the facts set forth in the plea shew distinctly the case of a substituted contract; it cannot avail as such, because it does not appear to have been under seal.

It may not be uninteresting or unimportant to observe, however, that other reasons, besides the rules of pleading, rendered it essential to the validity of this agreement, that it should have been under seal. The statute of frauds required it.

What was the state of the case, and the nature of the new contract? It was thus. William Spencer, who was entitled to a conveyance of the land to himself, is represented as agreeing that the land shall be conveyed, not to himself, but to another; namely, to Joseph Spencer. What is the effect, then, of the contract? It is, distinctly, to pass

274 William Spencer's land to Joseph Spencer. \*Could this be valid and binding under the statute of frauds? Could it be in consistency with that statute, to permit William's title to be taken away by mere parol evidence? Assuredly not.

But it is said that although the contract must be written, the authority to make it may be by parol; and that here parol authority was given to Joseph Spencer, to receive the deed to himself, and give the discharge. Why this but makes the matter worse. Though it has been decided that an authority may be by parol, was it ever heard that my parol authority to another man, to get a deed for my land made to himself, was not within the statute? The authority here constitutes the contract. Joseph Spencer has parol authority to get a deed made to himself of William's land, and he has no other evidence of his right thus to have a conveyance to himself of the property of another. If such a case does not require the authority to be in writing, the statute is a nullity: it is sounding brass and a tinkling cymbal.

But this is not all of this extraordinary affair. The allegation is, that instead of getting to himself the conveyance of the 150 acres of land which he had purchased, William Spencer verbally authorized Joseph to have a deed executed to himself, in discharge of the original contract; and this, without the allegation of the consideration of one cent moving from Joseph to William. So that, by parol authority, he is made to part with his estate without value received, to the very individual to whom the alleged authority is given, and who thus combines most singularly, in his own person, the characters of grantee and agent of the grantor.

But admit that we may go into the field of speculation and make a case. Suppose that William had sold to Joseph for value: we

have yet the difficulty, that whereas by the title bond William had a right to a good deed without incumbrances, he agrees by this contract to take the conveyance of the identical tract subject to "incumbrances;—  
 275 subject to a deed of trust, under which, according to the defendant's own affidavit, another person has acquired the property.\* Suppose an agreement is no good accord and satisfaction, unless the previous contract be released. For, as the payment of a less sum is no good satisfaction of a greater, 1 Str. 426; 5 East 230; 4 Mod. 88, (cited 2 Tucker's Comm. 26,) so the conveyance of a tract of land with an incumbrance can be no satisfaction of the obligation to convey the same land without incumbrance. And if such agreement is not good as an accord and satisfaction, without a release, neither can it be good as a substitution for the first agreement, without such a release. Above all, it can in no manner operate as a release, since an authority by parol can confer no power to execute a release, or any instrument which can have the force and effect of one.

The learned counsel, not insensible to these difficulties, has endeavoured to avoid them, by contending that the plea is intended as matter of excuse for nonperformance. It is a sufficient answer to this position to refer to the plea, which appears to have no sort of analogy to the plea of excuse, the forms of which the distinguished jurist and pleader by whom it was drawn would certainly have pursued, had such been his design. See forms in 3 Chitty's Plead. 1003-1009. The plea was obviously designed to shew a discharge, although it wants, it is true, the material requisites to constitute it such. But suppose it pleaded as an excuse: still it does not avoid the objections made to it as a plea of accord. And besides, what sort of excuse is it, for not conveying to me land to which I have a right, to say that he who was bound to convey to me had sold and conveyed to third persons, and that they, without any lawful authority from me, had conveyed  
 276 \*to a fourth? Was it any excuse for not conveying to William Spencer, that Stephen Wilson had conveyed to John and Benjamin Wilson? Or admitting he conveyed to them that they might convey to William Spencer, (which, by the way, is nowhere pretended,) is it any excuse for their not conveying to William, that they had conveyed to Joseph without any lawful authority from William? By no means. And it has been already shewn that a parol authority to Joseph, to have a deed made to himself of William's land, is void under the statute, and confers no authority.

The first special plea then is naught. The second is worse, for on its face it appears that the authority was by parol. Both pleas then being naught, there could be no error in rejecting the evidence in support of them. It is unnecessary, therefore, to enter upon the numerous objections which suggest themselves to the evidence, considered independently of the faults in the pleading. View it as we may, I think it was properly rejected.

We come next to the question as to the cri-

terion of damages. The jury, it is supposed, have assessed the damages according to their estimate of value at the time of the breach; and it is contended that that was erroneous; Thompson's ex'or v. Guthrie's adm'r, 9 Leigh 101. In the decision in that case, I coincided; but it is there distinctly intimated that the rule is not unbending, and that it will yield where, in consequence of fraud on the part of the vendor, its application would be unreasonable. In no case would it be more unreasonable than in one where the vendor, in violation of his contract, has sold or encumbered that property which he had bound himself to convey free of incumbrances. To say that a vendor may evade his contract by a sale to another and become liable to nothing more than the return of the purchase money, is in effect to give to that party the power of rescission whenever a higher price is offered, provided he can

277 make his second \*sale to a purchaser without notice. To avoid the stringency of this objection, the learned counsel admitted that a court of equity would compel the vendor to account for the increased price. And why not a court of law? If Stephen Wilson got the increased value of the land, and would be liable for it in equity, why shall he not be so at law? The true question then is, whether the circumstances of this case would justify the recovery any where? And I think they would. Waiving the objection to the course of the defendant upon the trial, there was enough before the jury to fix a fraud on Stephen Wilson. The defendant's pleas were before them, and they had a right to take as true the allegations of the defendant in his pleadings. In them it is distinctly alleged that Stephen Wilson had sold the land to Benjamin and John. There is no intimation that that conveyance was in trust to convey to the plaintiff; and moreover, Stephen had incumbered the property (as the pleas also shew) with a deed of trust; and though the plaintiff sued for a breach of the contract, there is no deed tendered to him by the pleadings. It seems then that the title was once in Stephen, and that he parted with it; so that the case is not that of a party who has conveyed in good faith that to which his title unexpectedly proves defective, but of one who had a title in him, but, after his contract of sale, has disabled himself to perform, by conveying to another. Such a vendor should pay the value at the time of the breach, upon the principles of Thompson's ex'or v. Guthrie's adm'r.

It is said, however, that the purchase money is the measure of the damages; that the plaintiff was therefore bound to shew what it was; that, in defect of his doing so, his damages should be nominal; and that such should have been the result in this case. The premises and conclusion are alike unfounded. According to the class of cases of which Stout v. Jackson, 2 Rand. 132, is the leading one, the value of the land at 278 the time of \*the contract is established as the true criterion of damages, and this in analogy to the recovery in the warrantia chartæ. Between that recovery and purchase money, there is no analogy. Yet as the value at the date of the contract is regarded as giving the rule, it

\*As the question is as to a new trial, a reference to that paper is proper. Note by the president.—Note in Original Edition

has been held that the agreed price between the parties was the fairest measure of that value. But that is only where there is an agreed price. Suppose there be none: suppose it were a personal service to be performed, such as to go to Europe to negotiate a loan; in such a case, instead of the value of the land being estimated by the service, it is obvious that the value of the service would be best measured by the value of the land. That is most certain, and most susceptible of ascertainment. The value of the land, then, at the date of the contract, is the true criterion in general for estimating the damages; and where there is no agreed price, and the consideration is of a matter collateral and not a sum of money in numero, the value of the land must be estimated upon evidence before the proper tribunal. Such was the case here. There was no agreed price of the land. The consideration consisted of two collateral acts; first, the delivery to Stephen Wilson of a contract between himself and one William Smith; and secondly, the discharge, and delivery to Wilson, of two bonds of his to Smith, amounting to eleven or twelve thousand dollars. Shall we then estimate the value of the land, which is the desideratum, by the testimony of witnesses, and thus directly attain our end; or shall we go round about to work, and ascertain the value of the collateral acts, in order thereby to measure the value of the land? The absurdity of the latter proceeding requires no commentary to expose it. In this case then, as there was no agreed price; as the title bond in the record evinced this, the court was right in saying that it was not necessary the actual consideration paid by the plaintiff should be proved. The plaintiff had only to prove the value

279 \*of the land. He did offer proof of it, referring to the time of the breach, and contended for that as the fair criterion of his damages. The defendant does not appear to have controverted it, but entered into the controversy as to the value at that period. Had he moved to instruct the jury that the date of the purchase was the true period to which to direct their attention, the question would have been fairly presented; the plaintiff would have been called on to shew why the rule should not apply; and if the instruction was refused, the court would have spread its reasons on the record. Instead of this, he joins issue with the plaintiff as to the value in 1830, and offers evidence to reduce the price at that date. And when the jury have fairly taken the medium value, he ask a new trial, because they did not do that which he neither asked them to do, nor asked the court to instruct them to do. And even on this motion for a new trial, he does not have all the evidence spread on the record, but submits himself to the decision of the court, only as to the damages being excessive, and not as to the principle on which they were estimated. The court, therefore, very naturally sets forth only what was proved as to value, without referring at all to the question of principle, now raised by the defendant. Upon the whole, therefore, I do not think him entitled to a reversal, for the refusal to grant a new trial.

Next, as to the interest. I think it was within the power of the jury to allow it, and

moreover that the justice of the case demanded it. It was allowed in the parallel case of *Pate v. Spotts*, 6 Munf. 394, and not objected to.

Lastly, as to the form of the judgment. The case of *Pate v. Spotts* seems to me fully to sustain the judgment here. It only differs from this in being full of irregularities; yet they were all disregarded. The declaration, as here, was on a title bond, and in 280 debt; the \*jury assessed the damages, with interest; and the court gave judgment, not for the penalty of the bond to be discharged by the damages, but for the damages, themselves. This was held an irregularity not injurious to the appellant, and the judgment was affirmed. I think it was rightly so. The judgment was certainly informal; and in a case where further breaches might occur, as in debt on administration bonds, the irregularity would be injurious to the plaintiff but beneficial to the defendant, as the judgment might be a bar to any future action. But in this case, where there can be but one breach, the form is not essential for the preservation of the plaintiff's rights, since the bond is satisfied by this recovery; nor can it be essential for the defendant, as "the remedy has extended to the whole injury, and the action can in no form be repeated."

It is objected, indeed, that if the plaintiff delays his recovery of the judgment, the accruing interest may exceed the penalty. The answer is obvious. The court sees that the damages and interest to the date of the judgment fall far short of the penalty: and as to the interest subsequent to the judgment, the plaintiff might recover that by action of debt upon the judgment, even if the jury had not allowed it. Besides, in the case of *Pate v. Spotts*, the same error (if it be one) was not deemed tenable, even by the able and veteran counsel for the appellant.

I am of opinion to affirm the judgment.  
PER CURIAM, Judgment affirmed.

281 \*Charlton and Others v. Gardner.  
Same v. Kent.

August, 1840, Lewisburg.  
(Absent PARKER, J.)

**Fraudulent Conveyances—Land—Special Verdict—Inferences.**—A father, in consideration of natural love and affection, makes a deed, which is duly recorded, conveying slaves and other property to three infant children, upon the condition understood and reserved, that the slaves are to remain in the donor's possession during his life, and if his wife should survive him, that she shall have the use of one third of the slaves and their increase, during her life. At the time of executing the deed, the father is indebted by two bonds, on which judgments are afterwards obtained, and

\***Fraudulent Conveyances—Fraud.**—See monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

**Sale of Personality—Retention of Possession by Vendor.**—On this question, see the principal case cited in *foot-note* to *Davis v. Turner*, 4 Gratt. 438.

**Special Verdict—Inferences by the Court.**—See, on this question, citing the principal case, *foot-note* to *Purcell v. Wilson*, 4 Gratt. 16; *Layne v. Norris*, 16 Gratt. 242.

the executions returned satisfied. Subsequent to the deed, he becomes appearance bail, and a judgment being obtained against him as such, the execution thereon is levied upon the slaves so conveyed, which are still in his possession, and they are sold by the sheriff. After the father's death, an action of detinue is brought against the purchaser by the widow and children jointly, and another action is brought by the children alone; in each of which cases there is a special verdict finding the facts before mentioned. HELD, 1. the action in which the widow is joined cannot be maintained, but that by the children alone is well brought; 2. the facts found do not constitute fraud per se; 3. so far as the fraud is matter of fact, the jury not having found it, the court cannot infer it.

On the 6th of December 1821, a deed was made purporting to be between John Lynch Charlton and Catharine B. G. his wife, of the county of Montgomery, of the one part, and Pamela Ann Charlton, Emily B. Charlton and James Christopher Lynch Charlton, infants under the age of twenty-one years, of the same county, of the other part, whereby it was witnessed that the said John L. Charlton, for and in consideration of the natural love and affection which he bore to the said Pamela Ann, Emily B. and James C. L. conveyed unto them, and their heirs and assigns forever, one third part \*of a certain tract of land, described in the deed by metes and bounds; also a certain female slave named Esther, aged 27 years, and two female slaves the children of Esther, one named Clarissa, aged 7 years, the other named Kitty, aged 2 years, and the issue of their bodies which might be born thereafter; also a certain male slave named Nelson, aged 9 years; which said slaves were then in the possession of the said John L. Charlton; and also the following property, to wit, three feather beds and the furniture thereto belonging, two chests, one trunk, one table, one candlestand, one cotton wheel, two flax wheels, the following blacksmith tools, to wit, one bellows, one vice, three hammers, two pair of tongs and shoeing tools, also a turning machine and all the appurtenances: "but upon the following express condition, which is hereby understood and reserved, viz. the above mentioned tract of land to remain in the possession of the said John L. Charlton during his natural life, and if the above named Catharine his wife survives him, to enjoy all her dower right in the said lands during her life; and further, the above mentioned slaves to remain in the possession of the aforesaid John L. Charlton during his natural life, and if his present wife Catharine should survive him, to have the use of one third of the said slaves and their increase, during her natural life; and the other property herein mentioned to remain in the possession of the said John L. Charlton until the above named James C. L. Charlton shall arrive to the age of 21 years, or, if he should not live till then, until the youngest of the two girls shall be of age or marry, and then for an equal distribution to take place between them, their heirs or representatives." The deed concluded, "In witness whereof I have hereunto set my hand and seal the day and year above written:" but the names of J. L. Charlton and C. B. G. Charlton were subscribed, and there

was a scroll opposite to each signature. 283 \*In the office of Montgomery county court on the 12th of December 1821, the deed was acknowledged by John L. Charlton and admitted to record.

The real property conveyed was situated in the county of Montgomery, and the other property was held therein at the time the deed was executed and admitted to record, and continued therein until the period at which the actions of detinue herein after mentioned were brought.

At the time the deed was executed, John L. Charlton was indebted by two bonds, one dated the 10th of November 1819, for £18. 6. 4. payable to John Anderson on demand, the other dated the 16th of November 1819, for £7. 6. 4½. payable to George and John Anderson on demand. Judgments were obtained for these debts in the county court of Montgomery, and executions were issued thereon the 8th of November 1823, which were returned satisfied.

On the 3d of December 1823, an execution issued from the same court in the name of Thomas Bowyer against Chattin Pollard, John Kent and John L. Charlton as appearance bail, for £40. with interest from the 1st of November 1815 till paid, and 13 dollars 15 cents costs. The undertaking of John L. Charlton in respect to the debt for which this execution issued, was made subsequent to the execution and record of the deed before mentioned.

Nevertheless a sale was made under the last mentioned execution, of the slaves Esther and Clarissa conveyed by the deed, and children of theirs born after its execution. At the sale so made, Esther and two children, who afterwards died, were sold for 281 dollars 50 cents, and Clarissa was sold for 166 dollars. Robert Gardner purchased Esther and the two children. Robert Kent purchased Clarissa, and sold her to Joseph Kent.

284 \*Actions of detinue were instituted in the circuit court of Montgomery against Robert Gardner and Joseph Kent, for the slaves in their possession respectively; that is to say, against Gardner for Esther and a child named Matilda, born after the sale under the execution, and against Kent for Clarissa and her children Mary and John, born likewise after the sale under the execution.

Against each defendant two separate actions were brought; one in the names of Catharine B. G. Charlton widow of John L. Charlton, and Pamela Ann Charlton, Emily B. Charlton and James C. L. Charlton, infants under the age of 21 years, suing by James C. Currin their guardian and next friend; the other in the names of the children without the widow.

A trial upon the general issue being had in each action, the jury returned in each case a special verdict, finding the facts before mentioned, and also the following, to wit: that John L. Charlton held the property in his possession from the time the deed was executed until the slaves were levied on; that before the suit were instituted, he died intestate; that at the time of his death, James C. L. Charlton was not 21 years of age; that James is still alive, but is not yet 21; and that no division of the prop-

erty has yet been made between the parties to whom the same was conveyed and limited by the deed.

In each case, the circuit court gave judgment for the defendant, and a supersedeas was awarded.

M'Comas, for plaintiffs in error. It is well settled that upon a special verdict the court can draw no conclusion of fact from other facts found by the jury. 1 Rob. Pract. 372, 3, and cases there cited; 1 Starkie on Evid. (6th american ed.) 448, 9. Here the special verdict not having found that the deed was fraudulent, the court cannot infer that it was so, unless that inference be a conclusion of the law itself from the facts

285 \*found. Do those facts amount in law to a fraud upon subsequent creditors of the donor? The circumstance that this conveyance was made by a father to his children in consideration of natural affection, does not of itself render it void as to such creditors; Newland on Contracts 385, 6; Sexton v. Wheaton, 8 Wheat. 229. Neither does the fact that possession was retained by the donor; for the possession was in conformity with the provisions of the deed itself; which, besides, was duly recorded. Durham & wife v. Dunkly, 6 Rand. 135; Davis v. Payne's adm'r, 4 Rand. 332. Though the grantor was indebted about 100 dollars at the time the deed was executed, yet the mere fact of indebtedness is insufficient to avoid it as to subsequent creditors; it must appear that he was indebted to the extent of embarrassment, if not of insolvency. Lush v. Wilkinson, 5 Ves. 387; Read v. Livingston, 3 Johns. Ch. R. 501; Stephens v. Olive, 2 Bro. C. C. 90; Chamberlayne &c. v. Temple, 2 Rand. 384. The conclusion of chancellor Kent in Read v. Livingston, drawn from a full review of the cases, is, "that fraud in a voluntary settlement is an inference of law, and ought to be so, so far as it concerns existing debts: but that as to subsequent debts, there is no such necessary legal presumption, and there must be proof of fraud in fact; and the indebtedment at the time, though not amounting to insolvency, must be such as to warrant that conclusion." This deed might have been set aside at the instance of the existing creditors (the Andersons) if they had been thereby hindered or delayed in the recovery of their debts; as to them, the deed was fraudulent in law: but even as to them, it appears that there was no actual intention to defraud; for their debts were afterwards paid without resort to the property settled. It may perhaps be argued from the contents of the deed, that the donor appears to have settled his whole property, and that consequently the settlement was fraudulent

in fact as to the existing creditors. 286 \*But even if an actual intent to defraud existing creditors could avail those whose demands accrued subsequently (which is not admitted), the jury have not found that the whole of the donor's property was conveyed; and the deed itself shews that if the whole was in fact conveyed, the grantor did not divest himself of all his interest therein. On the contrary, he retained the use and possession of the land and slaves during his life. Besides, the voluntary conveyance of one's whole property, though a

badge of fraud, is not conclusive evidence of it.

Edward Johnston and C. Johnson for defendants in error. Where a special verdict is not imperfect on its face—where it does not shew that some fact properly belonging to the case has been omitted in the finding, the court must intend that it comprises the whole of the facts existing. In this case, then, it must be intended that the grantor did not possess any other property than that conveyed by the deed. Such is the prima facie evidence afforded by the deed itself; and if the fact were that he did possess other property, that fact was easily susceptible of proof before the jury, whereas it would have been difficult or impossible for the defendants to prove the negative fact that he possessed no other property. The case shewn by the special verdict, therefore, is that of a party, indebted at the time, making a voluntary settlement of his entire property; and the question is, whether that settlement can be sustained against a creditor whose debt accrued afterwards. The second clause of the statute of fraudulent conveyances has, in this case, no influence upon the question: for under that clause the only enquiry is, not whether there was fraud in the transaction, but whether the conveyance was duly recorded. The question is one arising under the first clause of that act.

It is not sufficient that the transaction was fair and honest in fact; the question 287 is, what rule does the policy \*of the law require? Courts of justice cannot in general ascertain motives: there must be, if possible, certain rules, certain landmarks and limits, and not vague conjectures, like estimates of longitude in open sea. The simplest rule applicable to cases of this kind is, that the fact of indebtedness at the time shall be sufficient to avoid the deed. According to the almost unbroken current of english authority, indebtedness to any amount at the time of a voluntary conveyance will render the deed void, both as to existing and subsequent creditors. Walker v. Burroughs, 1 Atk. 93, 4; Russell v. Hammond, 1 Atk. 15; Townshend v. Windham, 2 Ves. sen. 10; Kidney v. Coussmaker, 12 Ves. 136, 155. The only case which seems to regard the amount of indebtedness as material, is that of Lush v. Wilkinson, 5 Ves. 387, and the expression of lord Alvanley in that case was a mere dictum, which has not been followed; see Atherley on Marriage Settlements, ch. 13, p. 213, 14; Id. p. 501. Besides, Lush v. Wilkinson was the case of a fishing bill, and in reference to such a case the dictum and decision of lord Alvanley may well have been correct. It is true that in Reade v. Livingston, and some other american cases, it has been considered material, where the deed was assailed by subsequent creditors, to enquire into the amount of the donor's indebtedness at the time of its execution; thus turning the fact of indebtedness, which in England is held conclusive in law as to the fraudulent intent, and sufficient to avoid the deed as to all creditors, into a circumstance from which there arises no more than a presumption susceptible of being repelled. But it is, even according to the doctrine of those cases, prima facie evi-

dence of fraudulent design, and throws upon the parties claiming under the deed the burthen of proving the fairness of the transaction. Now in this case there is no evidence to countervail the fact of indebtedness. It is not shewn that the grantor, at the time of the conveyance, had other property  
288 sufficient \*to discharge the existing debts, and therefore it must be taken that the fact was otherwise. The payment of those debts afterwards is immaterial: they might have been paid out of the property settled. Again, if the deed here be taken as a conveyance of the whole or the greater part of the grantor's property, it is fraudulent in fact and design, and void as to subsequent creditors, though the grantor were not indebted at all when he conveyed; for no man can voluntarily divest himself of all or the most of what he has, without being aware that future creditors will probably suffer by it. 1 Fonbl. Eq. bk. 1, ch. 4, § 12, note (a); Twyne's case, 3 Co. Rep. 81; Stileman v. Ashdown, 2 Atk. 480; Townshend v. Windham, 2 Ves. sen. 10; Taylor v. Jones, 2 Atk. 600; Fitzer v. Fitzer, 2 Atk. 513.

But, upon other grounds, the judgments of the court below were right. The provision in favour of the wife, contained in the deed, must be taken either as a condition annexed to the grant to the children, or as the creation of a substantive estate by limitation. As a condition, it could only be reserved to the grantor himself, not to any stranger; 2 Bac. Abr. Condition, E, p. 114. As a limitation, it is void, because a husband cannot, by any common law conveyance, give or grant any estate to his wife, either in possession, or in reversion or remainder. 1 Roper on Husband and Wife, p. 53; Littleton, § 168, Co. Litt. 187 b. The wife then taking no legal interest in the property, was improperly joined with the other plaintiffs, and the judgment for the defendants, in the two cases in which she was so joined, was correct. Then, as to the two other cases, in which the children alone are plaintiffs—Upon the just construction of the deed, the provision in favour of the wife must be held a limitation to her, and not a condition qualifying the estate granted to the children. There was no contingency with respect to the vesting of her interest, but only with respect to the enjoyment of it,  
289 \*which was dependant upon the event of her surviving the grantor; and the vesting in enjoyment was to occur at the same time with that of the estate given to the children. Besides, as it is settled that none can take advantage of a condition broken, but the grantor and his heirs, this rule of law bears upon the interpretation of conveyances, so that where the remedy for condition broken would not secure the enjoyment of the estate intended to be given, words of condition will be construed to create a limitation. 2 Bac. Abr. Condition, H. p. 117. Now in this case, the breach of the condition (supposing it such) in favour of the wife, by the children or administrator taking the whole property conveyed, could only be remedied, if at all, by the voluntary act of the wrongdoer. There was then a limitation to the wife, of a third part of the property for her life. But the grant to her was void,

by the rule of law; and the part so granted could not be taken by the children, against the express terms and clear intent of the deed. Therefore it remained in the grantor himself, and passed, by the sale under the execution against him, to the defendants, who thereupon became tenants in common with the plaintiffs. The question then is, whether one of several tenants in common of personal property can be sued in detinue by the others? It is well established that he cannot. 4 Bac. Abr. Joint tenants; I. p. 518; Littleton, § 323; Co. Litt. 200 a. This ground sustains the judgment of the court below in the two actions brought by the children alone, while it equally applies to those in which the widow was joined as plaintiff.

M'Comias, in reply, insisted, that by the operation of the deed the whole legal estate in the slaves, expectant upon the death of the grantor, was vested in the children alone, subject to a condition that the wife, in case she survived her husband, should have the use of a third part of the property for  
290 her life. The argument \*for the defendants itself shews, that the reason of the rule by which words of condition are sometimes held to create a limitation, is wholly inapplicable to this case. A condition annexed to an estate granted to the heir, by which that estate is to be defeated in favour of another person, is construed to operate by way of limitation to that person, only because he is capable of taking by limitation from the grantor, while the condition, enuring to the grantor and descending to the heir himself, cannot be taken advantage of by a stranger. But here, the limitation itself would be void, because made by the husband to his wife. Why should the words of condition in the deed be modified by construction, when the modification can only result in a void grant? The condition, though not available as such to the wife, yet clearly shews the intent of the grantor that the estate given to the children should be taken and held by them, in part, for her benefit; and to that extent a court of equity would hold them trustees for her. The whole legal title being therefore well conveyed by the deed, nothing passed by the sale under the execution, and the actions by the children are properly brought.

TUCKER, P. These four cases are without difficulty. By the deed from Charlton to his children, the property passed to them, and nothing to his wife. She occupied the position of grantor in the deed though, as she had nothing, she could grant nothing; nor could any thing be reserved to her, since reservation implies subsisting right, which she had not. In every view of the case, the title was exclusively in the children. Consider the children trustees for her, and the legal title would be in them. Consider the deed to be on condition, yet their right is unimpaired till entry for condition broken. Consider it as intending a grant to the wife (which, however, words of reservation  
291 cannot create) still it is void, \*for a husband cannot, by common law conveyance, grant or convey even an estate in remainder to his wife. 1 Roper on Husband and Wife 53. The deed then conveys the title to the children, with a condition or reservation that is inoperative and void. Their



right therefore is indefeasible. The actions in which she is joined were of course properly dismissed, and those brought by the children alone are well brought.

Then, as to the merits. We must not forget that we are in a court of law, and trying a case upon a special verdict; and the question is, whether the deed under which the plaintiffs claim is fraudulent or not? The question of fraud is sometimes matter of law for the court, and sometimes matter of fact for the jury. It is matter of law, wherever the facts found per se constitute fraud. For instance, in England it is decided that a voluntary settlement of lands is void as to a subsequent purchaser for valuable consideration. Whether fraud was intended or not, the fact constitutes, by the statute, fraud in itself, and the court pronounces its judgment upon the naked fact. So, if the fact that the party was indebted, and being so indebted conveyed away his property, is as to the subsisting creditor a fraud, whether fraud was intended or not; in a contest between the subsisting creditor and the grantee, the question of fraud would be matter of law, not matter of fact. So in cases like *Edwards v. Harben*, 2 T. R. 587. And the like principles prevail as to bankruptcy and usury. But where the question of fraud is matter of fact, there the jury must find it expressly, for the court cannot infer it; not only because it never can infer facts on a special verdict (*Bac. Abr. Verdict. D.*) but also because covin and fraud are odious, and never to be intended or presumed. Thus, where the question was whether a deed was void under the statute of 13 Eliz. avoiding gifts contrived to defraud creditors and others, the jury found the facts, and submitted the question of fraud to the

292 \*court. But it was "unanimously resolved, that forasmuch as no fraud is found by the jury, the court could not adjudge the feoffment to be fraudulent; and although the jury have found circumstances and presumptions to incite the jury to find fraud, yet it is but evidence to the jury, and not any matter upon which the court could adjudge fraud. And the office of jurors is to adjudge, upon their evidence, concerning matter of fact, and thereupon to give their verdict, and not to leave matter of evidence to the court to adjudge, which does not belong to them." Littleton's case, cited and approved in the case of *The Chancellor &c. of Oxford*, 10 Co. 53 b, 56 a. See also *Crisp v. Pratt*, Cro. Car. 550

Now in the case at bar, it is not found that the deed was made with intent to defraud, although the facts found might well have raised a suspicion of fraud in the minds of the jury, or of a court of equity, if the case were before that tribunal. The jury might have inferred fraud, and so found it,—subject indeed to the grant of a new trial, if their verdict was not sustained by the evidence; but the court of law cannot infer the wicked intent, which is a matter of fact on which the party has a right to a trial by the country, for a charge of fraud has been well likened to a criminal prosecution. To this, indeed, the conceded action of a court of equity is an exception.

Fraud in fact, then, not being found, are there facts found which, in law, or per se,

constitute fraud? I think not.—First, as to Charlton's retaining possession. That possession was consistent with the deed, and therefore not fraudulent per se. *Cadogan v. Kennett*, Cowp. 432,—a case much weaker than this, since the deed there was not put upon record, there being no recording act in England like ours; whereas, in this case, the record gave notice to all the world of the limited interest of Charlton in the property.—Next as to the sweeping character of the deed. Non constat that the grantor

293 \*had not other ample estates. Besides, if he was not indebted, the conveyance of all he had was no fraud upon any creditor, since the record gave notice to all subsequent creditors; and at most this could only be evidence of fraud, upon which the jury might have founded their verdict.—Thirdly, as to the precedent debts. Admit that in a contest between the grantees and the preceding creditors, the existence of the debts when the deed was made would have rendered it per se fraudulent; yet where subsequent creditors invoke that fact, it can only serve them as evidence from which to infer the fraudulent intent, and so is matter for the jury, and not the court.

I will, in conclusion, refer to the case of *Dewey v. Bayntun*, 6 East 257, for an example of the great caution of the courts even in permitting juries to infer fraud, notwithstanding the occurrence of circumstances most strong and persuasive.

On the whole, I am of opinion to reverse the judgments in the two actions in which the infants sue without the mother, and to enter judgments for the plaintiffs. The two other judgments must be affirmed.

In each of the cases wherein the widow was plaintiff, judgment affirmed: in the other cases, judgments reversed.

## 294 \*Harkins v. Forsyth and Others.

August, 1840, Lewisburg.

(Absent BROOKE and PARKER, J.)

**Married Women—Mortgages—Acknowledgment of Wife—Privy Examination.**—After husband and wife have signed, sealed and delivered a deed of mortgage, two justices of the peace certify, in the form prescribed by the statute, that she personally ap-

\***Married Women—Deeds—Acknowledgment—Sufficiency.**—In *Hitz v. Jenks*, 133 U. S. 297, 8 Sup. Ct. Rep. 147, it is said, it would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed afterwards, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate, citing *Harkins v. Forsyth*, 11 Leigh 294. See also, citing and approving the principal case upon this question, *Carper v. McDowell*, 5 Gratt. 237 (see also, note); *foot-note* to *Johnston v. Slater*, 11 Gratt. 321; *Tallaferro v. Pryor*, 12 Gratt. 286; *Grove v. Zumbro*, 14 Gratt. 515; *Vaughn v. Com.*, 17 Gratt. 389; *Quinn v. Com.*, 20 Gratt. 144. 146; *Price v. Holland*, 1 Pat. & H. 299; *Davis v. Beasley*, 76 Va. 493; *First Nat. Bank of Harrisonburg v. Paul*, 75 Va. 601; *Burson v. Andes*, 83 Va. 449, 8 S. E. Rep. 249; *Murrell v. Diggs*, 84 Va. 905, 6 S. E.



peared before them, and being examined privily and apart from her husband, and having the deed fully explained to her, she acknowledged the same to be her act and deed, and declared she had willingly signed, sealed and delivered the same, and wished not to retract it. In a suit in equity afterwards brought to foreclose the mortgage, it is contended that the deed is void as to the wife, for want of such explanation of its nature as the statute requires; and the depositions of the justices are taken to prove the fact that the deed was not fully explained to the wife: **Held**, as the privy examination, acknowledgment and declaration of the wife are certified by the justices pursuant to the directions of the statute, the deed is effectual to pass all her right, title and interest.

**Mortgages—Clause Allowing Mortgagees to Enter and Receive Rents and Profits—Effect upon Foreclosure.**

—A deed of mortgage containing a clause which provides that, after default, the mortgagees may enter upon the property, and receive the rents, issues and profits thereof for their indemnity, it is contended that no sale should be decreed unless the profits are inadequate for such indemnity; though there is in the deed an absolute conveyance of the fee, with a defeasance, as usual, in case of payment. **Held**, the right of the mortgagees to have a foreclosure and sale is not impaired by the clause before mentioned.

**Same—Foreclosure—Redemption—Discretion of Court.**

—When a foreclosure is decreed, the court is to exercise a sound discretion in relation to the period of redemption, and fix it according to the circumstances of the case. The usual time is six months; but less may be allowed.

**Appellate Practice—Mortgages—Foreclosure—Discretion of Lower Court—Presumption in Court of Appeals.**

—Though the time allowed for redemption be only thirty days, an appellate court will nevertheless presume that the discretion of the court below has been properly exercised, if no application

appears to have been made to that court for an extension of time.

By an indenture made the 25th of August 1833, between William Harkins and Elizabeth his wife of the one part, and James H. Forsyth, Eli B. Swearingen and \*John Goshorn of the other part, it was recited that Alfred Harkins, son of said William, was indebted to the president, directors and company of the bank of Mount Pleasant in the sum of 2500 dollars, by bond, in which the said James H. Forsyth and others were his sureties, and that the said William Harkins was indebted to the said president, directors and company in the sum of 450 dollars, for which the said John Goshorn and others were his sureties: and thereupon the said William Harkins and wife conveyed to Forsyth, Swearingen and Goshorn a lot of ground in Wheeling, upon condition that if the said Alfred Harkins, his heirs, executors or administrators, should pay to the said president, directors and company the debt first mentioned, and all interest that might become due thereon, and save harmless his said sureties therein, and not subject them, or any or either of them, to pay the same, and in case the said sureties, or any or either of them, should pay the said debt or any part thereof, should reimburse him or them all money that they should have paid on the same, with its interest, and all costs thereon; and if the said William Harkins should pay to the said president, directors and company the said debt secondly mentioned, with all interest that might be due thereon, and save harmless his said sureties therein, and not subject them, or any or either of them, to pay the same or any part thereof, and in case the said sureties, or any or either of them, should pay the said debt or any part thereof, should reimburse him or them all money that they should have paid on the same, with interest, and all costs thereon; the said indenture, and the estate thereby conveyed, were to cease and determine. Then came the following clause: "And it is hereby declared and agreed by and between the parties to these presents, that in the mean time, and until default shall be made by the said Alfred Harkins and William Harkins in the payment of the debts aforesaid with their interest,

\*whereby their said sureties shall be compelled to pay the same, contrary to the form and effect, true intent and meaning of the provision aforesaid, it shall and may be lawful for the said William Harkins and Elizabeth his wife, and their heirs, peaceably and quietly to have, hold and enjoy the said lot of ground above conveyed, together with the buildings, tenements, hereditaments and appurtenances thereunto belonging, and to receive and take the rents and profits thereof to and for their own use and benefit, without the interruption or hindrance of the said James H. Forsyth, Eli B. Swearingen and John Goshorn, or any or either of them, their or either of their executors, administrators or assigns; but so soon after the happening of such default by the said Alfred and William, or either of them, in the payment of said debts, so as to subject their sureties to the payment thereof, then they the said Forsyth, Swearingen and Goshorn are hereby authorized to enter upon the said property, and receive the rents, is-

Rep. 461; Hockman v. McClanahan, 87 Va. 39, 12 S. E. Rep. 280; Hurst v. Leckie, 97 Va. 562, 34 S. E. Rep. 464; Burley v. Weller, 14 W. Va. 278; Weinberg v. Rempe, 15 W. Va. 831, 859, 865; State v. Vest, 21 W. Va. 800; Rollins v. Menager, 22 W. Va. 467; Herring v. Lee, 23 W. Va. 672; Henderson v. Smith, 26 W. Va. 824; Pickens v. Knisely, 30 W. Va. 8, 19, 34, 37, 11 S. E. Rep. 934, 938; Sewall v. Haymaker, 127 U. S. 719, 8 Sup. Ct. Rep. 1852; National Bank of Fredericksburg v. Conway, 17 Fed. Cas. 1204. See monographic note on "Acknowledgments" appended to Tallaferré v. Pryor, 12 Gratt. 277; monographic note on "Husband and Wife" appended to Cleland v. Watson, 10 Gratt. 159.

**†Mortgages—Foreclosure—Redemption—Discretion of Court as to Length of Time.**

—In *Palro v. Bethell*, 75 Va. 832, it is said: "The answer to the objection, that the time (20 days) given by the decree for the redemption of the property from the lien is too short, is, that this is a matter resting in the sound discretion of the court under all the circumstances, and this court will presume that the discretion has been properly exercised, where, as in this case, no objection was made in the court below, and no extension asked for of the time allowed for redemption. *TUCKER, J.*, in *Harkins v. Forsyth and Others*, 11 Leigh 309; *STANARD, J.*, in *Manns v. Flinn's Adm'r*, 10 Leigh 109; *Green's Appendix to Wythe's Reports*, 414, note 44, and cases there cited." See also, citing the principal case, *King v. Burdett*, 44 W. Va. 565, 29 S. E. Rep. 1011; *Weinberg v. Rempe*, 15 W. Va. 859. See monographic note on "Mortgages" appended to *Forkner v. Stuart*, 6 Gratt. 197.

sues and profits thereof for their indemnity."

Two justices of the peace for the county of Ohio certified, in the form prescribed by the statute, that Elizabeth Harkins personally appeared before them in their county, and being examined by them privily and apart from her husband, and having the deed fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered it, and that she wished not to retract it.

William Harkins acknowledged the deed in the office of Ohio county on the 12th of October 1833, and the same, with the certificate of the justices, was admitted to record.

On the 30th of May 1834, Forsyth, Swearingen and Goshorn commenced a suit in chancery against William Harkins and wife in the circuit court of Ohio county. The bill

set forth that the complainants were each and \*all of them sureties in the bonds mentioned in the deed; that they have been obliged to pay the bond for 2500 dollars, which, with interest and costs, amounted, on the — day of May 1834, to 2773 dollars, or thereabouts; and that the debt of 450 dollars remained due, with a large amount of interest and costs, all of which they would in a short time be compelled to pay. The prayer was, that the property conveyed might be decreed to be sold.

Pending the suit, William Harkins died, and a supplemental bill was filed, reviving the same against his widow Elizabeth as his administratrix, and James W. Clemens as his administrator.

Elizabeth Harkins, in her own right, answered, that the original deed was signed by her; that the two justices of the peace asked her, in the absence of her husband, if she acknowledged it to be her act and deed, and had willingly signed, sealed and delivered the same, and whether she wished to retract it? and she replied that the same was her act and deed, that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. But she averred and charged the fact to be, that the justices did not read the deed to her, nor in any manner whatever explain it to her. She further averred, that at the date of the mortgage, the legal title to the property conveyed was in her.

She also answered in the character of administratrix. Her answer stated that there were no personal assets to pay the demand of the plaintiffs.

On the part of the defendants, the depositions of both the justices were taken. One of them, George Dulty, deposed that he had no recollection of the particular questions propounded to Mrs. Harkins, but he presumed he put the same questions to her, which he is accustomed to put as a magistrate in like cases; which questions are, 1.

Do you understand the nature of the deed? 2. Have you signed it willingly? 3. Have you no wish to retract it? When the party answers that she understands the deed, has signed it willingly, and does not wish to retract it, then he certifies. The deponent stated that he thought these questions were so put, and so answered, in this case. He did not read or explain the deed to Mrs. Harkins, it not being his habit to read or explain a deed to any feme covert,

when such feme declares that she understands the nature of the deed. Deponent added, that another question usually put by him to femes covert is, Do you acknowledge this to be your act and deed? and that he would not certify any acknowledgment, unless the questions aforesaid were answered in the affirmative.

Richard Simms, the other justice, concurred generally in the statements made by Dulty. It was his habit, he said, to put his finger on the signature of the feme, and ask her if she acknowledged that to be her act and deed, and desired it to be recorded? He never, in any instance, read or explained a deed to a feme covert. He asked them if they understood the nature of the deed? and if they answered in the affirmative, that was his explanation. Of this particular transaction he had no recollection.

The cause was heard the 9th of June 1835. It appearing that the complainants had satisfied the bond for 2500 dollars with interest and costs, by paying 1847 dollars 65 cents on the 10th of May 1834, and 910 dollars 36 cents on the 27th of May 1834; and it also appearing that the defendants had in their hands no assets belonging to the estate of William Harkins, wherewith to pay the said sums of money, the court decreed that unless the sum of 1847 dollars 65 cents with interest thereon from the 10th of May 1834, and the sum of 910 dollars 36 cents with interest thereon from the 27th of May 1834, and the costs of this suit, be paid within 30 days,

the sheriff of the county, who was appointed \*a commissioner for the purpose, should proceed to sell the lot of ground conveyed, at public auction to the highest bidder, at the courthouse of the county upon some court day. The decree then specified the terms of sale, and the time and manner of advertising the same.

On the petition of Elizabeth Harkins, an appeal was allowed from the decree.

The cause was argued by Johnson for the appellant and William Smith for the appellees, upon the following points made by the former:

1. That the deed was void as to the appellant for want of that explanation of its nature which the act of assembly positively requires.
2. That no sale should have been decreed unless the profits were inadequate to indemnify the mortgagees.
3. That the time allowed for the redemption of the land is too short, six months being the regular time for redemption upon a decree of foreclosure.

TUCKER, P. Among the errors assigned in this case is the shortness of time allowed by the decree for redemption; the regular allowance, according to the practice of the court, it is contended, being six months. Although, in the view I have taken of this point, it would be unnecessary to give an opinion as to the general rule, yet as it relates to the every day's practice of the court, I think it not amiss to say that I know no such inflexible rule in our courts. According to my recollections, both at the time I was at the bar where chancellor Carr presided, and when I afterwards succeeded him, the court adopted and pursued the opinion of chancellor Kent in *Perine v. Dunn*, 4 Johns. C. R.

141, regarding it as a matter of sound discretion to fix the period of redemption according to the circumstances of the case. I am  
300 very sure there must have been \*cases in that circuit, where the time allowed was even less than three months; and it is probable the same practice continues. I should be unwilling, therefore, to lay down any inflexible rule on the subject, as it might lead to mischief and is in no wise essential to justice. On the contrary, I think it better that the matter should be left to the sound discretion of the court, and that we should presume the discretion has been properly exercised, where no objection has been made in the court below, and no extension asked for of the time allowed for redemption. Upon such an application, if refused, the reasons of the court would appear, and the appellate tribunal could then decide whether the discretion had been abused. In the present case no objection has been made, and the decree therefore should not be disturbed.

A second ground of complaint is, if well founded, of much greater importance. It is said that no sale should have been decreed, unless the profits were inadequate to indemnify the mortgagees.

During the argument, it struck me that the conveyance partook somewhat of the character of a welsh mortgage, or of the vivum vadium. I am satisfied I was mistaken. In the welsh mortgage, the rents and profits go against the interest only, (Coote on Mortg. 9,) which would not be the effect of the clause in this deed. And as to the vivum vadium, that is a conveyance to the mortgagee to hold until, out of the rents and profits or otherwise, his principal and interest are paid. But here there is an absolute conveyance of the fee, with a defeazance in case of payment; which is precisely of the character of a mortgage. And the clause providing for the entry of the mortgagees after default, is no more than that which is now inserted in many mortgages, except that the words "for their indemnity" have been unnecessarily added in this. See 3 Powell on Mortg. 1120 a.,  
301 1116 a. for the form. The \*effect of this clause, then, is not to limit the mortgagees to the perception of the rents and profits for their indemnity, but merely to invest them, in terms, with the right to enter and hold the premises until redemption. Hence it follows that the right of the mortgagees to foreclose cannot be impaired by it, nor can there be any error in decreeing the foreclosure, whether the profits were or were not adequate, in a succession of years, to indemnify the mortgagees.

The other error assigned is, if well founded, vital to the plaintiffs' demand. It presents a question of great importance, and of the first impression here. It is contended that the mortgage was void as to the feme, for want of that explanation of its nature which the act of assembly requires. The certificate of the privy examination, it is admitted, is in due form; but it is alleged that that certificate is false in the point referred to; and the depositions of the justices have been taken to prove its falsity. Let us then consider the character of the act, and the meaning and intent of the statute which prescribes it, in order to dis-

cover whether it is susceptible of contradiction by any proof whatever.

By the common law, a married woman could not, by joining her husband in a deed, bar herself, or those claiming under her, of her own estate. In process of time, however, fines were adapted to this end, and by them the rights of a wife might successfully be passed. 5 Cruise's Dig. 115, 116. But to prevent imposition upon her, it was at length provided by a statute, that where a feme covert was one of the parties to a fine, she should be privily examined, and if she refused her assent, the fine should not be levied. Ibid. This proceeding is the prototype of our privy examination. But though the privy examination was positively enjoined by statute, yet if a feme was allowed to acknowledge a fine without examination, it nevertheless bound her, and could not  
302 be reversed; for she could not \*contradict the record, which set forth her examination. Ibid.

According to the british system of jurisprudence, then, we see that certain safeguards were thrown around the feme for her protection; but we also see that if those safeguards failed, she was left without a remedy; except in cases of fraud in the conusee, whom equity would in such a case consider a trustee for her.

In Virginia, as a substitute for the fine, a deed, accompanied by a privy examination of the feme, has been adopted. This privy examination, it is provided, may be taken either before a court of record, or before two justices of the peace. In both cases the same identical requisitions exist. In both it is required that the deed be shewn and explained to her, and that she shall acknowledge it as her act and deed, and declare that she had freely and willingly signed, sealed and delivered it. Where this examination has been made in court, it must be conceded that it is altogether conclusive, and that no allegation can be admitted to contradict the entry upon the record, however much that may be at variance with the real fact. Though the judge or justice who examined her may have disregarded every requisition of the statute, yet when the term is once ended, the truth of the record never can be questioned, but the examination must be taken to have been in truth what by the record it appears to have been. Thus then it would seem, that like our ancestors, we have, in this provision, been content to throw around the feme covert a certain safeguard, which nevertheless may fail to fulfil the just and benevolent intention of the lawgiver. We have not indulged the vain expectation that we have provided against every possible mischief, since we know that perfection is not attainable in human legislation. But we rest upon the assurance that with these guards the rights of married women are substantially secured, and that there is  
303 much less danger of their suffering by \*the ignorance or corruption of the courts, than there would be of shaking all confidence in the titles of the country, if femes covert were permitted, at the remotest period, to call in question what has been solemnly recorded in a court of justice.

The second mode of privy examination

prescribed by law, is by two justices of the peace; and it seems to be supposed, that because it is a matter in pais, the certificate of the justices may be directly contradicted, and the deed vacated by the testimony of witnesses, and even by the depositions of the justices themselves. Such a position is at variance, I take it, with the spirit and object of the law, and also with the terms of the law itself.

We have already seen that the object of the law was to provide a substitute for the proceeding by fine, whereby the rights of the feme on the one hand might be fenced around, and a sure, indefeasible and unquestionable transfer of her right secured on the other. While the legislature were protecting the wife, can it be believed that they had no regard to the importance of giving confidence to the title? Can they have been insensible to the ruinous consequences to the prosperity of any commonwealth, of doubt and uncertainty as to land titles? Could they have conceived of any measure more calculated to create these doubts, than the liberty, at any remote period, of alleging and proving that the magistrates' certificate is false? When they have entrusted the performance of this duty to a magistracy in whom is even the power of life and death; when they have prescribed the mode of fulfilling it, with a minuteness that one might think would have defied mistake; when they have commanded the act, when completed, to be placed upon the public records; when the act itself is substituted (merely for convenience) for one which, as we have seen, never can be contradicted,—can we believe

that it ever was contemplated to permit \*this solemn certificate to be falsified by the testimony of witnesses, and even by that of the very magistrates who, under the sanction of their official oaths, have signed and returned the certificate of privy examination? I cannot think it. If such be the law, who will ever resort to this mode of privy examination? Who will not insist upon the examination before the court, however inconvenient to the parties, or onerous to the courts of justices? Who will sit down content with a title in all respects complete upon its face, when, upon the death of his vendor, his widow and her magistrates may undo what they have solemnly done by their act, and without the possibility of contradiction, since they alone are permitted to be privies to it? With these startling considerations presenting themselves in opposition to the doctrine, now for the first time, I believe, advanced in our courts, it ceases to be a wonder that, for upwards of a century, no one has ever been found sufficiently adventurous to insist upon such a construction of our statutes.

But if the door be once opened to contradictions of the magistrates' certificates, where is the point at which we shall stop? The writing must be explained; and if the certificate that it was explained can be contradicted, what shall prevent enquiry whether it was truly explained? for if not truly explained, the condition of the feme is surely not better than if the deed were not explained at all. And if, in the complicated provisions of a settlement, the justices become entangled, what shall prevent the

proof by the feme, that she has in truth executed a deed altogether different in effect from the explanations which were given to her of that which she had signed? And if these enquiries are to be permitted, and that too when the feme has lain by during the lifetime of her husband, and rakes up these objections at a remote day, of what value will your privy examinations be? Who will take a title depending \*upon, or which can be traced through them? No one. To me indeed it seems that the demon of mischief could not suggest a notion better calculated to throw all things, in relation to titles, into their original chaos, than the establishment of the principle here contended for.

With these preliminary views of the spirit and meaning of the statute, let us look to its terms. The first part of the clause provides that if the wife, being examined, shall acknowledge the deed, and such examination and acknowledgment be certified, and such certificate be offered for record, it shall be recorded. Here the clause loses the hypothetical if, and proceeds—"And when the privy examination, acknowledgment and declaration of a married woman shall have been so taken in court, and entered of record, or certified by two magistrates and delivered to the clerk to be recorded, and the deed also shall have been duly acknowledged or proven as to the husband, and delivered to the clerk to be recorded, pursuant to the directions of this act, such deed shall be as effectual in law to pass all the right, title and interest of the wife, as if she had been an unmarried woman." Here then it is expressly provided, that when the examination shall have been certified and delivered to the clerk, &c. the deed shall be as effectual as if the maker were sole. The deed then is made to depend, not upon the truth of the certificate, but upon its existence, and its delivery to the clerk; and if so, the enquiry whether it be true or false is an immaterial enquiry.

It remains but to qualify the foregoing remarks by observing, that notwithstanding the conclusiveness of the certificate at law, the feme may be relieved in equity, where it has been obtained by the fraud of the party claiming under the deed. Such was the law as to fines, and such must doubtless be the law in reference to this \*substitute for the fine. Nothing of that kind is pretended here; so that the deed, I think, stands unimpeached.

It may not be amiss, before concluding this opinion, to examine what are the common law principles applicable to the case. And here two enquiries present themselves; first, as to the authenticity attributed by the law to the act itself; and secondly, as to the competency of an officer of the law to unravel a solemn act done by himself in pursuance of its directions. After a very diligent search, I have been unable to find a case in point, and am therefore compelled to resort to general principles and analogies. Now, in relation to the act itself, it has been long the received doctrine, that where the law appoints any person for any specific purpose, it must trust him as far as he acts under its authority. Buller's N. P. 229. And it would seem that "where a written instrument is

constituted by law the authentic and sole medium of proving a fact, oral testimony cannot be admitted to prove or disprove it;" and "where the law authorizes any person to make an enquiry of a judicial nature, and to register the proceedings, the written instrument so constructed is the only legitimate medium to prove the result." 3 Starkie on Evid. 1043, 4. Thus, parol evidence cannot be received of the declaration of a prisoner, taken under the statute of Philip & Mary, were the examination has, as required by the statute, been taken in writing; for it will be presumed that the magistrate, who has been entrusted by law to make a memorial of the confession, has acted in conformity with the statute. Id. part 4, p. 50, 1044. So here, the law has entrusted to the justices to examine a feme covert touching the execution of a deed, to take her acknowledgment, and to certify their act to the clerk of the court, in order to its being recorded in perpetuum rei testimonium. It has vested them with the power of doing in pais, for the convenience of the parties, what regularly it is the province of a court

307 \*to do. It has authorized them to take that privy examination which, in the levy of a fine, constituted part of a judicial proceeding, and never could be contradicted. It has empowered them to take and certify the examination and acknowledgment, which it also makes one of the functions of its courts of justice, and thus appears to invest them with an authority judicial in its nature. But above all, it constitutes their certificate the authentic and the sole medium of proving that the feme covert has acknowledged the deed with all the solemnities required by the statute. No other testimony can be admitted of the fact, and indeed, from the secret character of the proceeding, none other can exist as to the fact. And when to these considerations we add, that the very object of the privy examination and certificate is to complete, consummate and make final the contract between the parties, it must be conceded, I think, that there can be no act in pais of the officers of the law, entitled to greater sanctity than this. All the considerations which forbid the introduction of parol testimony to contradict the written contract of the parties, because it is presumed that what has been definitively agreed on is there set down, conspire with the influence of other principles to protect this solemn consummation of a contract, under the sanction of the magistracy, from being rendered nugatory and void, after the lapse of years, by the slippery testimony of the witnesses.

Nor is it a new principle in the law, to deem the certificates or returns of a public officer, in the execution of his duty, conclusive of the facts which they contain. Thus the official return of an execution by a sheriff is usually conclusive between the litigating parties, though not as between them and himself; for he is liable for his false return; as in this case the certifying justices may be liable for theirs. So I presume that when

the clerk of a court has certified in his deed book, or upon \*a deed, that it was duly acknowledged by the parties thereto, the certificate is conclusive of the acknowledgment, and cannot be contradicted. By the same reason the certificate of

the justices, who are equally trusted by the law, must be held unassailable by the testimony of witnesses.

Still less consistent with reason or principle would it be, to permit the officer himself to unravel what he has solemnly done. Can the clerk be permitted to undo a deed acknowledged before him, after the purchaser has paid his money or fulfilled the consideration, by swearing that his certificate was false? And if the clerk cannot do so, upon what principle can the justice? Upon what principle, in short, could the law permit a contract, closed and consummated by the act of the justice or the clerk, to be opened up and avoided by their testifying to their own official perfidy? I can see none; nor do I perceive that we violate the principle of *Jordaine v. Lashbrooke*, 7 T. R. 601, in rejecting the testimony of the justices in this matter. Though a mere witness may be admitted to defeat his own attestation, it by no means follows that a public officer should be permitted to defeat a solemn and public act, by contradicting his own certificate of the manner in which he has performed it.

On the whole, I am of opinion to affirm the decree in all things.

The other judges concurring, the decree was affirmed.

### 309 \*Powell's Ex'ors v. White and Others.

August, 1840, Lewisburg.

(Absent BROOKE and PARKER, \*J.)

**Deeds of Trust—Recital That Cestuis Que Trust Are Liable as Indorsers—Effect.**—A mere recital in a deed of trust, that the cestuis que trust are liable as indorsers for the maker of the deed, and that he is willing and desirous to indemnify and secure them from all loss and damage in consequence of their becoming indorsers, by conveying property for the purpose, will not entitle the indorsers, after the death of the maker, to rank as specialty creditors, in the administration of his personal assets. Accord. *Jackson v. Sackett*, 7 Wend. 94.

### Bonds—Payment by Surety—Right of Retainer Where

\*He decided the cause in the court below.

†**Sureties—Subrogation.**—In *Robinson v. Sherman*, 3 Gratt. 181, it is said the sureties of one of the joint debtors in the forthcoming bond, became, upon the forfeiture thereof, sureties for the debt and if they have subsequently discharged the same, they are entitled, upon the principles of equity as affirmed in *Powell v. White*, 11 Leigh 300, to be substituted to all the rights of the creditor against the original debtor subsisting at the time they became so bound for the debt. See also, citing the principal case upon the question of the rights of a surety to subrogation, *foot-note* to *Robinson v. Sherman*, 2 Gratt. 178; *Leake v. Ferguson*, 2 Gratt. 433 (see also, *foot-note*); *Buchanan v. Clark*, 10 Gratt. 173, and *foot-note*; *Hill v. Manser*, 11 Gratt. 525, and *foot-note*; *foot-note* to *Kendrick v. Forney*, 23 Gratt. 751; *Robertson v. Trigg*, 32 Gratt. 85; *Cooper v. Daugherty*, 35 Va. 351, 7 S. E. Rep. 387; *Pace v. Pace*, 95 Va. 797, 30 S. E. Rep. 361; *Sands v. Durham*, 99 Va. 267, 263, 38 S. E. Rep. 145; *Conaway v. Odbert*, 2 W. Va. 36; *Johnson v. Young*, 20 W. Va. 661; *Myers v. Miller*, 45 W. Va. 615, 31 S. E. Rep. 983; *foot-note* to *Tinsley v. Anderson*, 3 Call 329; *foot-note* to *Eppes v. Randolph*, 2 Call 125. See note citing the principal case to *Sands v. Durham*, 6 Va. Law Reg. 253, 257.

In *Cromer v. Cromer*, 29 Gratt. 285, it is said: "A bond on which principal and surety are both

**Surety Is Administrator;—Case at Bar.**—Sureties in a bond, who pay it off after the death of the principal, are entitled to rank as specialty creditors of the principal, and if they be administrators of his estate, may retain whatever they pay on account of such suretyship, out of the assets that come to their hands as administrators, against other specialty creditors. The case of *Copls v. Middleton*, 1 Turn. & Russ. 224, and *Jones v. Davids*, 4 Russ. 277, so far as they conflict with this doctrine disapproved.

**Opinion Disapproved.**—The opinion of PARKER, J., in the court below, that after the death of an administrator, a debt due to him from the decedent should be paid out of assets collected by the administrator *de bonis non*, in preference, to claims of other creditors of equal dignity, examined by TUCKER, P., and disapproved.

**Appellate Practice—When Question between Appellees Will Not Be Considered.**—When a decree is right as between the appellants on the one hand, and each and all of the appellees on the other, it will be affirmed, without considering any question between the appellees.

**Same—When Question between Appellees Will Be Considered.**—The power of an appellate court to take cognizance of a question between the appellees arises only when, on the questions between the appellants on the one hand, and one or more of the appellees on the other, a decision is made which disturbs the rights, as settled by the decree appealed from, of one or more of the appellees: per STANARD, J.

On the 20th of August 1823, an indenture was made between Robert B. White of the first part, Joseph Kean of the second part, and Alfred H. Powell and Robert

310 \*Vance of the third part, whereby it was recited that Powell and Vance had become the indorsers of sundry notes for White, discounted, some of them in the bank of the valley in Virginia, and others in the office of discount and deposit of the Farmers bank of Virginia at Winchester; that they had also consented and agreed to become indorsers for White, from time to time, on notes to be negotiated at the said office of discount and deposit, on such part of the notes so discounted in the said bank as to them should seem meet and proper; and that White was willing and desirous of indemnifying and securing them from all loss and damage which they might sustain in consequence of their having become and becoming indorsers as aforesaid, by conveying property for that purpose: and then the indenture witnessed, that White conveyed unto Kean a house in Winchester, and certain slaves and furniture, in trust that if Powell

bound, once paid by the surety in the lifetime of the principal without assignment by the creditor, or agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case. *Powell's Ex'ors v. White & Others*, 11 Leigh 300, 324; *Kendrick & al. v. Forney*, 22 Gratt. 748." See also, citing the principal case on this proposition, *Kendrick v. Forney*, 23 Gratt. 751, and *foot-note*: *Conrad v. Buck*, 21 W. Va. 410. See monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

**Executors and Administrators.**—See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

**Appellate Practice.**—See, citing the principal case, *Crawford v. Patterson*, 11 Gratt. 375.

and Vance, or either of them, their heirs, executors or administrators, should be obliged to pay any sum or sums of money for or on account of White, in consequence of their becoming indorsers as aforesaid, or if they or either of them should be in danger of suffering any damage or loss, then it should be the duty of Kean, at the request of them, their heirs, executors or administrators, to sell the property conveyed, or so much thereof as should be necessary to indemnify Powell and Vance or either of them, for ready money, at public auction to the highest bidder, (having first given reasonable and public notice of the time and place of such sale,) and out of the proceeds thereof pay and satisfy every sum or sums of money which they the said Vance and Powell, or either of them, their executors or administrators, might have paid or to be liable to pay in consequence of their having become and agreeing to become indorsers as aforesaid, so as completely and fully to exonerate them from any loss, injury or damage which they might thereby sustain.

311 \*In the month of July 1826, White died, much embarrassed with debt, and administration of his estate was granted to Powell. After the death of Powell, to wit, in October 1831, administration *de bonis non* of White's estate was granted to Vance and John B. White.

No assets came to the hands of Powell as administrator; and he, as well as Vance, was compelled to pay money as indorser of the notes mentioned in the deed. But there was a claim due the decedent, which Powell at the time of his death was endeavouring to collect.

The administrators *de bonis non* having succeeded in recovering a fund on account of this claim, and each of them being a creditor of the decedent, a bill was filed by them in the circuit court of Frederick county, specifying Vance's liabilities and payments as indorser, White's claims for money paid as surety and indorser, and as creditor on other accounts, and also a joint claim of Vance and White for money paid as sureties. The executors of Powell, and other creditors of White, were made defendants. And the prayer was that the debts might be exhibited and proved, according to their respective dignities, before a commissioner, and a legal and proper distribution be made of the assets.

On the petition of the plaintiffs, they were ordered to pay to a receiver of the court the sum of 2637 dollars 34 cents, the amount of assets in their hands as stated in their petition, which sum the receiver was directed to lend out. And by consent of the parties the cause was referred to a commissioner, to state an account of the debts due from the estate of the decedent, which the commissioner was directed to distinguish according to their respective dignities and priorities.

The commissioner made a report, which shewed, among other things, the amounts due Powell and Vance respectively for money paid as indorsers, after crediting the proceeds of the property conveyed by the deed of trust.

312 \*In this state of the case, Vance dying, his death was suggested on the record, and the cause continued in the name of White as surviving administrator; and

by consent of parties it was ordered that John Gilkeson, as administrator with the will annexed of Robert Vance, be made a party defendant.

The cause coming on to be heard the 8th of July 1835, the court was of opinion, that although the fund mentioned in the bill was not recovered or reduced into possession by Powell in his lifetime as administrator of White, yet a right or retainer, as against creditors in equal degree, would nevertheless attach upon such assets in favour of Powell's executors.\* But the court

313 \*was farther of opinion that Powell could only be considered a simple contract creditor as to the debts mentioned in the report, the deed of trust not elevating those debts to the dignity of specialties.

The court proceeded to declare, that out of the fund there should be paid, first, judgments recovered against Robert B. White in his lifetime, which had been revived against his administrator within the period limited by law; in which class the court was of opinion the plaintiff John B. White would stand, by substitution in the room of Roberts & Taggart, for an amount paid by him to them on an execution issued on a forthcoming bond, executed by said Robert B. White in his lifetime, with said John B. White as his surety: secondly, judgments on specialties against the first administrator, having regard to their priority; in which class the court was of opinion Vance and White would stand, by substitution in the room of Daniel Hartman, for the amount of a judgment recovered by Hartman against the first administrator, on a bond in which the said Vance and White were the sureties of the decedent, and which had been paid by them as such to Hartman: thirdly, specialty debts due the administrators de bonis non, or either of them. These three classes, it was

314 conceded, would \*more than absorb the fund, and it was therefore unnecessary to settle priorities farther.

A second report was made by the commis-

\*The following is an extract from the opinion given by JUDGE PARKER in the circuit court:

"The claim due to Robert B. White, although not reduced into possession, was assets of the estate, and whether it came into Powell's hands or not, must be distributed as other assets. If a different principle prevailed, executors and administrators might bring suit, recover judgments, and in consequence of death before receipt of the money, would lose the priority the law gives to them, and which they might, but for their qualification, have otherwise obtained; and thus no creditor would become an executor or administrator. It often happens that many years elapse before the funds of an estate can be gotten. In the meantime, creditors sue and obtain their judgments. The executor or administrator cannot sue himself, and unless the preference given to him by law continues in the event of his death, it would frequently happen that his debt would be lost, and lost without his negligence or default. The right of retainer does not seem to depend upon the actual possession of assets, and perhaps the word retainer itself does not truly express the privilege given to the executor or administrator. The principle of law is founded upon necessity, and that estates may not be unrepresented. It considers the action as gone by the administration; so that if there be two executors,

sioner, shewing, 1. the amount to which John B. White was entitled, by substitution in the room of Roberts & Taggart; 2. the judgments on specialties against the first administrator; shewing how much Vance and White were respectively entitled to, by substitution in the place of Hartman; and also shewing that in this class Thomas Phillips & Co. would come, by virtue of a judgment obtained in June 1827, and Samuel Rea by virtue of a judgment obtained in August 1827. The commissioner also included Edward Conrad's administratrix and Beatty Carson in the second class, although their judgments appeared, on the face of the report, not to have been obtained till June 1832, which was after the death of the first administrator. 3. The commissioner reported that there was no specialty debt due to Robert Vance, one of the administrators, but that there were several due to John B. White, the other administrator, one of which (specified by the commissioner) was alone more than sufficient to absorb the balance of the fund, after paying the debts in the first and second class.

The cause was finally heard the 10th of June 1835, when the report was confirmed, and a decree made directing the receiver of the court, out of the fund in his hands to the credit of the cause, to pay to the plaintiff the costs of the suit; to the commissioner, the amount of his fee; to White, his debts of the first and second class; to Vance's administrator, his debt of the second class; to Phillips & Co., Rea, Conrad's administratrix, and Carson, their respective debts; and to White, the residue.

On the petition of Powell's executors, an appeal was allowed.

315 \*The cause was argued in this court by Baldwin for the appellants, and Johnson and Cooke for the appellees. On behalf of the appellants it was insisted, that the acknowledgment of a debt in a mortgage or deed of trust, and an agreement to discharge it by means of the property conveyed, gives to the debt the character of a specialty,

and one of them (a creditor) dies first, his representative has no action against the surviving executor. It considers that there is a transmutation of the property in the assets to the executor or administrator, to the amount of his debt, by the operation of law, without suit and execution. As he cannot sue himself, nor have execution, the operation of law is equivalent to a recovery and execution for him, so that he stands in the situation of a judgment creditor having sued out execution, as soon as he qualifies. These principles are, I think, fairly deducible from the authorities, and particularly from the early case of Woodward v. Lord Darcy, Plowden 185, which is a leading one on this subject. It is clearly established that the executor of an executor may retain for a debt due the first executor; and if Powell's executors had also qualified as White's administrators, there could be no question of their right. See Toller on Ex'ors, head of retainer; and Thompson v. Grant, 1 Russ. 540, in note. If therefore Powell was a specialty creditor, he ought to be regarded as a judgment and execution creditor, so far as to be preferred to other creditors in equal degree. That which he might have done if he had not administered, ought to be considered as done at the date of his qualification."—Note in Original Edition.



and confers upon an executor the right of retainer against other specialty creditors; that the damages for breach of an engagement are, in the administration of assets, and in relation to the right of retainer, to be placed upon the same footing as a debt; that these principles are applicable to this case, in which the acknowledgment and agreement exist in relation to the liability as indorser, which was capable of being, and has in fact been reduced to certainty; and that if the claim of Powell's executors is to be regarded as a simple contract debt, that of Vance and White in relation to Hartman's judgment, and that of White in relation to the forthcoming bond of Roberts & Taggart, are entitled to no higher dignity.

The counsel for the appellants reminded the court, that in the case of *Baker v. Fawcett's administrators*, he was of opinion (and certified to that effect) that the mere acknowledgment of a debt in a deed of trust did not give it the character of a specialty debt; but the court was of a different opinion, and refused to allow an appeal. Though that decision was merely upon an application for an appeal, and therefore had not been reported, he nevertheless relied upon it as an authority which should govern this case.

STANARD, J. That Powell was but a simple contract creditor by reason of his indorsement for White, and the payment of the indorsed notes to the bank, is conceded; and that the deed of trust of White, conveying certain property to indemnify his indorsers, did not operate as a covenant 316 to indemnify, so as to give the \*claim of Powell for indemnity the rank of a specialty, is, I think, free from all reasonable doubt. That deed, as it effects this question, contains but a recital of White's willingness to indemnify, by the conveyance of the property that was conveyed by it. If the recital could be regarded as a covenant for any purpose, (which at least I greatly doubt,) it was but a covenant to convey that property, and that covenant was fulfilled by the conveyance.

Having ascertained that Powell could rank as a simple contract creditor only, the decision of the other and more important question, whether the sureties in the bond of White to Hartman, having paid that bond since White's death, are entitled to rank as specialty creditors on the assets of White, and retain out of assets that have come to their hands as his administrators *de bonis non*, against other specialty creditors, is not indispensable in this case. But as that question has been fully and ably argued at the bar, and considered by me, and I have formed my opinion on it, I do not deem it proper to decline the expression of it. That opinion is, that the sureties are entitled to rank as specialty creditors, and as such to retain out of the assets that have come to their hands to be administered. This opinion is sustained by the cases of *Eppes &c. v. Randolph*, 2 Call 125; *Tinsley v. Oliver's adm'r &c.*, 5 Munf. 419; *Tinsley v. Anderson*, 3 Call 329; *Enders &c. v. Brune*, 4 Rand. 438; *Watts and others v. Kinney and wife*, 3 Leigh 272; *Lidderdale v. Robinson*, 12 Wheat. 594, besides other cases in the American courts. These cases furnish a foundation of authority so firm and ample to sustain the opinion, as

to render a minute discussion of the question superfluous: and I may add, that the reasonings on which they depend have so firm a root in the principles of justice, of natural equity, and in those deducible from other cases bearing the closest analogy to, or strictest affinity with that in question, 317 as to vindicate \*the opinion, if the cases had not furnished examples of the practical application of them to the precise question.

The court of equity, in marshalling assets, but exercises a power having close affinity to, if not identical with, that invoked by the sureties in this case. The bond that is discharged by the executor, and, as between the parties, the obligee and obligor, satisfied and extinguished, is in effect revived by the court of equity to charge the land, and the simple contract creditors placed where the bond creditor might have been, in charging the realty. So here the specialty, which as such charged the assets, and to which the assets ought to have been applied in exoneration of the sureties, rather than to simple contract debts, as the sureties had a right to require should be done, is, in conservation of that right, still considered as existing, for the purpose of having that done which ought to have been done.

The decree being deemed right in all respects as it affects the questions in controversy between the appellants on the one hand, and each and all of the appellees on the other, I think the court cannot take cognizance, on this appeal, of any question between the appellees. The power of the court to take cognizance of such questions arises only when, on the questions between the appellants on the one hand, and one or more of the appellees on the other, a decision is made which directly or incidentally disturbs the rights of one or more of the appellees, as settled by the decree appealed from. When such disturbance is the consequence of the decision of the question between the appellants and the appellees, there must necessarily result the questions that arise from the new position in which the rights of the appellees are placed; and of such questions the court of appeals has cognizance, and they should be decided by the court.

I am of opinion to affirm the decree. 318 \*CABELL, J., concurred in the opinion that the decree should be affirmed.

TUCKER, P. Upon looking into the deed of trust in this case, I am well satisfied that it does not constitute a specialty debt. It is not like the case of *Baker v. Fawcett*, in which this court held that the deed of trust was to be taken as such. In this case White was not, when the deed was executed, the debtor of Powell, and peradventure never might be; for Powell was but his indorser, and might have been relieved by White's payment of the note, or might never have paid it himself. This deed was but an indemnity against his contingent liability, and no other indemnity was contracted or covenanted for; though White was indeed personally liable also in an action on the case, if his indorser took up the note. But in *Baker v. Fawcett*, the debt was due and ascertained, and moreover it was distinctly acknowledged and declared. The indenture



witnessed "that Fawcett, in order to secure a debt due to A. F. amounting to 2300 dollars," had granted &c. Here was distinct acknowledgment of a debt under seal, which is the very definition of a specialty. "Know all men that I owe A. B. £100." is a good specialty, if it be sealed, and debt must be brought upon it. Dyer 22 b. But it is said that a mortgage is not a specialty, unless there be a covenant for payment. This I do not controvert. But a mortgage does not contain a distinct acknowledgment of debt by the mortgagor. In strictness the words of the condition are the words of the mortgagee, and they do not distinctly set forth a subsisting debt. If debt were brought upon it, the mortgagor would not be estopped to deny the debt, for it is nowhere acknowledged by him. If there were such an acknowledgment on his part, it would be otherwise; and herein is the difference between

this case and *Baker v. Fawcett*. There 319 the debtor had acknowledged \*his debt. But it is said that mere recital of a debt, though in a deed, creates no specialty; and a dictum of lord Hardwicke is relied on, (1 Ves. sen. 313,) who said that sir Joseph Jekyll so decided. I can find no such case. In the case in Vesey, there could be no foundation for the pretension, for it was the case of a fine levied on the wife's property to secure the husband's debt; and it would indeed have been absurd to make the recital of the existence of that a specialty of the wife, binding her personally for its amount. The case therefore has no bearing upon that of *Fawcett's* deed of trust.

There is another aspect in which the question presents itself. The creditor in the deed of trust is confessedly a creditor beyond the security; that is, if it falls short, he may recover the deficit. If this deficit be a simple contract debt, it will be barred by the statute of limitations. But surely the statute could never have been designed to apply to a case where, in the most solemn assurance known to the law, the debt is acknowledged under hand and seal. So far from it, the creditor, though out of possession, may foreclose at any time within twenty years. Would it not be incongruous that equity should foreclose after five years, and compel the trustee to sell for the whole, and if, upon his report of sale, a deficit should appear, that it should then consider the balance due as barred by the statute? It seems to me that it would, and that wherever there is a distinct indebtedness acknowledged in the deed, the debt must be considered to be elevated above those vague, indeterminate and loose parol contracts, which the common law regards as of so little weight, that the party, whom it is sought to bind by them, may deny them at pleasure, and bar them by the statute.

In this case, however, I have already said that the claim of Powell is not a specialty; and with this view of its character, the 320 question of retainer is unimportant,\* as the whole fund is insufficient for the payment even of specialty demands. I have however examined it with some care, and am of opinion that even if Powell were a specialty creditor, his representatives could not avail themselves of the doctrine of retainer, under the circumstances of this case. Having no assets in their hands to account for,

there is nothing for them to retain. The phrase and the principle are equally inapplicable to their case. If indeed they had assets which the administrator *de bonis non* was seeking to recover, I have no doubt they would be entitled to retain against debts of equal dignity, although in his lifetime Powell made no election, and set apart none of the assets for the payment of himself. But as they have none, the question is not a question of retainer, but of recovery. It is a question whether the executors of the deceased administrator can recover the amount of his demand, out of the assets which he did not collect, and which have come to the hands of the administrator *de bonis non* since his death, in preference to creditors of equal dignity; and this upon the basis of the right of retainer which he had in his lifetime. Now this is a sheer question of law, and must be decided by legal principles, since the court of equity here is administering legal assets. How then would his executors sue at law? The idea of the learned judge is, "that the operation of law is equivalent to a judgment and execution for him, and that he stands in the situation of a judgment creditor who has sued out execution, as soon as he qualifies." Be it so, for the sake of argument; yet by his death this fictitious judgment is abated, and in order to enforce payment from the administrator who holds the assets, it must be revived against him. The very suggestion presents its own refutation. Shall he sue upon his original demand? If he does, I cannot perceive how he would reply to a plea

by the administrator *de bonis non*, of 321 retainer by himself for his own \*debt.

Would it serve his purpose to say that his testator had had a right to retain out of the assets in his hands, but had not retained? If so, he must be held to have waived his right. Or could he say that his testator had no assets out of which to retain? If so, does that give him a right to retain out of the assets which a subsequent administrator has since recovered? I think not. It was his misfortune, if he had not assets, and his own fault and folly not to retain, if he had.

When to these considerations we add, that there is no case in the books, nor any dictum in an elementary treatise, which remotely hints at the right here asserted, we may consider ourselves justified in repelling the pretension. It is indeed in conflict with fundamental principles of english law; by which, even if the administrator could, by an artificial system of reasoning, be supposed to have a judgment against himself, it could not avail him against the administrator *de bonis non*, against whom it never could be revived.

The doctrine of substitution has next been elaborately discussed in the cause; and some comparatively recent british adjudications have been arrayed against our own. The appellees having paid off a large specialty debt of one Hartman, as the sureties of White, claim to be substituted to Hartman's priority in the distribution of the legal assets of the estate; and it is contended by the appellants that they have no such right, since the bond was extinguished by the payment.\*

\*There was a judgment on it against White's first administrator Powell, but that did not elevate it

This position is maintained upon the authority of *Copis v. Middleton*, 1 Turner & Russ. 224,—a work which we have not in our library, but from which there are large extracts in the notes to the last edition of *Story's Equity*. The decision is, as it seems to me, in direct conflict with our own cases; and that would be a sufficient

322 \*apology for declining to follow it, and for waiving any examination into its consistency with well established principles. But the high authority of lord Eldon seems to demand that we should look narrowly into the case, that we may discern whether, in our own decisions in Virginia, there is any lee way or variation from the true course marked out by the established principles of law and equity.

Upon the examination which I have made my mind is satisfied, that if the case of *Copis v. Middleton* extends to the case of payment by the surety after the principal's death, lord Eldon has deviated from the principle of the roman law, which has been adopted in the equity code of the english law; that he has overruled and departed from some of the prior cases in his own court; that he has struck at the root of the only principle on which a very large and important head of equity depends; and that the decisions will moreover lead to the most flagrant absurdity in its application. This is indeed an adventurous undertaking; and if I fail, I must submit to have it said of me, as it was of another—"magnis tamen excidit ausis."

Upon the first point,—the alleged deviation from the roman law, I must content myself with referring to the note of judge Story in his *Equity*, vol. 1, § 499, c. note 3, page 477, and to his quotations from the roman law, p. [479,] [480]. From them it will appear that this very objection of lord Eldon, that the debt is extinguished, and there is therefore nothing to which the surety can be subrogated, is fairly stated and fully met. Speaking of the surety's right, when he has paid the debt, to be placed in the shoes of the creditor and have a *cessio actionum*, it is said—"Poterit quidem dici nullas jam esse; cum suum perceperit. et perceptione omnes liberati sunt. Sed non ita est; non enim in solutum receipt, sed quodammodo nomen debitoris vendidit." ("It may indeed be said that they" [the actions, or bonds] "are

323 now \*null; since the creditor has received his debt, and all are liberated by its receipt. But it is not so; for he has not received it in discharge, but has, as it were, sold the name of his debtor.") Thus the debt is, in favour of the surety, not treated as if it were paid, but is regarded as if it were sold: it is looked upon not as extinguished, but as transferred, with all its obligatory force against the principal.

The second point insisted on is, that the decision of *Copis v. Middleton*, if it goes to the extent contended for, overrules previous adjudications of the english courts, which rest upon the controverted principle, now for the first time, I think, repudiated in equity.

A report of the case of *Copis v. Middleton* not being in our possession, we are compelled to speculate somewhat upon the extent

to which it has gone. From the extracts in *Story's Equity*, and the decision (upon its authority) of *Jones v. Davids*, 4 Russ. 277, I take it that his lordship not only denied to the surety the right of standing in the shoes of the bond creditor whom he has paid off in the lifetime of the principal, but also where he has paid off the bond after the death of the principal. "With respect" (he says) "to the bond paid off after the death of the principal, the questions are, whether, inasmuch as at the death of the principal there was money due upon the bond, there was an equity on the part of the surety to compel the creditor to go in against the assets of the principal; and whether, there having been no interposition for that purpose, the right of the surety to stand in the place of the creditor can now be maintained. When it is considered that this was a joint bond, and that no action at law could be maintained except against the surety, the surviving debtor," [an argument, by the way, that can have no force with us since the statute as to joint rights and obligations] "it is a strong proposition to say, that the surviving debtor

is to be considered in equity as a 324 \*specialty creditor against the assets of the deceased debtor." 1 *Story's Equity*, § 499 d. note 3, p. 477. Here it would seem clear that the surety who pays off the bond after the testator's death is denied the dignity of a specialty creditor: and accordingly the case is so understood in *Jones v. Davids*, 4 Russ. 277, where it is expressly decided that in such a case the surety is only a simple contract creditor of the testator's estate. This is the only position we are interested to controvert; for we do not, in our courts, place the surety in the shoes of the bond creditor, where he has paid off the bond in his principal's lifetime. We still consider him as a creditor by simple contract. There is, at that time, no superior dignity in one debt over the other. There is no right, no privilege of the creditor, to which the surety can be subrogated. For though the bond should bind the heirs, yet during the debtor's life it cannot affect the realty; and as to his personality as well as realty, all creditors have, during his life, the same privileges. Substitution or assignment is therefore useless, as was justly said in *Gammon v. Stone*, 1 Ves. sen. 339, and *Woffington v. Shaw*, 2 Ves. sen. 569. But after the principal's death, there are rights which the creditor has, and to which the surety has a right of subrogation. These are, the right to go against the heir, and the right of priority in the administration of the assets. We do not then encounter the absurdity which is objected by lord Eldon, of regarding the surety, who has paid the debt in his principal's lifetime, as a simple contract creditor until the principal's death, and then as converted at once in a court of equity into a specialty creditor against the assets. We apply the principle only where the payment is after the principal's death.

Now, in the case of *Ex parte Crisp*, 1 Atk. 135, lord Hardwicke has said, that where the surety pays off the debt, he is entitled to have an assignment of the security; and so in *Morgan v. Seymour*, 1 Ch. Rep. 64, 325 \*[120,] the court is said to have decreed, that "the creditor should assign over

above its original dignity as a specialty. Note by the president.—Note in Original Edition.

his bond to the sureties, to enable them to help themselves against the principal debtor." In both these cases then, as I understand them, though the bonds were discharged at law, it was conceived to be within the power of a court of equity to revive them, and to give the surety the same remedy upon them that the creditor would have had: and this remedy it was always in the power of the court to enforce, by injoining the principal (when sued at law) from availing himself of the surety's payment to bar the action. See 2 Call 136, 137. See also Bishop v. Church, 2 Ves. 373.

In the cases just adverted to, it does not appear whether the payment was made in the principal's lifetime, or after his death. If the latter, they are in point; if the former, they are a fortiori.

In the case of Butcher v. Churchill, 14 Ves. 575, the master of the rolls evidently proceeds upon the principle we contend for, that a surety paying or compromising a bond shall stand in the shoes of the creditor.

In *The King v. Bennet*, Wightwick's Rep. 2-6, it was decided in the exchequer, that in the case of a crown debtor, a surety shall be substituted to the prerogative of the crown in regard to the debt, and then admitted to use the crown remedies. This seems to be identically the doctrine in our case of *Enders &c. v. Brune*, 4 Rand. 438.

In *Robinson v. Wilson*, 2 Madd. C. R. 569, 570, (American ed.) before the vicechancellor, the very point arose. And he there states, that he had examined the case of *Gayner v. Royner*, in the register's book, which was a case in point to the relief asked. *Hotham v. Stone*, decided by sir William Grant at the rolls, was also cited to the same point; but it had been appealed from, and appears at that time to have been still undecided. The case of *Robinson v. Wilson* was therefore also laid over.

326 \*In this case, however, we have the evidence, by an examination of the register's book, that sir Thomas Sewell had decided that where a surety pays off a specialty debt, he should be considered as a specialty creditor of the principal; and we also see that sir William Grant had decided the same point in *Hotham v. Stone*, and that the vicechancellor betrayed the same learning in *Robinson v. Wilson*.

In the case of *Hodgson v. Shaw*, 3 Mylne & Keene 183, sir C. Pepsy, observing upon the case of *Copis v. Middleton*, says, "it was the first to introduce in terms any exception to the generality of the rule established by so many earlier cases, that a surety paying off his principal's debt is entitled, as against that principal, to all the remedies of which the creditor might have availed himself."

The case of *Parsons v. Briddock*, 2 Vernon 608, which was recognized by sir William Grant in *Wright v. Morley*, 11 Ves. 12, and had never been impugned, is justly considered by lord Brougham as really inconsistent with *Copis v. Middleton*. And though his lordship, in approving the latter, must therefore have disapproved the former, yet it would seem to have been still sustained in later cases, if I do not misunderstand the note of judge Story as to the case of *Dowbiggin v. Bourne*, 1 Younge 111, 114,

115; S. C. 2 Younge & Coll. 462, 472, 473. The works are not in our library.

Lord Brougham himself admits (3 Mylne & Keene 183,) that "the way could not be said to have been prepared for *Copis v. Middleton*, by any former decision:" and this may indeed be truly said; for *Gammon v. Stone*, 1 Ves. 339, and *Woffington v. Shaw*, 2 Ves. 569, were, I take it, both cases of payments by the surety in the lifetime of the debtor, and do not therefore decide the question as to such payment made after his death.

With all the cases before him which have been cited, it seems that his lordship 327 was scarcely justified in adding \*to the above remark, that "there was no body of authority against it." It is indeed remarkable that in the very case containing this review and approval of *Copis v. Middleton*, lord Brougham should have begun the work of paring it away by his decision. In that case (*Hodgson v. Shaw*, 3 Mylne & Keene 183), the surety had given his bond with a new surety for part of the debt, and had paid it off to the amount of £2937. leaving about £400. due and unpaid. The surety was considered a specialty creditor as to what he had paid, although, if he had paid the whole, he would have been held to be but a simple contract creditor!\* Lord Eldon had but little reason, I think, to congratulate himself upon the support to his judgment, afforded by the decision in *Hodgson v. Shaw*; for it is acknowledged by his learned successor, that he was unsupported by any former decision; it is impliedly admitted

328 that there \*were authorities, though not a "body of authority," against it; and it is overruled upon grounds which, if consistent with it, would lead to the most glaring inconsistency in the administration of equity, and to injustice and absurdities revolting to the judicial mind.

\*The reporter understands the case of *Hodgson v. Shaw* differently, and thus:—Two obligors having executed their joint and several bond for a debt, and one of them having died before any part of the money was paid, the survivor, being applied to by the creditor for payment, gave a new bond, with surety, for an amount something less than the whole debt. The surety having made payments amounting to £2937. in part discharge of the second bond, the creditor assigned the original bond to a trustee, upon trust, in the first place, to pay the assignor £430. the balance still remaining due to him; and as to the residue, upon trust for the surety. It was held, that in the administration of the estate of the deceased obligor in the first bond, the surety was entitled to rank as a specialty creditor; expressly upon the ground, that the payments being made on account of the second bond, the first, to which the surety was no party, still remained a subsisting security, capable of assignment for his benefit: whereas, in *Copis v. Middleton*, the only security for the debt was the bond in which the surety himself was an obligor, and which was held to have been extinguished by his payment of it. It seems, therefore, that the decision in *Hodgson v. Shaw* would have been the same, although the second bond had been given for the whole debt secured by the first, and although the surety had paid the whole. Indeed, the claim of the surety appears to be treated by the lord chancellor as if such were the real facts of the case.—Note in Original Edition.

Having shewn, I think, that *Copis v. Middleton* is at variance with the principles of the roman law, which have been professedly engrafted into the practice of courts of equity in England, and having also shewn that it is unsupported by any, and at variance with many, of the english decisions, I proceed to the third and most important consideration,—that it is in conflict with the well settled analogies of the law, and strikes at the root of the only principle on which a very large and important head of equity depends.

In presenting a few very cursory hints on this subject, let me advert first to the principle on which *Copis v. Middleton* is decided. To use lord Brougham's distinct enunciation of it, "The surety may enforce any security against the debtor which the creditor has; but by the supposition," [the surety having paid off the bond] "there is no security to enforce, for the payment" [by the surety] "has extinguished it. He has a right to have all the securities transferred to him; but there are, in the case supposed, none to transfer; they are absolutely gone." The whole of this reasoning, and that of lord Eldon himself, is truly said by judge Story "to proceed upon the ground, that by the payment by the surety the original debt is extinguished." It proceeds also upon the postulate, that as it is extinguished at law, equity has no power to revive it, and to sustain the surety in an action upon it for his benefit, by injoining the principal from unrighteously barring the just recovery of the surety, by a plea of payment, when that payment was made to the creditor by the surety himself. It must also deny to the court of equity the power to treat the principal,

329 in that forum, as if the bond, \*though extinguished at law, were still a subsisting security in the contemplation of equity.

If this principle be denied; if, when a bond is extinguished at law, a court of equity has no power to treat the parties as if it were a still subsisting security, what will become of that class of cases, of which *Bishop v. Church*, 2 Ves. 100, 371; *Primrose v. Bromley*, 1 Atk. 89, and *Simpson v. Vaughan*, 2 Atk. 33, may be considered as leading decisions? According to them, although, by the death of the principal in a joint obligation, the debt becomes extinct at law as to him, the bond is, under equitable circumstances, considered in equity a still subsisting security in behalf of the creditor, and is enforced not only against the personal estate of the principal, but also against his heirs, if they be named in the instrument. What becomes of the acknowledged right of a surety in a joint bond, (before our act as to joint obligations,) where the principal is dead, to go into equity for relief against his estate, on the ground that the money was lent to the deceased, and the plaintiff was only surety? See *Harrison ex'or of Minge v. Field's ex'x*, 2 Wash. 136; *Chandler's ex'x v. Neale's ex'ors*, 2 Hen. & Munf. 124; 5 Bac. Abr. Obligation, D. 4; *Sale v. Dishman's ex'ors*, 3 Leigh 548. In *Hoare v. Contencin*, 1 Bro. C. C. 27, lord Thurlow, indeed, doubted the creditor's right, in the case of a joint demand which was extinguished at law as to one of the parties by his death, to revive it against his representa-

tives. But lord Eldon, though he speaks of his "surprise that a court of equity should have interposed to enlarge the effect of a legal contract," admits that "the modern doctrine certainly is, that where a man has chosen to take the joint credit of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a

330 court of equity will, under \*certain modifications, constitute that demand." He then proceeds to state that it is a demand in equity only, and upon equitable principles. *Ex parte Kendall*, 17 Ves 525. Of these opinions was sir William Grant also, in *Devaynes v. Noble*, 1 Meriv. 546, 547. From these cases, then, it would seem unquestionable that equity can and will, where equitable principles require it, resuscitate the lifeless bond in favour of a creditor. It should do so, *pari ratione*, in favour of a surety; as where the survivor is the surety, and the deceased party was the principal who received all the money.

Again, if the power of a court of equity to resuscitate an extinguished legal demand, or to treat the parties as if it still subsisted, be denied, what becomes of the whole doctrine of marshalling the assets of a decedent's estate? By that doctrine, if a bond debt which binds the heirs is paid out of the personality, and thereby extinguished at law, a simple contract creditor will have a right (if the personal assets are exhausted) to stand in the shoes of the bond creditors to the amount which he has received out of the personality, and to charge it upon the realty. 1 Story's Equity 529; 1 P. Wms. 679; Cox's note 1. So in the case of the widow's paraphernalia taken by bond creditors whose bonds bind the realty. *Ram on Assets* 353, 354. And even legatees, whose legacies are swept by the bond creditor, will have a right to stand in his shoes against the heir. 1 Story's Equity 531, 2. On the other hand, if the heir is sued on a bond and pays the debt, whereby it is extinguished, he will be entitled to stand in the shoes of the creditor, and demand payment out of the personality, as the natural fund for the payment of debts. 1 Story's Equity 536. And lastly, a surety who pays off a bond will stand in the creditor's shoes against the heir. *Tinsley v. Oliver's adm'r and heirs*, 5 Munf. 419.

It would be needless to go into all the ramifications of this very comprehensive principle. It is obvious, \*from what has been said, that it rests upon the very power which is disavowed in *Copis v. Middleton*, and if that power be taken away, the whole doctrine is in danger of tumbling in ruins.

I think then I have established the third position, that the case of *Copis v. Middleton* strikes at the root of an important principle, on which many doctrines of equity must rest, unless we are now prepared to sweep them away by this new and mischievous decision.

Lastly, I think the decision of lord Eldon will lead to the most flagrant absurdity in its application. This has already been seen in the remarks upon *Hodgson v. Shaw*. By that case it would seem, that if the bond is only in part discharged, the surety is to be

regarded as a specialty creditor as to what he has paid; but if he has paid off the whole, he is to be placed in the lower grade of simple contract.\* Thus in the case at bar, if the sureties had not paid off the whole of Hartman's bond, but only a part of it, they would have been held to be specialty creditors to the amount of the payment; but as they have in fact paid off the whole bond, they are to be taken to be simple contract creditors only! No system of opinions can be true, which leads to such incongruous results. The truth is, that the decision of Copie v. Middleton jars with many of the most familiar principles of equity. Equity regards not form. Equity regards not what has been done, but what ought to have been done. Equity looks upon the debts due from a decedent as attaching upon the assets according to their dignity.† Equity will so far control legal proceedings, as to prevent a party from making an iniquitous defence at law. Equity will not permit the cap-

price of a creditor \*to put a burden on the party who ought not to bear it; but will interfere even with the law, in putting it on the right shoulders. Equity will reanimate a bond or other duty, extinguished at law, where equitable circumstances require it. These, and many more of the received axioms of the court, are violated by a decision which enables a party to fence himself behind a legal advantage, against the just claims of his adversary. I am therefore clearly of opinion, that we must on this occasion reject the decision of the learned lord, to whom we are all so much indebted for the improvements in the great structure of equity jurisprudence, which have resulted from the profound reflections of his very enlarged, sagacious, and discriminating mind.

In following the decisions of our own courts, I shall content myself with merely referring to them,‡ and with a reference particularly to the case of Watts &c. v. Kinney & ux., for my own views on the subject of substitution. With a view also to curtail this opinion, already too much extended, I ask leave to refer, for my own ideas of the difference in effect between the payment by the surety before and after the death of the principal, to what I have said elsewhere: 2 Tuck. Com. title Substitution, 1st edition, p. 485, 2d edition, p. 493.

With respect to the judgments of Conrad's administratrix and Carson, I think they ought to have been made to yield to the administrator's right of retainer. The judg-

ment against an administrator is not with us, as it is in England, conclusive of assets, where he has \*failed to plead fully administered. He is not precluded, after such a judgment, from shewing that there are no assets, (1 Rev. Code, ch. 104, § 36, p. 384,) and in doing so, it is competent to him to retain for his own debt. The decree ought so to have provided; but as the administrator de bonis non is not an appellant, and Conrad's administratrix and Carson are not before the court, the error, if it be one, cannot be corrected.

I am of opinion to affirm the decree.

Decree affirmed.

334 \*Taylor &c. v. Burdett &c.

August, 1840, Lewisburg.

(Absent BROOKE and PARKER, J.)

**Evidence—Land Patents\*—When Not Admitted—Statute.**—The act of April 1, 1831 declared, that in a suit for the recovery of land lying west of the Alleghany, against a person bona fide claiming such land under a grant from the commonwealth issued previously to the act, who has had the land duly entered, and has paid all the taxes chargeable upon it, his adversary shall not be allowed to give his grant in evidence, unless he shall shew that he too has had the land duly entered and charged with taxes according to law, and has actually paid the taxes charged and justly chargeable upon it. Per TUCKER, P., this act is constitutional.

**Same—Same—When Admitted—Case at Bar.**—In a suit against a defendant holding land lying west of the Alleghany, under a grant from the commonwealth issued previously to the act of 1831, it appearing that he had had his land duly entered, and had paid all the taxes chargeable upon it, the circuit court refused to allow his adversary to give his grant in evidence; but the court of appeals, being of opinion that he too had shewn that he had had the land duly entered and charged with taxes, and had paid the taxes chargeable upon it, reversed the judgment.

Ejectment in the circuit court of Kanawha county, in the name of John Doe, claiming in one count upon the demise of Thomas O. Taylor, and in another upon the demise of Adam Altz. Charles Burdett and Archibald Burdett were admitted defendants, and pleaded the general issue. On the 18th of May 1835, a jury was impanelled to try the cause.

At the trial, the defendants gave in evidence a grant made by the commonwealth on the 11th of April 1825, to David Shirkey and Granberry Samuels, for a tract of 300 acres, and a deed bearing date the 28th of December 1830, from David Shirkey and wife, conveying an undivided moiety of the said 300 acres to Archibald Burdett and Nates Legg. And the said defendants proved that the land in controversy was embraced by this deed; that the land embraced in the deed was in the actual possession of Shirkey from the time of the grant till the date of the deed, and in the possession of the defendants ever since the deed was made: that the land mentioned in the grant had

\*See the note on page 327. (Reporter.)—Note in Original Edition.

†Hence the sureties had a right, at the instant of the principal's death, to demand that the assets should be applied to pay the bond. To deprive them of this right would be a fraud upon them. (Note by the president.)—Note in Original Edition.

‡Eppes &c. v. Randolph, 2 Call 125, 188; Tinsley v. Anderson, 3 Call 320; Kinney's ex'ors v. Harvey &c., 2 Leigh 70; Watts &c. v. Kinney & wife, 3 Leigh 272; Enders &c. v. Brune, 4 Rand. 438, 447; Douglass v. Fagg, 8 Leigh 568; Tompkins v. Mitchell, 2 Rand. 428; McMahon v. Faucett &c., 3 Rand. 514; Hatcher's adm'r's v. Hatcher's ex'ors, 1 Rand. 58; Lidderdale v. Robinson, 12 Wheat. 594; Tinsley v. Oliver's adm'r &c., 5 Munf. 419. (Note by the president.)—Note in Original Edition.

\*Land Patents.—The principal case is cited in Ushers v. Pride, 15 Gratt. 196; Cecil v. Clark, 44 W. Va. 673, 30 S. E. Rep. 221.

been duly entered on the books of the commissioner of the revenue of Kanawha county, where the land was situated, from the time of issuing the said grant to this time; and that Samuels, Shirkey, and the defendants, had paid and discharged all the taxes charged or justly chargeable thereon against them, since the issuing of the said grant. Thereupon the plaintiff produced a grant made by the commonwealth on the 16th of June 1786, to Thomas Augustus Taylor, for 3051 acres; under which grant the plaintiff claimed the land in controversy. And in order to be allowed to give said grant in evidence to the jury, the plaintiff proved that Thomas O. Taylor, one of the lessors of the plaintiff, is the only child and the heir at law of the said Thomas Augustus Taylor, who had died before the institution of this suit; and he produced the following papers, to wit: a receipt, of the 28th of August 1834, given by John Adams Smith, the chief clerk in the auditor's office, then acting as auditor, shewing that, pursuant to the 27th section of an act passed on the 10th of March 1832, concerning delinquent and forfeited lands, Thomas O. Taylor had paid in advance, for the year 1834, the taxes on several tracts of land, one of which was the said tract of 3051 acres, and that the payment was credited to the sheriff of the county; at the foot of which receipt it was certified, that the taxes on said lands had been released by law, to 1831 inclusive, and that the same had not been returned delinquent to the auditor's office for the years 1832 and 1833, and were only charged on the commissioner's books of Kanawha for the year 1834, in Thomas O. Taylor's name: also a certificate of the commissioner of Kanawha county, bearing date the 26th  
336 \*of February 1835, stating that Thomas O. Taylor did enter on the commissioner's books certain tracts of land, one of which was the tract of 3051 acres, and that he had charged the taxes on the said tracts for the years 1832, 1833 and 1835, on his land book for 1835, without charging damages; and that the said tracts were entered on the books in May 1834, and were so certified by him to the auditor in the books of that year: also a receipt of the auditor, bearing date the 18th of March 1835, shewing that Taylor paid the taxes of 1832, 1833 and 1835, which payment was in advance of the revenue of 1835, and would be passed to the credit of the sheriff: and likewise the official printed list of the auditor of public accounts, dated the 24th of August 1831, purporting to be a list of lands and lots returned as delinquent for the nonpayment of taxes for the year 1820, and prior thereto, and redeemable on or before the 1st of January 1832; by which list it is shewn that the land mentioned in the said grant to the said Thomas Augustus Taylor was returned delinquent for the nonpayment of the taxes thereon in the year 1811. And no other evidence being offered by the plaintiff to show that the land mentioned in said grant, and claimed by him in this suit, had been duly entered on the books of the commissioner of the revenue in the county where it was situated, and charged with taxes according to law, or that he, or those under whom he claimed, had actually paid the taxes charged and justly chargeable

thereon, the defendants objected to the grant so offered by the plaintiff going in evidence to the jury; and the said objection being referred to the court, the judge was of opinion that the defendants had shewn themselves bona fide claiming the land in controversy, mediately, under a grant from the commonwealth issued before the first day of April 1831, and had had the land so claimed by them duly entered on the books of the commissioner of the revenue,  
337 and had paid and discharged \*all taxes charged or justly chargeable thereon since the date of the patent under which they held as aforesaid; and that the plaintiff, on his part, had not shewn that he, and those under whom he claimed, had had the land, so by him claimed, duly entered on the books of the commissioner of the revenue, and charged with taxes according to law, or that he or they had actually paid the taxes justly chargeable thereon, so as to authorize him to give in evidence the grant from the commonwealth under which he claimed title as aforesaid, according to the provisions of the 17th section of the act passed the 1st of April 1831, entitled "an act concerning lands returned delinquent for nonpayment of taxes, and making disposition of certain lands so delinquent, and of certain escheated lands, for the benefit of actual and bona fide holders thereof under grants from the commonwealth;" and therefore sustained the objection made by the defendants, and excluded the said grant to Thomas Augustus Taylor from going in evidence to the jury. To which opinion the plaintiff excepted.

The jury found a verdict for the defendants, and judgment was rendered for them; to which, on the petition of the plaintiff, a supersedeas was awarded.

Johnson for the plaintiff in error.

B. H. Smith for defendants in error.

TUCKER, P. I do not think that in this case the plaintiff's patent should have been rejected, as there was, to my mind, satisfactory evidence that he had in all things complied with the law.

In the act passed April 1, 1831. (Acts of 1830-31, ch. 28; Supp. to Rev. Code, ch. 287,) it is provided by the 17th section, that in a suit for the recovery of lands lying west of the Alleghany mountain, against a person  
338 bona fide claiming such lands, mediately or immediately, \*under a grant from the commonwealth issued previously to the act, who has had the lands duly entered, and has paid all the taxes chargeable upon them, his adversary shall not be allowed to give his grant in evidence, unless he shall shew that he too has had his lands duly entered and charged with taxes according to law, and has actually paid the taxes charged and justly chargeable upon them. Has the plaintiff in this case done so?

First, as to entering the land with the commissioner. This was first required by the act of 1810; and accordingly it appears that the lands were on the commissioner's books in 1811; for they are on the auditor's list, as delinquent for that year. Now, if they were once on the books, it would seem that this duty was fulfilled, as it was not required to be repeated every year. But be

this as it may, on the 26th of February 1835, Thomas O. Taylor, the plaintiff, entered the lands again in his own name, as appears by the certificate of commissioner Wilson. That commissioner further proceeded, according to law, to charge the tax on the lands for the year 1835, and also those for the back years 1833 and 1832, (that for 1834 having been previously paid in advance into the treasury, as appears by the auditor's receipt). Why did he not go farther back? Why did he not charge the taxes for the years anterior to 1832, back to 1811? Doubtless because they had before that time been already charged, either to Thomas O. Taylor or Thomas Augustus Taylor; for the lands had been listed in 1811 in the name of Thomas Augustus Taylor, and must be presumed to have continued so on the books until they were listed by Wilson, in 1835, as Thomas O. Taylor's. When any thing is entrusted to an officer to be done, the law presumes omnia rite acta, unless the contrary appears. Phillipps on Evid. 614; Starkie on Evid. part 2, p. 172. Here we are not at liberty to doubt that Wilson would have proceeded to enter and charge the taxes anterior to 1832, unless they had been already so entered and charged.

339 \*Next, as to the payment. It is admitted that all the taxes subsequent to 1831 have been paid; and it only remains to enquire whether those of 1831, and anterior, have been also paid or released. The evidence is satisfactory to my mind that they were released. By the act of March 10, 1832 it is provided, that if the amount of taxes, exclusive of damages, charged upon any tract of land returned delinquent for the year 1831 or any prior year, shall not exceed ten dollars, they should be by that act relinquished and forever discharged. To establish the fact that his lands were exonerated by this act, the plaintiff has introduced the certificate of John Adams Smith the acting auditor. On this certificate two questions present themselves.

1. Is the certificate, being that of the clerk and not of the auditor, admissible evidence? This can admit of no doubt. In case of sickness or absence of the auditor, the chief clerk in the auditor's office is required to perform the duties of the office; and the certificate being signed by J. A. Smith as chief clerk and acting auditor, I must presume he was acting by reason of the sickness or absence of his principal.

2. Does this certificate establish the fact that the taxes on this land were released by law? If the evidence is competent, there seems to be no reasonable doubt of its sufficiency; for the officer whose duty it was to receive the treasurer's receipt for the taxes, and to give the landholder his receipt for them, has certified that for 1831, and the years preceding that, the taxes were released. An attention to the formula in such cases will render this matter more clear. The landholder wishes to pay off his taxes to the state, at the treasury; which he is expressly authorized to do, "upon the certificate of the auditor of public accounts authorizing the treasurer to receive the same." 2 Rev. Code, ch. 183, §

87, p. 38. Accordingly, he first goes to the auditor, and states his desire to pay the taxes upon his \*land. It is the auditor's duty to examine the commissioner's books on file in his office, ascertain the taxes due upon the land, and issue his order or warrant to the treasurer to receive the amount. The treasurer does receive the amount, for which he gives his receipt. This receipt is handed to the auditor, who takes it up, and gives in lieu of it his own receipt; and that closes the transaction. That receipt of the auditor is a quietus to the party. In the performance of these duties, the auditor must examine the commissioner's books, he must ascertain what is due; he must therefore, in that examination, decide whether the lands of the party are or are not exonerated by the act of March 10, 1832. If not exonerated, the amount due for them should be certified, that it may be paid. But he cannot decide whether they were exonerated, without ascertaining that the taxes anterior to 1832 did not exceed ten dollars. In the fulfilment of his duty, he must then have ascertained that fact from the books, and must have known that it was a fact when he so certified. The evidence therefore was sufficient. Was it competent? I think it was. The competency may be inferred from what has been already said. The duty of the auditor is to examine the books and ascertain the taxes due. Those which are released are not due. Of those charged, then, he must ascertain what are released. And when a quietus is demanded by the landholder, to which he is certainly entitled when he has paid all that is due, what is the auditor to give? If he is to give a receipt or quietus for those taxes which are paid, is it not within his province to give also a certificate that the other taxes, which were charged on the books, have been released? If the receipt is evidence of payment, why should not the certificate of the officer whose duty it is to decide what is due, be proper evidence of what has been released? It is his business to examine and to judge whether the arrears before 1832 were under \*ten dollars, and were therefore released; it was the party's right to have evidence of that fact; and it was therefore competent for the auditor to give it.

I am therefore of opinion that the patent was improperly rejected.

As to the other question, as I have not a shadow of doubt of the constitutionality of the law, and as it is not necessary to be decided, I shall not enter upon a consideration of the elaborate argument on the subject. Suffice it to say, that it has not had the effect of shaking the opinion I have always entertained, that however harsh many of our land laws may seem, it was fully competent to the legislature to pass them. The act in question is one of those, and harsh as it may be, it is the law of the land, which we must respect. I am not sure that it will not, upon the whole, be beneficial.

PER CURIAM, Judgment reversed, and cause remanded for a new trial.



## Caldwell v. Chapline's Heirs.

August, 1840, Lewisburg.

(Absent PARKER, J.)

**Deeds of Trust—What Sale under Will Not Be Set Aside—Feme Covert—Lapse of Time—Case at Bar.—**

The trustee in a deed conveying land to secure payment of a debt, by his will devises the land to his executors, and expressly directs and empowers them to sell the same in execution of the trust. The executors accordingly sell the land, their sale being fairly made, and for a price which is the full value at the time. This sale is made in 1818, after the death of the grantor in the deed; whose heirs are two daughters, both married, and one of them absent from the commonwealth when the sale takes place. The husband of the other is present at the sale, assents to it, and receives the surplus proceeds after payment of the debt, one moiety as the share of his wife, the other as the share of the absent daughter, for whom he undertakes to act. The husband of the latter having died, she returns to Virginia in 1820, and thenceforth resides with her brother in law and sister, in the same town in which the land is situated. The purchaser makes valuable improvements on the property; and no claim whatever is made or intimated by any of the parties, until 1835, when a bill is filed by the husband and wife and the widowed daughter, seeking a redemption or resale, on the ground that the executors of the trustee had no authority to sell. The wife dying pending the suit, the same is revived in the names of her children and heirs. **Held**, 1. the devise by the trustees passed the title to his executors; 2. the executors had, however, no authority to act in execution of the trust; but, 3. under the circumstances of the case, the sale shall not be disturbed, even in favour of the heirs of the party whose coverture continued from the time of the sale until the institution of the suit.

By a deed dated the 20th of April 1809, John Lee and wife, of Ohio county, conveyed to Alexander Caldwell (among other property) two lots in the town of Wheeling, upon trust to sell the same, and apply the proceeds to the payment of certain debts due from Lee.

343 \*By another deed, dated the 13th of August 1811, John Lee conveyed to Noah Linsley, his heirs and assigns forever, all the property comprised in the former deed, (subject however to the trust created by that deed, so far as the debts therein mentioned had not been paid,) upon trust that Linsley should proceed to sell the same at public auction or private sale, for cash or upon a reasonable credit, and out of the proceeds pay, first, the balance remaining due upon the deed of trust to Alexander Caldwell, and then a debt of 807 dollars with interest, due to the administratrix of Joseph Swann deceased.

John Lee and Noah Linsley both died in

\*Trust Deeds—Sale—Setting Aside.—In *Morriss v. Virginia State Ins. Co.*, 90 Va. 375, 18 S. E. Rep. 843, it is said, after the sale has been made, the court interposes with more reluctance than when it is applied to in the first instance, and before the sale is actually made. Citing *Taylor v. King*, 6 Munf. 366; *Harris v. Harris*, 6 Munf. 368; *Gibson v. Jones*, 5 Leigh 370; *Hughes v. Caldwell*, 11 Leigh 348.

the year 1814. The wife of Lee survived him, and he left also four children his heirs at law, namely, Sally Ann, Ann Maria, Elizabeth L. and John C. Lee. Linsley died without having executed the trust created by the deed of 1811, and by his will he devised (inter alia) as follows: "I do devise to my executors hereinafter named, or the survivor of them, all lands conveyed to me in trust, and I do direct and empower them, or the survivor of them, or their executors, to sell and dispose of the said property in the same manner that I, if living, could and ought to do, to effect the purposes and intention of the respective conveyances." Samuel Sprigg and Noah Zane were appointed the executors, and they proved the will and took upon themselves the execution thereof.

In 1818, Linsley's executors, in pursuance of the authority and direction contained in the will of their testator, proceeded to sell the two lots in Wheeling, at public auction. Daniel Steenrod became the purchaser, at the price of 2470 dollars, and received from Sprigg and Zane a conveyance of the property, bearing date the 6th of April 1818. The price of 2470 dollars was the full value of the two lots at the time of the sale.

344 \*At this time, all the daughters of John Lee were married women; Sally Ann was the wife of Josiah Chapline; Ann Maria, the wife of James C. Hughes; and Elizabeth L. the wife of Timothy Adams. Chapline and wife were residing in Wheeling; Hughes and wife were nonresidents of the commonwealth. The interest of Adams and wife and of John C. Lee in the equity of redemption of the two lots, had, previously to the sale, been purchased by Alexander Caldwell: and both Caldwell and Chapline were present at the sale, and assented to it. After satisfying the debt due to Swann's administratrix, secured by the trust deed, the executors of Linsley paid to Caldwell, as the assignee of Adams and wife and of John C. Lee, 588 dollars, being one half of the surplus proceeds of the two lots: and they paid to Chapline the remainder of that surplus; a moiety of it as the share to which he was entitled in right of his wife, and the other moiety as the share of Hughes and wife, for whom he undertook to act in receiving the same.

In the year 1820, James C. Hughes died, and his widow removed to Virginia, and thenceforth resided with Josiah Chapline, who for several years succeeding lived in the town of Wheeling, and afterwards in its immediate neighbourhood.

By a deed dated the 26th of January 1820, Daniel Steenrod and wife sold and conveyed to James Caldwell, for the price of 3150 dollars, the two lots which Steenrod had purchased at the sale made by Linsley's executors. Josiah Chapline was one of the justices who took the acknowledgment and privy examination of Mrs. Steenrod. James Caldwell paid the purchase money, and in 1826 and 1827 (during which period Chapline and wife and Mrs. Hughes were residing in Wheeling) proceeded to make large and valuable improvements upon the property.

345 \*By a deed dated the 10th of December 1826, and duly recorded, John C.



Lee bargained, sold and conveyed to Jane Lee Chapline (a daughter of Josiah Chapline), for the consideration of 300 dollars expressed in the deed, "all the undivided real estate lying in the county of Ohio or Tyler, which he inherited as one of the heirs of John Lee deceased, and all claims which he may have on the estate of the said John Lee deceased;" together with a horse, saddle and bridle.

At January rules 1835, Josiah Chapline and Sally Ann his wife, Ann Maria Hughes, and Jane L. Chapline (by the said Josiah her next friend), exhibited their bill in the circuit superior court of law and chancery for the county of Ohio, against James Caldwell. By a subsequent amendment, Daniel Steenrod and Timothy Adams and wife were also made defendants. After setting forth the execution of the trust deed of August 1811 by John Lee, the sale and conveyance of the two lots to Steenrod by the executors of the trustee, Steenrod's sale and conveyance of them to James Caldwell, the coverture of the plaintiff Sally Ann at the time of the said sale by the executors of the trustee, and ever since, the coverture of the plaintiff Ann Maria at the time of that sale and until about the 7th of July 1820, and John C. Lee's conveyance to the plaintiff Jane L. Chapline,—the bill proceeded to charge, that by the said conveyance from John C. Lee (who was stated to have since died) Jane L. Chapline became entitled to all his interest in the real estate of his father, including the two lots in Wheeling: that the authority to sell those lots, conferred upon Linsley by the deed of August 1811, was a personal trust, which he could not rightfully delegate, and which, after his death, could not rightfully be executed without the aid and decree of a court of equity; consequently, the sale of them by his executors having been made without such aid and decree, the plaintiffs may rightfully insist that the same \*be set  
346 aside and annulled: that the said lots are exceedingly valuable, and are in reality worth several thousand dollars more than the price at which they were sold. The prayer was, that Caldwell might be decreed to reconvey the lots to the plaintiffs, upon such reasonable terms as should seem just, in order that a resale might take place under the directions of the court; and for general relief.

Caldwell, in his answer, stated, that at the time he purchased the lots from Steenrod, paid his purchase money, and received his conveyance, he had no knowledge of any defect whatever in the title, or of the pretended equity of the complainants: that Chapline knew of his intended purchase, and neither made any objection to it, nor intimated that he, or any one else, had any claim to the property. The answer of this respondent set forth the several facts (already detailed) that Alexander Caldwell had acquired the interest of Adams and wife and of John C. Lee, before the sale made by the executors of Linsley; that said Caldwell and the plaintiff Chapline were both present at the sale, assented to it, and received the surplus proceeds—Caldwell the shares of Mrs. Adams and

John C. Lee, and Chapline those of his wife and Mrs. Hughes; that the property produced its full value; that Chapline and his wife had been residing in Wheeling and its immediate vicinity, ever since the sale by Linsley's executors, and Mrs. Hughes residing with them ever since the death of her husband in 1820; that Chapline was one of the justices who took Mrs. Steenrod's acknowledgment and privy examination; and that the respondent had made expensive improvements on the property. These improvements, the answer alleged, were to the value of 7000 dollars; and though Chapline, his wife, and Mrs. Hughes were in a situation to see the lots, and did see them, almost constantly while the improvements were in progress, yet they stood  
347 quietly by, making no objection \*to the improvements, and no claim to the lots; and with full knowledge of all the facts relative to their pretended rights, had slept over those rights for seventeen years. Respondent insisted that his equity was superior to any possessed by the complainants; that he had also the legal title; and consequently that his enjoyment of the property ought in no manner to be disturbed.

Steenrod answered, referring to and adopting the answer of his codefendant Caldwell. No answer was put in by Adams and wife.

To the answers of Caldwell and Steenrod, the plaintiffs replied generally.

Pending the suit, Mrs. Chapline died, and the cause was revived in the names of Jane L. Chapline and others, her children and heirs at law.

John C. Lee's assignment of his interest in the two lots to Alexander Caldwell, was produced and filed as evidence in the cause. It is under seal, and bears date the 20th of April 1817. Much of the testimony taken related to the point whether John C. Lee had attained his age of twenty-one years at the date of that instrument. It seemed probable that he had not; although he must have attained full age in the course of the same year. But it appeared that in August 1826 he was in Wheeling, and had a settlement at that time with Alexander Caldwell. Several receipts given by him, for different sums of money paid him by Caldwell, were produced and proved. All of them are dated in August 1826. One of them is for money paid on account of his "share of the proceeds of the two lots on the main street in Wheeling, now owned by James Caldwell;" and another, dated some days afterwards, is "in full of all claims and demands."

The cause was heard the 13th of June 1837; when the court decreed, that as to the plaintiff Ann Maria Hughes, and also as to the plaintiff Jane L. Chapline  
348 so \*far as she claimed under the deed from John C. Lee, the bill be dismissed with costs. But the court, being of opinion that the executors of Linsley had no authority to sell the lots in the bill mentioned, and that the heirs of Sally Ann Chapline were not barred, by lapse of time or otherwise, of their claim to redeem their undivided fourth part of the said lots, or to have the benefit of a resale,—decreed that

the cause be referred to a commissioner, for accounts to be taken of the debt and interest secured by the trust deed to Linsley; of the rents and profits of the lots since the sale by Linsley's executors, and by whom received,—charging the same with the taxes, insurance, and other charges on the property, necessarily and properly paid or incurred, and with the value of the permanent improvements made upon the said property; and of the moneys received of Linsley's executors by Josiah Chapline, on behalf of himself and his wife: all which the commissioner was directed to report, in order to a final decree.

On the several petitions of Ann Maria Hughes and James Caldwell, appeals were allowed them respectively from the decree.

Price, for the appellant Ann Maria Hughes, and the appellees the heirs of Sally Ann Chapline.

Johnson, for James Caldwell.

TUCKER, P. Some of the points which have been argued at the bar do not fall within the view that I have deemed proper to take of the rights of the parties: I have therefore not intimated any opinion upon them. A short statement will best present the point on which I consider these cases as turning.

In 1809, John Lee conveyed the lots in question to Alexander Caldwell, to secure certain debts. In 1811 he conveyed the same lots to Noah Linsley, another trustee, to secure other debts. Lee died in

1814, and Linsley \*in the same year.

Linsley by his will devised these lots to his executors Sprigg and Zane, with power to execute the trust. This authority I take to be, beyond question, void. In 1818, the persons entitled to the equity of redemption in this property were A. Caldwell for one half, Mrs. Chapline for one fourth, and Mrs. Hughes for one fourth. In that year, the creditors having applied to Sprigg to proceed with the sale, he and his coexecutor did so. The lots were bought by Steenrod at 2470 dollars; a full price, as is clearly proved. The sale was assented to by A. Caldwell, representing one half, and Josiah Chapline the husband of Sally Ann, who represented one fourth. Mrs. Hughes, representing the remaining fourth, was covert and out of the state. After the sale, and payment of the debts, A. Caldwell received one half of the balance, and Josiah Chapline received the other half, on account of his wife and Mrs. Hughes.

On this simple state of facts certain questions arise, the answers to which must decide the cause. Had the executors the title to the property in them by the devise? Unquestionably: whether they had the power and authority of trustees or not, the title clearly passed to them by the will. Had the creditors a right in any way to enforce a sale? Without doubt: they might have filed a bill of foreclosure; and that was the regular mode in which they should have proceeded. The sale by the executors was certainly irregular and unauthorized by the deed. But though unauthorized and irregular, will the court, even upon the application of infants and femes covert who have been guilty of no default,

set it aside under the circumstances of this case? I think not. The creditors had a right to enforce the trust. Under a false impression of the law, they apply to the trustee's executors to sell. The person representing one half the equity of redemption assents to the sale, under the like impression; and the tenant by curtesy of

another fourth does the same. The trustees proceed; \*the sale is fairly made; a full price is obtained; the purchaser pays up his money; it is scattered by distribution among the creditors, and the owners of the equity of redemption; and the sale is in effect ratified by the representative of one half, by the receipt of his portion of the surplus, and by the husband of the representative of another fourth, by the receipt of her portion. Since these transactions, sixteen years roll by without objection: another person (James Caldwell) purchases of the bidder at the sale, pays up his money, and builds largely on the property, which has been thus greatly increased in value, not only by the natural rise in a growing city, but by actual and expensive improvements. Will a court of equity unravel all that has been done, and decree a new sale, merely because of the irregularity; an irregularity, too, of which the best counsel of the day seem in no wise to have been aware? This is the true question to be decided.

That a court of equity would not be disposed to realize the dreams of profit which probably gave rise to this suit, seems clear from the course it has pursued in yet stronger cases. The complainants can upon no principle be entitled to recover the valuable improvements which have been made upon the property by the purchasers, in the confidence of title, and before any intimation of claim on the part of Lee's representatives. In Southall v. M'Keand & others, 1 Wash. 336, the claim of Southall was made known to M'Keand, but he instituted no suit to enforce it, till M'Keand had placed improvements to ten times the value on the lot. The court decided he should only have the value at the time M'Keand purchased, which was directed to be ascertained by a jury. They said, it was unreasonable he should in equity avail himself of the increased value produced by his own delay, since M'Keand had a right to suppose, from that circumstance, that he had deserted his claim. So in our case. A sale was made, of the

\*validity of which no one doubted.

There was no mala fides in the trustees, the purchaser, or the vendee of the purchaser. All parties sui juris had acquiesced in the transaction. The defendant Caldwell held the property for eight years before he began his improvements. No pretence of title was set up. He then proceeded to build, while the parties sui juris silently looked on. It would indeed be unreasonable that they should now avail themselves of the increased value produced by their own conduct, since Caldwell had a right to suppose that they had no claim to the property, or that they had abandoned it. And here let it be observed, that the time from which abandonment is presumed is not governed by the rules which prevail

as to an equity of redemption. Twenty years are not necessary to justify the presumption of abandonment. It depends upon the acts of the parties, and the circumstances of the case; and it might in this case well have been presumed by Caldwell, from the acquiescence of all the parties interested who were sui juris, and of the natural protector of the only party who was not. See the remark of judge Cabell in *Cresap v. M'Lean & al.*, 5 Leigh 391, and the cases there cited by him.

The case of *Pierce's adm'r &c. v. Trigg's heirs*,\* decided at the last term, affords another instance of a similar description. In that case an irregular sale had been made, and the parties interested were infants at the time of the sale. They sought a resale. The court refused it; but as there was no proof that the price was a full price, it directed a valuation to be made of what the property was worth at the time of the sale, and the excess, if any, over the price for which it had sold, to be paid to the claimants.

Pursuing the principle of these cases, then, it is very clear that the plaintiffs can have no benefit of the improvements made by Caldwell. Their only pretence of claim is to the value of the lots.

352 \*In considering this pretension, let us recur again to the fact that the creditors had a right to have the sale made in 1818; that all the parties, then sui juris, approved it; that a general mistake prevailed among all concerned, as to the powers of the executors to sell; that every thing was fairly conducted, and that the trust property commanded a full and fair price. Ought a court of equity now to set aside the sale, and direct a resale, or ought it even to direct an enquiry as to the value of the property in 1818, in the expectation that upon such valuation the plaintiffs might get something more? I think not. When that has been done which ought to have been done, though not precisely in the manner it ought to have been done, equity should not interfere. The claimants themselves have no equity, and never had any. They have sustained no injury, and without that they can have no equity. Had a bill of foreclosure been filed, a court of chancery would have decreed a sale in 1818. It would have appointed a commissioner, or the executors themselves, to sell; and most probably the latter, as they were liable to no exception, and the title was in them. If so, precisely that has been done, which the court would have ordered to be done; and therefore it must be taken to have been well done. For what a trustee (and such the executors were) is compellable to do by suit, he may do without suit. 2 Fonb. Eq. 175. There is then no motive for the action of a court of equity. On the other hand, there is the strongest motive for its not acting; for it cannot bring back the year 1818. Its only proper power would be to do now what should have been done then. But that it cannot do, because it cannot carry itself back to the date at which the creditors had a right to have a sale. If indeed the property had been sacrificed, measures might be taken, as in

*Pierce's adm'r &c. v. Trigg's heirs*, and in *White v. Atkinson*, 2 Wash. 94, to ascertain the proper redress. But the proof is ample that the sale was fair and the price full, and indeed there is no allegation to the contrary.

It remains but to refer to the case of *Taliaferro v. Minor*, 1 Call 524, to show, that though a sale by trustees has not been made in strict pursuance of a power, and though the parties complaining were infants when it took place, a court of equity will not set it aside, if every thing was fair, notwithstanding a loss has accrued to the infant parties interested in the transaction. It may be regarded, I think, as sustaining the position, that if a sale be made by trustees when it ought to have been made, and if it be fairly made and for a full price, a court of equity will not interfere with it, even at the instance of infants, though the trustees may not strictly have pursued their authority. This appears to me sound doctrine, and decisive of these cases.

The result is, to affirm the decree in *Hughes v. Caldwell*, and reverse it and dismiss the bill in *Caldwell v. Chapline's heirs*.

The other judges concurred. In *Hughes v. Caldwell*, decree affirmed: in *Caldwell v. Chapline's heirs*, decree reversed and bill dismissed.

#### 354 \*The Fire and Marine Insurance Company of Wheeling v. Morrison.

August, 1840, Lewisburg.

[36 Am. Dec. 385.]

(Absent PARKER, J.)

**Insurance—Contract to Sell Insured Property—Destruction before Contract Completed—Right of Vendor to Recover on Policy—Case at Bar.**—A house is insured against fire, by a policy containing a provision that it is to have no effect if assigned, unless the assignment be allowed by the insurance company. The owner and assured makes a written contract, by which he agrees to sell to A. the house with the lot on which it stands, and A. agrees to procure and assign to the vendor the bond of a third person for the purchase money, and to execute a mortgage on the property for securing the payment; the contract to be

**\*Contract to Sell Insured Property—Right of Vendor to Recover on Policy Where Property Destroyed before Contract Performed.**—In *MacCutcheon v. Ingraham*, 32 W. Va. 385, 9 S. E. Rep. 263. it is said: "In *Wood on Fire Insurance*, p. 568, § 330, we find that 'a mere contract to sell property covered by insurance, even though the insured has bound himself to convey upon the performance of certain conditions, does not affect the validity of the policy; and if a loss occurs before the conditions are performed a recovery may be had by the insured, even though the conditions are subsequently performed; and, if it was agreed that the policy should be assigned to the purchaser, the judgment will inure to his benefit. Neither will a conditional transfer of property avoid the policy, but, if the insured parts with all his interest in the property, the policy ceases to be operative.' See, also, 2 Bart. Ch. Pr. p. 918, § 290; also, *Insurance Co. v. Morrison*, 11 Leigh 354." See also, monographic note on "Insurance, Fire and Marine" appended to *Mutual*, etc., Soc. v. *Holt*, 20 Gratt. 612.

\*Reported 10 Leigh 406.—Note in Original Edition.

fulfilled on A.'s part within the month. A. fails to perform his contract within the month; and five days afterwards, and while it is still unperformed, the house is consumed by fire. The contract is subsequently carried into effect by the parties. In an action by the vendor against the insurance company to recover the value of the house, the parties to the suit, in addition to the foregoing facts, agree, that both before and after the execution of the written contract for the sale of the premises, it was agreed by parol between the vendor and vendee, that the former should assign the policy of assurance to the latter: reserving however the question of law, whether the said parol agreement can be admitted, either as a distinct contract, or for the purpose of affecting the terms of the written contract of sale. HELD, the plaintiff is entitled to recover, notwithstanding the contract of sale, and the subsequent performance of it: 1. because the purchaser, if sued in equity for specific execution, might have set up the parol agreement to assign the policy, and, thereby entitled himself to an abatement for the loss of the house; 2. because, by the stipulation for a mortgage, the plaintiff retained an insurable interest in the premises, which gave him an immediate right of action against the insurance company upon the happening of the loss.

Joseph Morrison brought an action on the case, in the circuit superior court of Ohio county, against the president and directors of the fire and marine insurance 355 \*company of Wheeling, to recover the value of a house insured by the plaintiff with the defendants, and subsequently consumed by fire. Issues being made up on the pleas of non assumpsit and payment, the parties stated and agreed the following case for the judgment of the court.

1. That on the 9th of August 1832, the defendants executed to the plaintiff a policy of insurance for one year on a certain dwelling house in Wheeling, and some furniture therein, which policy is agreed in hæc verba, and contains among others the following provisions: "that the capital stock, estate and securities of the company shall be liable to pay, make good, and satisfy unto the said insured, his heirs, executors, administrators or assigns, all such damages or loss which shall or may happen by fire to the house and furniture above mentioned," within the year, "not exceeding in the whole the sum of 1000 dollars, according to the amounts as above mentioned," (that is to say, 500 dollars for the house, and 500 dollars for the furniture) "unless the said company shall, within five days after the proof of such damage or loss of the building aforesaid insured, give directions for putting the same into as good a state of repair as the same was before the injury by fire, or make good the loss or damages by paying therefor;" with a similar provision for replacing or paying for the furniture, in case of loss or injury by fire: that the damages should be paid according to an estimate to be made by arbitrators indifferently chosen: that the house should not be occupied for certain purposes deemed hazardous: and that the policy should have no "force or effect if assigned, unless such assignment be made within thirty days after the transfer of the property, and allowed by the company agreeable

to article 10, of the proposals annexed;" which article is in these words: "The policy may always be transferred, provided such transfer be endorsed upon the 356 \*policy, and brought to the office for approval within thirty days from the date thereof, otherwise the premium shall be considered as sunk for the benefit of the assurers."

2. That the policy was renewed from time to time until the 16th of March 1836, when it was again renewed for one year from that date on the building alone, to the amount of 700 dollars, at which time the plaintiff was seized of the premises in fee, and the house was worth 700 dollars.

3. That the premiums of insurance were paid by the plaintiff to the defendants.

4. That on the 5th of May 1836, the house was consumed by fire, without any fraud on the part of the plaintiff, who gave due notice and satisfactory proof thereof to the defendants, and performed all the conditions precedent which were incumbent on him.

5. That on the 11th of April 1836, the plaintiff entered into an article of agreement under seal, with a certain Austin Peay, for the sale of the house insured and the lot on which it stood, which agreement is set forth in hæc verba, and is to the following effect: That the plaintiff Morrison had sold to Peay the house and lot aforesaid, with other property, for which Peay had paid ten dollars in hand, and agreed to deliver to Morrison, duly transferred, the bond of John M. Clark for 12000 dollars, payable five years after the 1st of April 1836, and bearing interest payable half yearly from its date, and also to invest Morrison with all the security attached to the bond aforesaid, and to give him, as additional security for the payment thereof, a mortgage upon two lots, (one of them being that on which stood the building in question); all of which covenants on the part of Peay were to be done and performed in the same month of April: and that upon the delivery of the bond and security aforesaid, Morrison was to execute and deliver to Peay a good and sufficient deed in fee simple, with general warranty.

357 \*6. That at the time when the house was consumed by fire, Clark, who had been absent for some time before, and continued absent for some time afterwards, had not executed the bond which was to be delivered in payment, and Peay had not complied with the terms of the said agreement; but that afterwards the said agreement was carried into effect by the assignment of Clark's bond, and the execution of a deed from Morrison to Peay, who had ever since been, and was still, in possession of the premises.

7. That at the time of the bargaining between Morrison and Peay for the said property, it was agreed by parol between them, that possession was to be delivered to Peay at the time Clark's bond should be assigned to Morrison, and that Peay was to receive the rents from the 1st of April 1836, provided the contract on his part was carried into effect: that it was also agreed by parol between Peay and Morrison, both before and after the execution of the writ-

ten agreement, that the policy of assurance was to be transferred and assigned by Morrison to Peay. But the question of law was reserved, whether the said parol contracts can be admitted, either as distinct, independent contracts between Morrison and Peay, or for the purpose of affecting in any way the terms of the said written agreement.

8. That no objection to the form of the action was to be taken: and if, upon the facts above stated, the law was for the plaintiff, judgment should be rendered in his favour for 1700 dollars, with interest from the 10th of May 1836 till paid; and if the law was for the defendants, judgment should be rendered for them.

The circuit court held that the law upon the case agreed was for the plaintiff, and rendered judgment in his favour for the damages and interest agreed as aforesaid, and his costs of suit. To which judgment, on the petition of the defendants, a superseas was allowed.

358 \*Johnson, for plaintiffs in error.

Every sort of insurance, whether marine, against fire, or upon lives, is a mere contract of indemnity. Blackstone (2 Bl. Comm. 458,) defines a policy of insurance as "a contract between A. and B. that upon A's paying a premium equivalent to the hazard run, B. will indemnify or insure him against a particular event." The demand of the assured is restricted to the amount of damnification as it really is at the time of action brought, and where, upon the whole event, no damage has been sustained, he can recover nothing. Godsal and others v. Boldero, 9 East 72; Hamilton v. Mendes, 2 Burr. 1198, 1210; Bainbridge v. Neilson, 10 East 329; Rhineland v. Ins. Co. of Pennsylvania, 4 Cranch 29. Upon this principle depend the decisions that a party effecting a double or triple insurance can only recover the amount of his loss, and if he sues one insurer for the whole and recovers, that insurer may compel the others to contribute their proportional parts. Ellis on Insurance and Annuities 13, citing Newby v. Read, 1 Bla. Rep. 416; Rogers v. Davis, Beaves' Lex Mercat. 242, and Davis v. Gildart, Beaves ubi supra. The engagement of insurers against fire is more strict and confined than any other: it is an undertaking "to indemnify the insured against any loss or damage which he may sustain from fire, within a limited time, in respect to certain property." 2 Selw. N. P. 1056; Ellis on Ins. and Annuities 1, 2 Marsh. on Ins. 784; 3 Kent's Comm. 370. The party insured must have an interest or property at the time of insuring, and at the time the fire happens; and the contract extends only to him, and does not pass to his assignee or vendee, without the consent of the insurers. Sadlers' Company v. Badcock and others, 2 Atk. 554; Lynch v. Dalzell, 4 Bro. P. C. (Tomlins's ed.) 431; Graves et al. v. Boston Mar. Ins. Co., 2 Cranch 419; Dumas v. Jones, 4 Mass. Rep. 647; Pearson v. Lord, 6 Mass. Rep. 81.

Now in this case, before the house  
359 \*was consumed by fire, Morrison had sold and transferred to Peay all his estate in the property by a written contract,

and thenceforth the premises were at the risk of the purchaser. 1 Sugden on Vendors, ch. 4, § 1, p. 171. Notwithstanding the destruction of the house by fire, equity would, at the instance of Morrison, have decreed a specific execution of the contract by Peay. 1 Sugden on Vend. 277; Paine v. Meller, 6 Ves. 349; Spurrier v. Hancock, 4 Ves. 667; Harford v. Purrier, 1 Madd. C. R. 532; White v. Nutt, 1 P. Wms. 62. As to the parol agreement to assign the policy of assurance, that fact must be taken to have been introduced into the case agreed at the instance and by the agency of Morrison; it obviously forms no part of the defendants' case. The question as to its legal effect being expressly reserved, it is, as to the defendants, no more than a simple admission that such a parol agreement was made between Morrison and Peay, under protest that the fact is wholly immaterial in point of law. And so, in truth, it is: for upon a bill filed by Morrison against Peay to have the written contract of sale specifically enforced, Peay could not have availed himself of this parol stipulation by way of defence. Omerod v. Hardman, 5 Ves. 722. Neither could he avail himself of it as a distinct, substantive agreement, by an action against Morrison for failing to assign the policy; because, to such an action, Morrison might well answer that the failure proceeded from Peay's own default, in not performing his contract for the purchase of the property within the time agreed upon, that performance being the sole consideration of Morrison's engagement to assign the policy. In every view, therefore, Morrison was without interest in the property at the time of the fire; and as it appears that Peay has since performed his agreement, no damage can have resulted to Morrison from the destruction of the building insured. This

is further manifested by that provision of the policy \*which reserves to the insurance company the option of rebuilding the premises destroyed; for if they had elected to rebuild, they would either have had no right to enter upon the land for that purpose after the sale to Peay, or (supposing the sale did not deprive them of such right) the benefit of the new building would in no manner have enured to Morrison, but exclusively to Peay. Morrison, then, having parted with his interest before the fire, and having sustained no damage, cannot maintain the action for his own benefit; and he cannot maintain it for the benefit of Peay, because the defendants have never contracted to insure Peay, and the contract of insurance, both upon general principles and by its express terms, was not assignable without their approval. To sustain the action for Peay's benefit would be, in substance, to convert an executory contract to assign, into an actual assignment as between the contracting parties, and then to enforce such assignment against the insurance company though they have never assented to it.

Price for defendant in error. Morrison, at the time of the fire, was in possession of the premises, and held the legal title, notwithstanding his executory contract for the

sale of them to Peay; and he was the legal owner of the policy of insurance, notwithstanding his executory contract for the assignment of that also to Peay. He is therefore legally competent to maintain this action; and the court of law, which regards legal rights only, cannot properly enquire into the equities between Peay and Morrison, arising out of their contract for the sale and purchase of the property. Whether Peay was compellable in equity to perform his agreement of purchase without any abatement for the value of the house destroyed; whether, if he has voluntarily performed that agreement without such abatement, he has any demand against Morrison in respect of the contract to

assign the policy; and whether Morrison is now \*suing the insurance company for the benefit of Peay,—are enquiries wholly foreign to the present case. But if the court can and will undertake to determine what would have been the rights of Morrison and Peay, on a bill filed by the former against the latter to enforce specific execution of the written agreement, then it is clear that Peay might successfully have resisted such execution by setting up the parol agreement to assign the policy, and that Morrison must have consented either to rescind the entire contract and retain the property, or to allow the abatement for the value of the house destroyed; and in either case, Morrison would be entitled to maintain this action. *Clarke v. Grant*, 14 Ves. 519; *Marquis of Townshend v. Stangroom*, 6 Ves. 328; *Hosier v. Read*, 9 Mod. 86. The agreement to assign the policy cannot be looked upon as distinct from the agreement to sell the land; it formed a part, and an essential part, of the contract of sale; for the parties never could have designed that if performance of the contract of sale should be waived or become impracticable, the contract of assignment should yet subsist, and the right to the policy be separated from right to the premises insured. Such a construction would, in the case supposed, have the effect to compel an extinguishment of the policy for the sole benefit of the insurance company; for their consent to such an assignment could never be obtained, and even if it could, their new contract with the assignee would be merely a wager, he having no interest in the premises insured. As that parol contract forms a part of the facts agreed, it is not material to enquire by which party the evidence of it was brought forward: but if it were material, the introduction of it must be attributed, not to Morrison, but to the defendants. Morrison's case was complete on shewing the insurance, his legal title, and the destruction of the premises. But there is another ground on which the judgment must be held right; and this,

362 without any necessity \*to look beyond the written agreement. Morrison stipulated for the security of a mortgage upon this very property: and by that stipulation he retained an insurable interest in the premises. *Traders' Ins. Co. v. Roberts*, 9 Wend. 404; 2 Marsh. 789; *Ellis on Ins.* and Ann. 22. And this gave him an immediate right of action against the company

upon the happening of the loss, and to the full amount of that loss.

STANARD, J. In this case certain facts have been agreed by the parties, and the law on those facts submitted to the court; the parties agreeing that if it be for the plaintiff, judgment shall be entered for a specified amount. The only question presented then is, has the plaintiff, on the facts agreed, a right of action against the defendants? the agreement of the parties as to the amount of damage precluding an enquiry by the court into that matter.

The original insurance is free from all exception, and the property embraced by it having been destroyed by the risk insured against, the right to the action is clear, unless the interest of the insured in the property had been extinguished at the time of the loss. It is said to be extinguished by the executory contract of sale made before the loss. That contract, if it had been carried into full execution according to its provisions, would have left the insured a mortgagee. The existence of that interest, of sufficient stability to sustain an original policy, is surely sufficient to repel the pretension that the interest was extinguished. If the contract executed would not extinguish the insurable interest, the contract executory surely would not. The interest so abiding in the insured would have entitled him to recover the full amount of the insurance on the loss, without subjecting him to a delay of his claim on the insurers, until he had shewn, by the pursuit of the claim on the mortgagor, that it could not be recovered from him. *Stetson v. Massachusetts Fire Ins. Co.*, 4 Mass. Rep. 330.

363 \*The mortgagor confessedly has an insurable interest, and yet it is nowhere intimated in any treatise or adjudication on the subject, that, in the event of destruction of the property, his claim on the policy must await the pursuit of his claim on the mortgagor.

A commission merchant, in the habit of making advances on consignment, has an insurable interest in the consigned property to the extent of his advances. Though I have not found a judicial decision on the precise point, yet in the case of *Parks v. General Interest Assurance Co.*, 5 Pickering 34, the immediate right to demand of the insurer the amount of advances on the property destroyed, without a previous pursuit of the claim on the consignors for the advances, was not questioned by the insurers.

Where the hundred is responsible for the loss by fire, it would seem that the insured is entitled on the policy to the full amount, though he might recover full indemnity from the hundred.

But, independent of the foregoing considerations, I think that on the facts agreed, the insured was entitled to recover the full insurance; those facts ascertaining that he was interested in the loss to that extent. There is no ground on which his claim is resisted, but that furnished by the ascription to the court of law, of power to look at the executory contract of sale in the manner a court of equity might, and to consider the interest in the property to have

passed by the sale, if a court of equity would, at the instance of the insured, decree its specific performance. Without giving a judicial approbation to this proposition, but for this case conceding its correctness unquestionable, the enquiry is, on what terms would this contract be enforced at the instance of the vendor? To the solution of this question it is material to ascertain the effect of the parol agreement, stated in the agreed case to have been made before and after the execution of the

364 written contract of \*sale, for the transfer by the vendor to the vendee of the policy of insurance. No one can reasonably suppose that the contract to transfer the policy was separate from and independent of the contract of sale. In the nature of things it is not to be surmised that such a separate and independent contract could precede that for the sale of the property. We must understand that it constituted a part of the parol treaty for the sale, and formed one of the considerations of that parol agreement which must precede the reduction of it to writing,—was omitted by accident or design in reducing it to writing,—and was subsequently recognized. By it, the vendor was to assure to the vendee the benefit of the insurance, and was bound to obtain the assent of the insurers to the assignment. This, in a court of equity, could have been set up by the vendee in resistance of the specific performance which would deny him the benefit of the insurance; and a court of equity would not have compelled performance without an abatement for the loss. The assured was therefore interested at the time of the loss, to the full amount; and in every view of the case, I think the judgment ought to be affirmed.

TUCKER, P. Without impugning the doctrines of insurance as laid down in the cases cited for the plaintiffs in error, I am of opinion that the judgment in this case was right.

In the formation of this opinion, I have been mainly influenced by the agreed fact, that both before and after the contract between Peay and Morrison, there was a parol agreement that Morrison should transfer to Peay the policy of insurance. It is objected however that that agreement cannot be admitted, either as a distinct, independent contract, or for the purpose of affecting the written contract. And this question is reserved. It must, I think, be decided against the plaintiffs in error.

365 \*By whom was the evidence of this parol contract introduced, and on whose behalf was it designed to operate? Was it introduced by the plaintiffs in error? If so, how is it competent for them now to deny the validity and effect of their own evidence? It is impossible; and it is accordingly intimated at the bar that it was introduced by and on the part of Morrison. Now Morrison was the party to be bound by it, and if he chooses to recognize it as a binding and valid agreement, notwithstanding it was by parol and not introduced into the body of the agreement, who can gainsay it? A parol contract is not void by the statute of frauds, though its obligation may be repelled by the party sought to be bound by it. The protection is intro-

duced for his benefit by the statute, and may of course be renounced by him. If he is willing to abide by it; if, disdaining the mala fides of breaking his plighted faith, merely because the ceremonies of the law have been neglected, he recognizes the contract and confesses its obligation, shall it not be enforced? Let the unvarying course of equity cases answer the question. How then can it be objected by a third person, that the contract which the party himself acknowledges and claims to be valid and binding upon him, is not to be so considered? The pretension I conceive to be utterly without foundation.

I take the agreement, then, to assign the policy, as a substantive and most material part of this case; and I will now proceed to shew how (taking that fact into consideration) Morrison, at the time of the fire, was damnified by the destruction of the premises.

It cannot be denied that according to the spirit of the agreement to assign the policy, Morrison was bound to give to Peay the benefit of it when the house was burnt. By that occurrence, however, the policy became functus officio. An assignment after that would have been futile. But as,

by the agreement, Peay was to have 366 \*the benefit of the indemnity, so it is clear that he would have been entitled to demand from Morrison any benefit which he might derive from the insurance. Nay more, if Morrison had instituted his bill against Peay to enforce a specific execution of the contract of sale, a court of equity must have departed from its ordinary principle of holding the purchaser bound by the loss, and have refused a specific execution except upon the terms of making good that loss. It could not have compelled Peay to sustain a loss which, by the very contract itself, it was clear he did not engage to abide, but against which, in effect, he contracted to be insured. If therefore Morrison could have enforced the policy, the court would have obliged him to give the benefit of his recovery to Peay, or to relinquish the contract; or if, as is now contended, the policy was rendered nugatory by the sale, the court, in the exercise of its sound discretion, would not have deemed a specific execution reasonable, since Peay was not in equity bound to bear the loss against which he had in effect contracted to be insured. Morrison must then have lost his contract, or indemnified against the damage.

What then was the state of the case immediately upon the happening of the fire? Morrison then had the legal title in him. But it is said, that having sold, the title was to be considered to be in Peay upon equitable principles. This position has been advanced upon false deductions from the principle that equity considers that as done which ought to have been done. But equity never so considers, but in behalf of one who has done equity, and has put himself in a condition to demand the execution of his contract. Now, at the time of the fire, it did not appear whether the contract ever would be carried into complete effect. It did not appear whether Peay ever would or could comply, and therefore equity could



not consider the title to be in him. He had not delivered the bond which was to  
367 \*have been delivered. That bond was to be the bond of a third person, and it might never have been in his power to deliver it. It was not delivered within the stipulated time. He then, on the 5th of May 1836, was in default, (for the bond had not even then been delivered) and on that day he had no right to demand a specific execution of the contract, and of course could not be deemed to have the title. The title was then in Morrison; the house burned was his house, and the loss sustained was his loss. This is the more manifest when we reverse the picture. Morrison sues for a specific execution. Peay repels the demand unless he will pay for the house: alleging that by his contract he was to be protected against loss by fire; that Morrison either can or cannot give him the benefit of the policy of insurance for which he contracted; that if he can, but will not, he has no title to relief; that if he cannot, then he cannot give what was most essential in the contract, and a court of equity will not relieve him. In the exercise of that discretion which is always exercised in bills for specific performance, it will not compel a party to execute the contract, when he cannot get that which he contracted for. It would be unreasonable to compel him to take the property without the indemnity, when he expressly contracted for the indemnity: and equity will not do that which is unreasonable.

This defence would be unanswerable, and Morrison must either have kept the land, or paid for the loss. If he kept the land, he would be clearly entitled to recover of the insurers. If he paid the loss, he would be a loser and entitled to indemnity from them to the identical amount.

It has been contended, however, that as the contract was carried into execution subsequently, it appears that Morrison sustained no damage. I am by no means satisfied that the fullest proof of his having received the entire consideration,  
368 without deduction for the loss, \*could take from him a right of action which had previously attached. But if proof of indemnity by that means could be a bar, then it must be clearly established, and the onus is on the defendants. The damage having been proved by the plaintiff, the indemnification must be shewn by the defendants. But it is not shewn; since, for aught that appears to the contrary, Morrison is liable to the action of Peay for not transferring the policy, or has indemnified him for the loss, which, upon every equitable principle, he was bound to do.

Upon the whole, I think the judgment is right. The insurers have received their premium for a succession of years, and now seek to avoid the fulfilment of their contract, upon the pretext that the insured has received indemnity from another quarter. Without calling in question the cases on insurance, we should not be too astute, I think, in the application of a principle by which a burden is to be taken from the shoulders of those who have been paid to

bear it, and cast upon one of two innocent persons who have advanced their money to be absolved from it.

PER CURIAM, Judgment affirmed.

369 \*Reynolds's Adm'r v. Stephenson's Adm'x.

August, 1840, Lewisburg.

(Absent PARKER, J.)

**Administrators\*—Suit against—Competency of Distributee as Witness for—Release.**—In an action against an administrator, a distributee being offered as a witness for the defendant and objected to by the plaintiff, a deed is produced from the distributee to the administrator, releasing his interest in the benefit of any judgment which might be rendered in favour of the administrator in that action, so far as such recovery might increase the distributable surplus, and also releasing his interest in the decedent's estate, so far as the distributable surplus might be increased by the failure of the plaintiff to recover. **Held**, the objection to the witness was removed by this release.

In an action of debt in the circuit court of Kanawha county, between Sarah Stephenson administratrix of Samuel Stephenson, plaintiff, and James B. Rust administrator of the estate of Clark Reynolds unadministered by William Reynolds deceased, defendant, a verdict was found for the plaintiff on the 28th of May 1839, and judgment rendered thereupon.

At the trial, two bills of exceptions were filed by the defendant, one of which presented a question as to the admissibility of Charles G. Reynolds (a brother of Clark Reynolds), as a witness for the defendant. The parties agreed that Clark Reynolds died without will and without issue, having real and personal estate; that in December 1833 administration of his estate was committed to William Reynolds, his brother, who died leaving a widow and child, which child died and was survived by the widow; that in July 1835 administration de bonis non of the estate of said Clark Reynolds was granted to the defendant; that no inventory or appraisal of the estate of Clark Reynolds has ever been returned to the

court which granted the said administrations, \*nor has any settlement been made of the accounts of either of the administrators, nor any appointment made of commissioners to make such settlement; and that the said Charles G. Reynolds the witness so offered, and two other persons, are the distributees of the estate of the said Clark Reynolds, but that no distribution has been made by either of the administrators in the course of their administration. The testimony of the said Charles G. Reynolds being objected to by the plaintiff, on the ground that he was interested in the event of the cause, a release was executed and acknowledged by the said Charles G. Reynolds in open court, in the following words:

"Know all men by these presents that I, Charles G. Reynolds, one of the distributees of Silas Reynolds deceased and of

\*See monographic note on "Executors and Administrators" appende d to Rosser v. Depriest, 5 Gratt. 6.



Clark Reynolds deceased, all of the county of Kanawha, for and in consideration of the sum of five dollars to me in hand paid by James B. Rust, late sheriff of the county of Kanawha, and as such administrator de bonis non of the goods and chattels, rights and credits which were of Clark Reynolds, have remised, released, confirmed and forever quit claim, and do by these presents remise, release, confirm and forever quit claim unto the said James B. Rust administrator as aforesaid, all right, title, interest, claim or demand which I may or can claim or demand as one of the distributees aforesaid, in and to the benefits of any judgment or recovery which may be had in favour of the said James B. Rust administrator &c. aforesaid, in a suit at law now depending in the circuit superior court of law and chancery for Kanawha county, wherein Sarah Stephenson administratrix of Samuel Stephenson deceased is plaintiff, and said James B. Rust administrator as aforesaid is defendant, in as far as such recovery might increase the distributable surplus of the said estate of Clark Reynolds, and of the estate of Silas Reynolds the common ancestor of the

371 said Charles G. \*Reynolds and Clark Reynolds. And I have also remised and released, and do hereby remise and release to the said James B. Rust administrator as aforesaid, all my right, title and interest in and to the estate of the said Clark Reynolds deceased, and in and to the estate of the said Silas Reynolds, and in and to the estate of William Reynolds deceased, as one of the distributees of each of said estates, so far as the distributable surplus of the said estates, or either of them, may or can be increased by a failure of the plaintiff in the above described suit, to recover the amount claimed by her in the said suit. In witness whereof I have hereunto set my hand and seal this 28th day of May 1839.

Ch's G. Reynolds [Seal.]"

The circuit court was of opinion that this release did not render the said Charles G. Reynolds a competent witness, and that to render him competent, it would be necessary that his distributive share in the personal estate of the said Clark Reynolds deceased should be released. The court therefore sustained the objection of the plaintiff to the competency of the witness; and the defendant excepted to the opinion.

On the petition of the defendant, a superseas was awarded.

B. H. Smith for the plaintiff in error.

Summers for defendant in error.

TUCKER, P. C. G. Reynolds was a distributee, and clearly incompetent unless rendered competent by releases. Janey v. Blake's adm'r, 8 Leigh 88. He was interested in preventing the recovery of the plaintiff. To get rid of this interest, he executed a release. Suppose it good and sufficient for that end: he had a further interest that the defendant's costs in the action, which were payable out of the

372 estate, should be reimbursed \*by a judgment against the plaintiff, unless the liability of his distributable share for a portion of them was released. To effect this, a release from the administrator to

him of that liability would have been proper. Row's adm'r v. Kyle's adm'r, Gilm. 202. I do not see how his release to the administrator can have removed this difficulty. Had he released his whole interest, as the court thought he should do, there could be no question: but as he has not done so,—as his release was only of his interest in that controversy, a release from the administrator seems to have been also necessary. If so, the rejection of the evidence was right, and the judgment should be affirmed.

PER CURIAM, Judgment affirmed.

### Tompkins v. The Branch Bank.

August, 1840, Lewisburg.

(Absent PARKER, J.)

**Suit against Branch Bank—Against Whom Summons Must Issue.**—Where an action is brought under the act passed March 19, 1832, entitled "an act authorizing suits against the branches of banks in this commonwealth in certain cases," the summons is not to be issued nor the declaration filed against the branch bank, but both must be against the mother bank by its corporate name.

The declaration in this action was filed in the circuit court of Kanawha county, at January rules 1835. It was in the following words:

"Kanawha county, to wit: The president and directors of the office of discount and deposit of the bank of Virginia at Charleston, Kanawha county, were summoned to answer William Tompkins of a plea

373 of trespass \*on the case. And thereupon the said William Tompkins complains that the said president and directors, therefore, to wit, on the first day of October 1834, at the county of Kanawha aforesaid, in a transaction which then and there arose between the said William and the said office of discount and deposit, became indebted to the said William in the sum of 100 dollars lawful money of Virginia, for money by the said William before that time lent and advanced to, and paid, laid out and expended for the said president and directors, and at their special instance and request, and also in the further sum of 100 dollars of like lawful money, for other money by the said president and directors before that time had and received to and for the use of the said William; and being so indebted, they the said president and directors, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and then there faithfully promised the said William to pay him the said several sums of money in this count mentioned, when they the said president and directors should be thereunto afterwards requested. And for that also afterwards, to wit, on

\*Branch Banks—Liability to Suit.—In Hall v. Bank of Va., 14 W. Va. 680, it is said: "They (the branch banks) were not in themselves corporations and could not be sued as such. The mother bank was alone liable to bring suit for the contracts of the branches: though suit could be brought in the counties where the branches were located. See *Tompkins v. The Branch Bank*, 11 Leigh 372." See monographic note on "Banks and Banking" appended to Bank v. Marshall, 25 Gratt 378.

the day and year aforesaid, at the county aforesaid, in a certain other transaction which arose between the said William and the said office of discount and deposit, the said president and directors became indebted to the said William in the farther sum of 100 dollars of like lawful money, for other money by the said William before that time lent and advanced to, and paid, laid out and expended for the president, directors and company of the bank of Virginia, and at the like special instance and request of the said president and directors of said office of discount and deposit; and being so indebted, they the said president and directors of said office of discount and deposit, in consideration thereof, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, undertook and

374 \*then and there faithfully promised the said William to pay him the said last mentioned sum of money, when they the said president and directors of said office of discount and deposit should be thereunto afterwards requested. Nevertheless the said president and directors of said office of discount and deposit, not regarding &c. but contriving &c. have not, nor hath either of them, as yet paid the said several sums of money, or any or either of them, or any part thereof, to the said William, although often requested so to do, but the said president and directors last aforesaid to pay him the said William the same have hitherto wholly refused, and still do refuse, to the damage of the said William 200 dollars; and therefore he sues &c."

James C. M'Farland, president of the office of discount and deposit of the bank of Virginia at Charleston, Kanawha county, was stated upon the record to have been summoned to answer; and there being no appearance, a conditional judgment was entered against the defendants, which at the succeeding rule day was confirmed, and a writ of inquiry awarded.

At the following term, the general issue was pleaded, and the defendants entered a general demurrer to the plaintiff's declaration and to each count thereof, in which demurrer the plaintiff joined.

The demurrer being argued, on the 29th of May 1835 the circuit court gave judgment for the defendants. Whereupon, on the petition of the plaintiff, a supersedeas was awarded.

B. H. Smith for the plaintiff in error.

Johnson and Summers for the defendants in error.

STANARD, J. If, on the general demurrer to the declaration, the court could intend that the president and directors of the office of discount and deposit of the bank of Virginia at Charleston might 375 be a private corporation, \*or an association of individuals trading under that designation and personally chargeable on their contracts, as was hinted at rather than seriously contended for in the argument, then the demurrer ought to have been overruled, and the case permitted to progress to judgment against such private corporation or individuals; and the judgment would charge that corporation or those individuals, and not the corporation of the bank of Virginia. But that such intend-

ment cannot be made, is, I think, free from all doubt. It is judicially known to the court that the corporation of the president, directors and company of the bank of Virginia exists, and that the designation of one class of its functionaries is "the president and directors of the office of discount and deposit at Charleston." The functionaries so designated are not a corporation, and have not, under that designation, corporate capacity to contract, or effects to charge; and any contract made by them is effectual only as a contract of the corporation of the president, directors and company of the bank of Virginia. They are non-entities to the end of creating any other corporate responsibility, and their contracts are nugatory and abortive for any other purpose, unless they are so framed as to create a personal responsibility of those who are president and directors of the office. Without enquiring whether or no the president and directors may so contract as to subject them to personal responsibility, and consequently to suit on that responsibility, it is, I think, perfectly clear that in this case the suit is not on such responsibility, and that no judgment could be taken which would charge them personally. That it could, was not seriously insisted on in the argument. It is obvious that the claim of the plaintiff is not on an individual or personal, but an alleged corporate responsibility, and no judgment could be properly rendered in this case that would personally charge, or the execution on which could

be levied on the effects of the 376 \*individuals who, at the time of suit or judgment, or thereafter, might be the president and directors of the office. It has already been shewn that no suit against them as constituting in themselves a corporation distinct from the bank of Virginia, can be maintained, because they have no such corporate character, no capacity to contract, no effects to charge. All this has been in effect conceded in the sequel of the argument of the counsel for the plaintiff in error, and he endeavours to maintain that this is a suit on a responsibility of the corporation of the bank of Virginia, the judgment in which would only charge, and the execution on that judgment be levied only on the effects of that corporation; and that the suit, in the manner in which it has been brought and conducted, is warranted by the act passed the 19th of day of March 1832, Suppl. to Rev. Code, p. 381.\* In other words, the

\*This statute (Acts of 1831-2, ch. 75, p. 68.) enacts, "that hereafter any person or persons, body or bodies politic or corporate, having any controversy with any of the banks within this commonwealth, established by the laws thereof, which has or shall have arisen out of any transactions between such person or persons, body or bodies politic or corporate, and any one of the branches of either of the said banks, it shall be lawful for any such person or persons, body or bodies politic or corporate, desiring so to do, to institute any suit at law or in chancery, which by law could now be maintained against the said mother bank on any such controversy against any such branch bank; in any court of record in the county or corporation where the office of discount and deposit of such branch bank is

proposition in effect is that the act authorizes a suit in which the process, declaration and judgment are in terms to be against the office or branch, \*or the president and directors of the office or branch, but the cause of action must be a responsibility of the corporation, (the president, directors and company of the bank of Virginia) and the judgment and execution must charge or be levied on the effects of that corporation only. If this be so, then the act authorizes a suit against the bank, by the description of the branch bank, or the president and directors of the branch bank. Without questioning the power of the legislature to authorize a suit on the contract, and charging the effects, of the corporation, by process and pleadings giving any name to the defendant that whim or caprice may dictate, as a substitute or equivalent for the corporate name, and supposing that power to be exercised by the act in question, still the declaration in this case is radically defective, and the demurrer to it was properly sustained. Whatever name is assigned to the defendants whether branch bank, or president and directors of the office of discount and deposit, the case to be made by the pleadings (that being the only warrant for the suit) is a consummate right of suit against the bank of Virginia, arising out of transactions between the plaintiff and the branch named in the process and pleadings. The suit is not authorized on all transactions with the branch, or the president and directors thereof, but only on such from which a controversy exists with, and on which a suit is maintainable against, the corporation. It is therefore not sufficient to allege a transaction with or contract of the branch, or the president and directors thereof, (for in truth every such contract, unless it be that of the corporation, made by the agency of the branch or of the president and directors thereof, is nugatory and abortive of any responsibility of the corporation) but the responsibility or contract must be alleged as that of the corporation, otherwise the case that would sustain a suit against the corporation is not made, and consequently it cannot appear to be warranted by the \*act. Neither of the counts in the declaration shews necessarily any engagement, contract or responsibility of the corporation. The second count is as defective in this respect as the first; for though it alleges the advance of money to the corporation, there is no averment that a controversy with the corporation respecting it had arisen, and no assumption by the corporation is charged, so as to shew that the plaintiff could sustain a suit therefor against it.

established; and in all such cases it shall be sufficient to execute a summons instituting such suit, on the president, or in his absence, the cashier, of such branch bank. And any execution which may issue upon any judgment so recovered, shall be levied in the county or corporation where the judgment is obtained; and if there be no property, or if the property taken in execution be not sufficient to satisfy the same, then the execution shall be levied, or the amount due thereon, on any property of the bank in any part of the commonwealth."—Note in Original Edition.

Were I to confine my opinion to the particular declaration in this case, the general question respecting the construction of the act of 1832, in regard to the manner of conducting suits under its provisions, would remain unsolved. As that question has been argued, and is one of general importance, and as I have formed a distinct opinion on it, I deem it proper to express it.

I have already noticed the construction contended for by the plaintiff in error, which results in giving, in substance and effect, a suit against the corporation, but to be conducted against it by the name of the branch bank, or the president and directors of the office of discount and deposit. To say the least of it, this would be a whimsical change, without any apparent reason, liable to inconvenience, and recommended by no conceivable advantage; and the intention to make it should not be imputed to the legislature, unless that intention be evinced by language free from all ambiguity.

This construction cannot be made without changing the punctuation; and if that be done, still the letter of the act would require the suit, pleadings and judgment to be against the branch bank, *eo nomine*, and not otherwise. Confessedly the act cannot operate according to its letter, and justify the suit and pleadings in this case. Under such circumstances, its sound construction is to be sought in the admitted object of the act, and the forms to be observed should be moulded to harmonize with that object. The object of the 379 act was to enable \*parties having controversies with the corporation to institute suit on such controversies at the place where the transaction occurred out of which they arose, and to facilitate the introduction of the case into court by an easy service of process. The act had in view the prosecution of no claim but one against the corporation, the judgment and execution for which should charge the effects of the corporation only. As the suit was to be for a claim on the corporation, the pleadings must of necessity manifest that claim, and the judgment be rendered in conformity with it. All these objects were attainable by serving process as the act directed, and, on such process, declaring upon the contract or responsibility of the bank. The summons, in strictness, should be to answer a claim of the plaintiff on the corporation; since for such claim only could the suit be brought. In opposition to the construction which requires the pleadings and judgment to conform to the claim, (that is, a declaration against the president, directors and company of the bank of Virginia, on the contract or responsibility of the corporation, and a judgment against the president, directors and company) it is objected that the act, by a change of punctuation, authorizes the suit against the branch bank. If a change must be made to sustain a construction which imputes the purpose of making so whimsical and unnecessary an alteration in the name of one of the real parties, involving difficulties and inconvenience in the pleadings and judgment, and the lan-

guage may be interpreted in reference to the end and in conservation of all the purposes of the act, avoiding all difficulties and incongruities in the pleading and judgment, the latter rather than the former interpretation should be adopted. Indeed the urgency of the case may be such, that the latter interpretation would be given, though, to make the act distinct as interpreted, words should be changed, rejected or supplied. Could the interpretation be

380 given, \*in no other way than by understanding the words "controversy against any such branch bank" as equivalent to "controversy with any such branch bank," that would be justified by sound principles of construction. But that is not necessary in this case. The object of the act was to authorize a suit for a claim on the corporation, having a particular origin, to be instituted at the place where it originated. To institute a suit is to sue out process in it; then if the latter words be substituted for the former, the act will authorize the party to sue out process in a particular jurisdiction, in a suit which can be maintained against the corporation; and as the act authorizes the process to be served on the officers of the branch bank, there is very little straining of language to characterize the process as one against the branch bank, which the law authorizes to be served on the officers thereof. At all events the suit in which the process is issued must be one that can be maintained against the corporation, the judgment in it is to charge, and the execution on the judgment is to be levied on, the effects of the corporation; and it is proper that the declaration should be against the corporation by its corporate name. This being so, the declaration in this case is fatally defective.

Having reached the conclusion that the declaration is not against the corporation, and the corporation is not thereby made a party, and the further conclusion that it charges a corporate responsibility of the president and directors of the office, and that we cannot intend that there is or may be a private corporation by that name, but have judicial cognizance of the fact that the designation in the declaration is of a mere agency of a public corporation, having no corporate character per se, to contract, sue, or be sued; that is, that there is no corporate character of the defendants in respect to which the plaintiff can have judgment; I think that we must make the like negation of corporate character

381 \*throughout, and as in that character we cannot render judgment against them, we cannot render judgment in that character in their favour, and therefore judgment cannot be given for them for costs on the affirmation of the judgment.

CABELL and BROOKE, J., concurred in the opinion that the judgment should be affirmed, without costs.

TUCKER, P. This is an action arising out of a transaction between the plaintiff in error and the branch bank of Virginia at Charleston in Kanawha county, brought under the provisions of the act of March 19, 1832, entitled "an act authorizing suits against the branches of banks in this commonwealth in certain cases." The process

is not in the record, not having been made a part thereof by oyer: but the declaration commences with shewing that the president and directors of the said branch bank were summoned to answer the plaintiff of a plea of trespass on the case; and it proceeds accordingly throughout to complain of them, to set forth their indebtedness for money lent to or laid out for them, or lent to or laid out for the president, directors and company of the bank of Virginia, at the request of the defendants, in consideration whereof the said defendants promised to pay &c. and lays the breach that they did not pay.

This action presents a perfect anomaly. It is brought against the agents of the bank of Virginia (for such the president and directors of the branch bank are) instead of against the bank itself: it is brought against a board constituting the president and directors of the branch; who are not sued in their individual character, and yet are not a corporation capable of being sued. It demands a judgment which is to be rendered against this body of president and directors, and yet is to be enforced by execution against the property of the

382 corporation \*(known to the law) of the president, directors and company of the bank of Virginia; and thus, while it proceeds against a quasi corporation, which is no corporation, and asks for judgment against it on its own alleged indebtedness, it looks to the enforcement of that judgment against the property of the Virginia bank, by an execution which, if it correspond with the judgment, never can command the officer to levy on one particle of its property.

All these embarrassments arise from a want of perspicuity in the act, and from construing it rather according to its letter than its spirit. Can it be conceived to have been the legislative design to change, without a motive, the charter of the bank, and to repeal the provision which gave it its name of "the president, directors and company of the bank of Virginia," and directed that by that name it should sue and be sued? Can it have been designed to authorize a suit against a quasi corporation, having no legal name by which to be sued, and having in fact no legal existence as a corporate body; and this too without prescribing by what name they should be sued? Can it have been designed to break down, without a motive, that symmetry in legal proceedings which requires that the execution shall be supported by the judgment, the judgment by the pleadings, and the pleadings by the demand? Can the legislature have designed, either that on a judgment against the branch bank, in which the mother bank would not be named, an execution should issue against the mother bank, or that the officer of the law, with an execution not directed against the property of the mother bank, should, without the command of the process, proceed to levy upon it? I cannot think so. The design of the act was merely to authorize suits against the bank, on transactions with a branch bank, in that county in which the branch was situated, and to make the service upon its officers equiv-

383 alent to service on the \*officers of the mother bank at Richmond. The act must be construed in conformity with this intention. In doing so, we must not on the one hand disregard the charter principle that the bank must be sued by its corporate name, nor imagine on the other that a board of agency shall be sued by no name at all recognized by the law. Construe the act by its letter, and it provides, it is true, that the branch bank may be sued. But how sued? by what name sued? It cannot be sued as a corporation, for it is none. It cannot be sued by the name of the president and directors of the branch bank, for it has no legal name. But the branch bank may be sued by issuing process in the county where it is established, and serving it as the law directs, on its president or cashier. This is what is meant by suing the branch bank. It consists in instituting the proceeding in that county where the branch is established, and giving notice to its officers to appear and defend the suit. But with this it is perfectly compatible that the process, the declaration, and the subsequent proceedings should be against "the president, directors and company of the bank of Virginia." No action could be maintained otherwise. For there can be no cause of action against the branch bank as such. Being but an agent,—being no corporation, its liability is the liability of the mother bank. The act itself contemplates no liability of the branch as such. Its language is, "any person &c. having any controversy with any of the banks, which shall have arisen out of any transactions between such person &c. and any one of the branches." The controversy then is with the bank itself, though the transaction was with the branch. The bank, and the bank alone, as the corporation, is liable: the demand must be against it; the contract must be laid with it, for such it truly is; the implied promise must be laid as made by it, and the breach must correspond. Then

384 will follow in symmetrical \*order the pleadings, the verdict, and the judgment; upon which last, such an execution as the statute contemplates will issue against the goods and chattels of the bank, wherever found. Thus every thing is harmonious and consistent with legal principles, while the present action is in irreconcilable conflict with them all.

I am of opinion to affirm the judgment, without costs.

Judgment affirmed, without costs.

### Waggener v. Dyer.

August, 1840. Lewisburg.

(Absent CABELL and PARKER, J.)

**Pretense Titles—What Conveyance Unaffected by Statute against Taking or Conveying\*—Case at Bar.**

—Land sold under a trust deed made to secure the payment of a debt, is purchased by and conveyed to the creditor and cestui que trust, and

\***Pretense Titles.**—In *Steed v. Baker*, 13 Gratt. 387, it is said: "The cases of *Allen v. Smith*, 1 Leigh 231, *Ruffners v. Lewis*, 7 Leigh 720, and *Waggener v. Dyer*, 11 Leigh 884, were cases of the sale and purchase of mere equitable rights: of purchasers made, not by

he is in possession thereof, but under circumstances which entitle the debtor to redeem: another creditor procures from the debtor a conveyance of the land, absolute in form, but intended as a mortgage: HELD, the last conveyance is not affected by the statute against buying and selling pretended titles, and the creditor who claims under it shall be entertained in equity, in a suit to set aside the sale under the trust deed, and to have a resale of the land.

**Bonds—Covenant That Creditor Will Not Sue Surety—Competency of Such Surety as Witness.**—One of two sureties in a joint and several obligation for the payment of money, having received from the creditor a covenant that he shall never be sued thereon, is a competent witness for such creditor, in a suit brought by him as mortgagee of the debtor's land, to set aside a sale and conveyance of the land to third persons, under a prior deed of trust executed by the debtor.

Appeal from an interlocutory decree of the circuit superior court of Mason County, pronounced on the 18th of April 1835, in a suit in chancery in which the appellee \*Zebulon Dyer was plaintiff, and the appellant William Waggener and others were defendants. The facts of the case appearing by the record were as follows—

By an obligation dated the 4th of August 1824, James, Andrew and Edmund Waggener bound themselves jointly and severally to pay to Zebulon Dyer 736 dollars 57 cents. By an obligation dated the 31st of May 1826, James and Andrew Waggener bound themselves jointly and severally to pay to Dyer 300 dollars. And by an obligation dated the 6th of October 1828, James Waggener bound himself to pay to Dyer 111 dollars 50 cents. These obligations were given by James Waggener for money which he owed to Dyer, and in the first of them Andrew and Edmund Waggener, and in the second Andrew Waggener, were his sureties. At the time these debts were contracted, James Waggener owned little property besides his farm; which was one fourth of a tract of land in Mason county on the Ohio river, called Waggener's bottom, containing upwards of 4000 acres.

On the 20th of January 1826, James Waggener gave his note to his nephew William Waggener for the payment of 1620 dollars 25 cents on the 20th of January 1827, with interest from the date, and executed a deed of trust on his land to secure its payment, which authorized the trustee, in default of payment, to sell the land at public auction for cash, after advertising the time and place of sale for sixty days at the door of Mason courthouse and in some newspaper most convenient to Mason county. This deed was duly recorded in May 1826. The debt secured by the deed being unpaid, William Waggener, not long after the time for payment had elapsed, caused the land to be set up for sale by John D. Lewis the trustee named in the

stranger voluntarily intervening in the controversies of others, but by creditors to save themselves from loss; and under the peculiar circumstances, were sustained."

†**Witnesses—Competency—Release.**—The principal case is cited in *foot-note* to *Mandeville v. Perry*, 6 Call 78; *Hewitt v. Adams*, 1 Pat. & H. 37.

deed. There was some sort of proof that the sale was advertised in a newspaper printed at Chillicothe in the state of Ohio, \*and at the door of Mason courthouse, but it did not appear for what length of time previous to the sale. The property was struck out to William Waggener at the price of 1000 dollars, which was the only bid. The land was at that time worth much more; its cash value being variously estimated by the witnesses at from 1500 to 7000 dollars. William Waggener declared, before the sale, on the day of the sale, and after the sale, that he wanted the land for his own security merely,—that he would hold it or dispose of it for that purpose only, and after satisfying his debt, the residue should belong to his uncle James and his family. The trustee conveyed the land to William Waggener by deed dated the 2d of July 1827. William permitted his uncle to retain possession of a part of the land till the fall of 1828, when he turned him out.

On the 2d of September 1828, William Waggener executed a deed of trust upon the land to secure a debt of 500 dollars to Henderson & Smith, payable the 2d of September 1829; and on the 4th of February 1829, he executed another deed of trust on the land to secure a debt of 991 dollars 37 cents to Andrew Lewis, payable the 1st of February 1830.

In the spring of 1829, William Waggener wrote to Dyer, that he would convey the land to him, if he would pay the amount which James Waggener owed him, William: and he sent Dyer a similar message soon after by Andrew Waggener, who went to Pendleton, the county of Dyer's residence, on a visit in May 1829. Dyer replied that he would come to Mason between the 1st and 15th of September, to pay him the money according to his proposition. Dyer arrived on the 15th of September: but in the mean time William Waggener had sold to one Henry Capehart a part of the land, at the price of 1800 dollars, and though he had not made the conveyance when Dyer arrived, he made it on the day after.

387 \*Before Capehart's purchase, it was known to William Waggener and others that James Waggener talked of bringing suit to set aside the sale to William; and that fact was communicated to Capehart before his purchase. Capehart, however, determined to run the risk, and accepted a deed from William Waggener with special warranty only. He paid 300 dollars of his purchase money in a horse; 500 dollars in discharge of Henderson & Smith's incumbrance; and the remaining 1000 dollars by discharging the incumbrance of Andrew Lewis above mentioned, which was effected, in pursuance of an arrangement between William Waggener, Capehart, Lewis, and Alexander and Samuel M'Culloch, creditors of Lewis, by Capehart giving to the M'Cullochs his two bonds for 500 dollars each, payable in August 1830 and August 1831, with a deed of trust on the land he had bought of William Waggener, and the M'Cullochs allowing to Lewis a credit for the same amount. Capehart's deed to secure the payment of

his bonds to the M'Cullochs is dated the 16th of September 1829, and conveys the land to John M'Culloch as trustee.

On the 9th of November 1829, James Waggener and wife executed a conveyance of the same 1000 acres of land to Dyer, which was recorded in February 1830. The deed is in form an absolute deed to Dyer in fee simple, with general warranty, but its intention, according to the declarations and acts of the parties to it, was to confer upon Dyer a security for his debt, and for this purpose to invest him with James Waggener's right to redeem the land in possession of William Waggener and Capehart.

Accordingly, in April 1830 Dyer commenced this suit in the late superior court of chancery for the Clarksburg district, and in May 1830 filed his bill, making James Waggener, William Waggener and Henry Capehart defendants; setting forth his claims upon \*James, the fraudulent conduct of William, the irregularity of the sale to him, the gross inadequacy of the price, his declarations which shewed that he held as a trustee for James, his sale to Capehart, who had notice of the trust, and James's conveyance by way of mortgage to the plaintiff. The bill alleged also that the debt of James to William Waggener had been greatly reduced. It sought an account of that debt, and of the rents and profits of the land since William's purchase, and a sale of the land for the payment of the plaintiff's debt.

The answer of James Waggener corresponds in its statement of facts with the bill.

The answer of William Waggener admits some payments made to him by James; admits that his bid of 1000 dollars was the only bid; denies that he made any declarations before the sale, that he would purchase and hold the land as a mere security for his debt, but admits that he informed James, and perhaps others, after the sale, that he did not want the land,—that all he wanted was his money; and declares that his own necessities and want of money induced him to have the land sold by his trustee, and afterwards to sell part of it to Capehart. He denies the alleged inadequacy of price, but admits that he sold part of it to Capehart for 1800 dollars.

Capehart, by his answer, objects that the plaintiff claims under a deed which is void by the statute prohibiting the purchase of pretended titles. He declares that he was a purchaser from William Waggener for valuable consideration, without notice of any equity or claim of either James Waggener or the plaintiff against William; but insists that if he could be affected with such notice, yet having paid off the incumbrances created by William on the land, he became clothed with all the rights and substituted in the room of the creditors whose debts he discharged.

389 \*The cause having been regularly transferred to the circuit superior court of law and chancery for Mason county, Alexander and Samuel M'Culloch, in September 1832, filed a petition setting forth their interest as incumbrancers of

part of the land under the deed from Capehart to their trustee John M'Culloch, and asking to be made parties. An amended bill was accordingly filed, making them and their said trustee defendants: whereupon they filed their answer, declaring that they acquired their incumbrance fairly, and without any knowledge or notice of the equitable claims preferred in the bill.

Among the depositions for the plaintiff, that of Andrew Waggener was of primary importance. This deponent being asked whether he had any interest in the controversy, responded that he had none as he believed, and produced an instrument under the hand and seal of Dyer, dated the 25th of February 1833, by which Dyer, reciting the two obligations wherein the deponent was bound as the surety of James Waggener, covenanted that he should never be sued upon them, and that no attempt should ever be made to enforce the collection of the same, or of either of them, from him by any process of law. This instrument was returned and filed with the deposition, the defendants by their counsel objecting to its being copied. They excepted also to the deposition on two grounds; 1st. that the witness was interested; 2dly, that the instrument produced by the witness was in effect a release, and the plaintiff therefore had no longer any claim.

The cause being heard the 18th of April 1835, the court overruled the exceptions to the deposition of Andrew Waggener, directed the land in the bill mentioned to be sold at public auction upon a credit of one, two and three years, after advertisement in the manner prescribed by the decree, and ordered several accounts to be taken by its commissioner; to wit, 390 an account of \*the rents and profits of the land since the date of the deed to William Waggener, with an account of the value of the permanent improvements put upon the land by William Waggener and Henry Capehart; and accounts of the debts due from James Waggener to the plaintiff, and from James Waggener to William, and of the mortgage debt of the M'Cullochs.

On the petition of William Waggener, an appeal was allowed him from the decree.

Fisher and W. A. Harrison for appellant. C. Johnson and G. N. Johnson for appellee.

TUCKER, P. There is no legal question of interest in this case, except those which respect the propriety of reading Andrew Waggener's deposition. He is one of two sureties in a bond to Dyer the appellee, and if Dyer succeeds in the cause, the debt will be thereby liquidated and discharged. To remove this objection, Dyer has executed to him a covenant not to sue him, which he produced at the taking of his deposition. Two questions are now made; 1st. Can the covenant be read without proof by the subscribing witness? This objection, if valid, comes too late. It ought to have been made when the paper was introduced, that the subscribing witness might be called. This was not done.

The paper was admitted, the counsel for the defendants only objecting to its being copied,—meaning, I suppose, that the original must be filed. Independent of this, it seems to me that as Dyer calls for the covenant, and avails himself of it to rehabilitate his witness, the proof of the subscribing witness was not necessary. *Mandeville v. Perry*, 6 Call 78. He could never afterwards be permitted to deny it, and if so, the witness would have the full benefit of its protection. 2. Did this covenant exonerate the witness? I think it did. It did not, it is true, discharge 391 the cosurety, \*because a covenant not to sue one does not exonerate both.

*Ward v. Johnson*, 6 Munf. 9; *Dean v. Newhall*, 8 T. R. 168; *Wright's adm'r v. Stockton*, 5 Leigh 153. But the covenant operated to protect Andrew Waggener forever from Dyer's claim. It is contended, however, that he would be subject to the cosurety's demand for contribution. I think not. By exonerating him, Dyer's redress against Edmund Waggener the cosurety would be confined to one moiety of the debt. Could Edmund Waggener, if he had paid that moiety, demand that Andrew should reimburse him any part thereof? If each surety is to be considered, in respect to his cosureties, as a principal as to his aliquot part of the debt, and only surety to his cosureties for the balance, (see *Ex parte Gifford*, 6 Ves. 805; 1 Story's Eq. § 499, p. 477,) then it is clear that Edmund can have no claim upon Andrew. But if this be not a general rule, (see *Theobald on Princ. & Surety*, 267,) yet where a creditor, with a view to the purposes of justice and to have the benefit of a witness's testimony, gives up the liability of the witness for one half his debt, no court of law or equity would recognize the claim of the other surety to defeat this reasonable arrangement by holding the witness responsible for the payment of a portion of his cosurety's moiety. No wrong is done to him: for if, instead of being released, Andrew Waggener had paid his moiety, Edmund never could have demanded contribution for his aliquot part paid by himself. And as his rights are not impaired, it would be unreasonable to make him partaker in equity of the benefit of a covenant which confessedly cannot avail him at law, and which equity will never carry beyond the intention of the parties. *Kirby & wife v. Taylor &c.*, 6 Johns. C. R. 242.

Waggener was therefore a good witness; and reading his testimony, the merits are most clearly with the appellee. The objection as to the title being pretended 392 \*cannot prevail. The cases of *Allen &c. v. Smith*, 1 Leigh 231, and *Ruffners v. Lewis's ex'ors et al.*, 7 Leigh 720, promulgate, I think, the true doctrine on this subject, on the authority of the opinions of learned english chancellors there cited. The present case is fully within the influence of them.

As to the objection that the priorities of the incumbrances are not settled, that is a matter of which, if it were as is contended, Waggener cannot complain, as he is the first incumbrancer. Digitized by Google



On the whole, I think there is no error in the decree to the prejudice of the appellant, and that it should be affirmed with costs.

PER CURIAM, Decree affirmed.

### 393 \*Kincheloe v. Kincheloe.

August, 1840, Lewisburg.

(Absent PARKER, J.)

#### Appellate Practice—Bill to Set Aside Will—Parties.\*

—A decree dismissing a bill filed to set aside a will. If correct on the merits as between the plaintiff and defendant, will be affirmed, though some of the heirs of the testator were not, and the plaintiff was not required to make them parties to the suit: dissentiente TUCKER, P., who held, that in such case no decree could properly be made, except a decree dismissing the bill for the failure of the plaintiff to make the proper parties, after being ruled to do so.

**Same—Same—Devisavit Vel Non.**—The question as to the admissibility and effect of the defendant's answer to a bill filed to set aside a will, as evidence on the trial of the issue *devisavit vel non*, considered by CABELL and STANARD, J.

**Deposition—Notice of Taking—Sufficiency.**—A notice is given by plaintiff to defendant, for taking the deposition of several witnesses at a specified place in Missouri, on six successive days, between certain hours of each day: HELD, considering the distance of the place appointed for taking the depositions and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice is sufficiently definite.

A writing purporting to be the will of Daniel Kincheloe the elder, of Wood county, was proved in the court of the said county at August term 1834, by the oaths of the subscribing witnesses, and was thereupon ordered to be recorded. It bore date the 4th of August 1826. The testator died the 14th of August 1834, having then very nearly completed his eighty-fourth year. At the date of his will, and at his death, there were living his three sons, Nestor, Elijah, and Daniel, an infant son of a deceased daughter, and three infant children of another daughter, likewise deceased. The will contained devises or bequests to each of the sons and grandchildren. The wife of the testator was also a devisee and legatee therein; but she died before him. Daniel Kincheloe, 394 \*the son of the testator, was appointed the executor.

In November 1834, a bill was filed in the circuit superior court of Wood county, by Nestor Kincheloe against Daniel Kincheloe, alleging that the said writing (which he exhibited) was not the will of the decedent; that even if no undue influence had

been exerted over him, he was, at the date of the writing, incapable of making a will, by reason of the imbecility of his mind, arising from extreme old age; that in the enfeebled condition of his mind, the defendant, who was his youngest son and lived with him, was enabled to exert, and did exert, an undue influence over him, to induce him to make a will contrary to his wishes, and unduly favourable to the defendant; and that after the execution of the writing, a rigid surveillance was exercised by the defendant, to prevent the testator from making any alteration in the dispositions therein contained. The bill called upon the defendant to answer all the foregoing allegations, fully, plainly and distinctly; and also propounded various special interrogatories, of which the most material were (in substance) whether the defendant had not frequently heard his father, some years before the date of the writing, declare that he would make no will—that the law should be his will? Whether the defendant, before and about the date of the said writing, had not frequently said that his father was so infirm as to be incapable of business? and whether the defendant had ever said that his reason for not removing to a farm he had purchased, was the fear lest his father should alter his will? The prayer of the bill was, that the court would direct an issue to be made up and tried, whether the said writing be the will of the said decedent or not? and if it should be found not to be his will, that the same might be annulled by a decree of the court; and for general relief.

395 \*The answer of Daniel Kincheloe the defendant was duly sworn to, and it denied, positively and explicitly, every material allegation contained in the bill, and responded to every material interrogatory in a manner unfavourable to the complainant. Respecting the charges of mental incapacity of the testator, and undue influence exerted over him by the defendant, the terms of the answer were as follows: "Respondent says that at the time of making and executing the said will, his father was in the full enjoyment of all his mental faculties, and as capable of so doing as at any period of his life; and he fully understood what he was doing. Respondent denies, in the most positive manner, his ever having exercised the least influence over the devisor in making the said will, and declares that all the charges or intimations to that effect contained in the complainant's bill are utterly false."

In April 1835, it was ordered that an issue be made up, and a jury impanelled on the common law side of the court, to try whether the said writing be the will of Daniel Kincheloe deceased, or not. At April term 1836, a jury was accordingly impanelled, and the trial had; when the jury found that the said writing was the true last will and testament of the said decedent.

Three bills of exceptions were filed by the plaintiff, to opinions of the court given against him upon the trial. Of these it is only necessary to notice the first and second.

\*Appellate Practice—Bill to Set Aside Will—Want of Proper Parties—Waiver.—If the heirs of the intestate are not made parties, and there is no objection made in the lower court until after the issue of *devisavit vel non* has been made up and tried, and the jury has returned a verdict against the will, which has been probated, those claiming under the will will not then be allowed to object to a decree in accordance with the verdict on the ground that the heirs had not been made parties. Dower v. Church, 21 W. Va. 23, citing, at pages 52 and 53, *Kincheloe v. Kincheloe*, 11 Leigh 393.



By the first bill of exceptions it appeared, that the plaintiff offered to read in evidence to the jury the depositions of Cyrus Saunders, Abraham Vandiver, George Parker and Elias Kincheloe, taken and certified by two justices of the peace of Shelby county in the state of Missouri, under a commission issued by the clerk of the circuit court. The commission was dated the 18th of May 1835, and directed to any two justices of Shelby county aforesaid, requesting them, "that on the 396 6th, \*7th, 8th, 9th, 10th and 11th days of July next, at the house of W. B. Braughtons in the county of Shelby and state of Missouri, between the hours of seven o'clock a. m. and six o'clock p. m. of each day," they should assemble themselves and examine the said witnesses.

One of the depositions was dated the 10th, another the 11th, of July 1835. Neither the time of taking the two others, nor the place of taking any one of them, was stated or appeared, otherwise than by the certificate of the justices that each deposition was taken "pursuant to the annexed commission, and also the annexed notice." And when the depositions were returned to the office of the circuit court under the seals of the justices, no notice was returned with them. It was proved, however, that after the return of the depositions to the office, the counsel of the complainant filed therewith an original notice, from the complainant to the defendant, that the depositions of the said witnesses would be taken on the days, between the hours, and at the place, specified in the commission, and mentioned above; on which notice was an affidavit, dated the 18th of May 1835, of the service thereof on the defendant, by delivering him a true copy. And it was further proved that the said counsel enclosed and sent by mail, together with the commission under which the depositions were taken, a true copy of the original notice filed as aforesaid. There being no other evidence that the depositions were taken in pursuance of notice to the defendant, or at the time and place mentioned in the said original notice, and the defendant having, previously to the trial, to wit, on the 25th of August 1835, endorsed upon each deposition an exception, on the ground that no notice of the time and place of taking the same was given him, the court, on the motion of the said defendant, refused to permit the said depositions to be read: to which opinion the plaintiff excepted.

397 \*The depositions so excluded contained material evidence for the complainant. Three of the deponents testified, that they were acquainted with the decedent in the year 1826, and believed that at the date of the writing in question (the 4th of August 1826) he was not capable of making a will. The other deponent testified, that he was acquainted with the decedent from 1815 to 1831, though not sufficiently acquainted to form "any correct opinion as to his capacity;" but from the observations he had been able to make during his acquaintance with him, he did not think him capable of doing any business of importance. This deponent, however, added, that he had no distinct

recollection of having been in company with the decedent about the 4th of August 1826.

By the second bill of exceptions it appeared, that the defendant offered to read to the jury, as evidence, the bill filed in the cause, together with the answer of the said defendant thereto, and asked the court to instruct the jury, that the defendant was entitled to the benefit of the answer, as evidence on his behalf upon the trial of the issue, in the same manner and to the same extent that an answer of a defendant would be evidence for him upon the hearing of a cause in a court of equity. The plaintiff objected to the reading of the said answer as evidence upon the trial of the issue, and to the giving of such instruction as to the effect of the answer when read; but the court overruled his objections, permitted the answer to be read, and gave the instruction prayed for: to which opinions the plaintiff excepted.

The verdict, and all the proceedings had upon the trial of the issue, being certified to the court on its chancery side, the complainant moved the court to award a new trial of the said issue, upon the ground set out in the bills of exceptions aforesaid. This motion the court overruled. The cause then came on to be heard upon the bill and exhibit, the answer of 398 the \*defendant, and the verdict of the jury: "whereupon" (the record proceeds) "it appearing to the court here, from the verdict aforesaid, that the will in the bill and proceedings mentioned is the true last will and testament of said Daniel Kincheloe deceased, but all parties in interest not being before the court, so as to authorize a decree affirming said will, it is therefore adjudged, ordered and decreed that the bill of the complainant be dismissed," with costs to the defendant.

From which decree the complainant appealed to this court.

Fisher, for appellant.

Johnson, for appellee.

CABELL, J. In the case of Swann v. Selden, this court decided that the decree dismissing the bill on the merits ought not to be reversed, merely on the ground that some of the persons concerned in interest had not been made parties. It is the business of the plaintiff to make all proper parties. If he fails to do so, it is too late for him, in the appellate court, to take advantage of his own omission, for the purpose of reversing a decree which is correct and proper in all other respects.

If therefore the decree were right on the merits, it would be too late now to object to the want of parties, whatever may have been the reason which operated on the mind of the chancellor in dismissing the bill. And if it be wrong on the merits, it ought to be reversed on that ground, and not on the ground of the want of parties.

In a suit in chancery, the object of which is to contest the validity of a will, on and issue devisavit vel non, under the act of assembly, I do not think that the answer of the defendant becomes, of necessity, evidence in the cause, on the question as to the validity of the will. Where no ap- 399 peal is made to the conscience of \*the

defendant; where no discovery is sought from him as to facts within his particular knowledge, but he is called on to answer, merely as a step or part of the proceeding through which it is necessary to pass, for obtaining a trial before a jury; in such a case, it would be unjust to make the answer evidence as to the validity of the will. In such a case, the statements of the answer are entitled to no more weight than the allegations of the bill. In such a case, the position of a party as defendant entitles him to no advantage.

But in the case before us, an appeal is directly made to the conscience of the defendant, by various searching interrogatories, which he is called on to answer specially. Being thus called on and required to give evidence which might have operated against him, he ought, on the principle of chancery practice, to be entitled to its benefit when it operates in his favour.

I am of opinion, nevertheless, that the decree dismissing the bill is wrong on the merits. The verdict of the jury ought to be set aside, because it was rendered on a trial in which material testimony offered by the plaintiff was excluded from the consideration of the jury. The objection to the excluded depositions, founded on the alleged insufficiency or illegality of the notice, is in my opinion not valid. When we consider the great distance of the place where the depositions were to be taken, the uncertainty of being able to arrive there at a particular day, and the difficulty and uncertainty of procuring the attendance of the commissioners and of numerous witnesses at the same time and place, it was quite reasonable to notify the adverse party that the depositions would be taken on six successive days, so as to justify the taking of them on any of the days, even the last.

On this ground, I am for reversing the decree, and remanding the cause for a new trial of the issue. And as the cause is necessarily to go back, I think the complainant <sup>400</sup> should be ruled to make all proper parties, and on his failure to do so, that the bill should be dismissed.

TUCKER, P. In this case, I am of opinion that the decree of dismissal of the plaintiff's bill was erroneous. That dismissal was not upon the merits, but for want of parties. This distinctly appears to my mind, from the terms of the decree. After reciting the return of a verdict in favour of the will, it proceeds—"but all parties in interest not being before the court, so as to authorize a decree affirming said will," it is decreed that the bill be dismissed. Here there is a disclaimer of a decree on the merits, and a dismissal because there are not parties to enable the court to render such decree.

Considered as a dismissal for want of parties, it was erroneous; for the court should rather have ordered the proper parties to be made, and have given time to amend the bill; and the bill should only have been dismissed in case the plaintiff failed to make parties. *Allen &c. v. Smith*, 1 Leigh 231; *Hill v. Kirwan*, Jacob 163; 4 Cond. Eng. Ch. R. 76; *Green v.*

*Poole*, 4 Bro. P. C. 122, (ed. Toml. vol. 5, p. 504;); *Key v. Hord &c.*, 4 Munf. 485.

But if the dismissal be considered as a decree on the merits, it was yet more erroneous. For no decree can be properly pronounced affirming the validity of a will (which is the effect of a dismissal on the merits here) unless all persons concerned in interest are before the court. For the will cannot be good against some of the heirs, and void as to others: nor can a verdict and decree against one bind the others. The other heirs may therefore file their bills, and on the trial of an issue, it may be found against the will. If so, then the will would be void as to them, and good against Nestor Kincheloe, if this <sup>401</sup> decree is to be taken \*as affirming the will as to him. This cannot be.

Where it appears that all persons interested are not before the court, the court should require the parties to be made, and if not made in reasonable time, the bill should be dismissed; not on the merits, but for defect of parties. The question of the validity of a will is integral, and cannot be disposed of piecemeal.

With these views, I cannot go into the other questions, which are not before us, as the dismissal has been for want of parties only; but I am of opinion to reverse the decree of dismissal, and send the cause back, that the proper parties may be made.

The decree of the court of appeals was as follows:

"The court is of opinion that the depositions offered by the appellant in evidence on the trial of the issue were improperly excluded from the jury. The court is further of opinion that though the omission to make all the heirs of the testator parties, if that were the only objection to the decree, would not authorize the reversal of it, at the instance and for the benefit of the party guilty of the omission, yet as the decree is to be reversed on a different ground, and the cause remanded, it is proper, when the case goes back to the circuit court, that that court should require the other heirs to be made parties; and as the introduction of the other parties may change the question presented by the appellant's exception to the introduction and effect of the answer of the appellee, as evidence on the trial of the issue, that question need not be (as it is not) decided. Therefore" decree reversed with costs, and cause remanded to the circuit court, "with directions to require the appellant to make the other heirs parties, and on his failure to do so in a reasonable time, to dismiss his bill for want of parties; and in the event the parties are made, for such further proceedings as may be proper."

<sup>402</sup> \*JUDGE STANARD also delivered a separate opinion in the foregoing case; but, as he informed the reporter, the manuscript was afterwards mislaid or lost. His opinion (according to a summary furnished by him to the reporter) was, 1st. That the answer to a bill for an issue *devisavit vel non* cannot be used as evidence for the respondent, in respect to facts alleged in the bill, and thereby urged against the validity of the will, and denied by the answer, except where the facts are suggested to be, or from their nature must be.

within the special knowledge of the respondent, and as to them an appeal is made to his conscience, and a discovery specifically called for from him. When therefore the bill suggests invalidity of the will for want of testamentary capacity of the decedent, by reason of age, or defect of intellect, or other cause not produced by the immediate agency, nor coming within the particular knowledge, of the respondent, the answer asserting the testamentary capacity, and denying the existence of the suggested defect or cause, is not evidence to the jury for the respondent, to prove such capacity. 2dly. He was also of opinion, that, making due allowance for the distance of the place at which the depositions were to be taken, the notice in this case was sufficiently definite, and that the court erred in the opinion by which the said depositions were excluded from the jury. And he concurred in the decree that was rendered by this court.—Note in Original Edition.

403 \*London v. Turner.

November, 1840, Richmond.

(Absent STANARD,\* J.)

**Personal Property—Parol Declaration of Trust—Valid as between Whom.**—Although, where personal property is given to one upon a trust by parol for another, the declaration of trust by parol may be valid as between the donee and the cestui que trust, yet as between the cestui que trust and the creditors of the donee the case is essentially different.

**Fraudulent Conveyances—Limitation of Chattels—Possession in Another—When Liable for Debts of Person in Possession.**—Where any reservation or limitation is pretended to have been made of a use or property, by way of condition, reversion, remainder or otherwise, in goods and chattels the possession whereof shall have remained in another for five years, the same, as to the creditors and purchasers of the person so remaining in possession, is, under the act to prevent fraud, and perjuries, taken to be fraudulent, and the absolute property to be with the possession, unless such reservation or limitation were declared by will or by deed in writing, proved and recorded.

**Same—Same—Same—Same—Case at Bar.**—A father, upon the marriage of his daughter, makes her a gift of slaves, and the possession thereof remains in the daughter's husband five years. While the husband is in possession, the father makes his will, confirming the gift, and declaring that the same is "to her in trust for the sole and only purpose of her immediate use and comfort in life, and after her decease the title and fee simple interest to be vested forever in the children or issue lawfully begotten of her body, free from the claim, control or direction of any other person whatever." Although this will is made and recorded within five years from the time of the gift, yet HELD that the slaves are liable to be taken in execution by the creditors of the husband.

This case distinguished from *Beasley v. Owen*, 8 Hen. & Munf. 449.

In December 1827 Terza London exhibited her bill to the judge of the superior court of chancery holden at Lynchburg, setting forth that about the 31st of December 1809,

\*He had been counsel for the appellant.

The principal case is cited in *foot-note* to *Bradley v. Mosby*, 8 Call 50.

†**Fraudulent and Voluntary Conveyances.**—See monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

the complainant, whose maiden name was Higginbotham, intermarried with 404 John London; that \*some time after the marriage, her father John Higginbotham delivered into her husband's possession two female slaves, to wit, Parmelia and Elvira, "declaring at the time of said delivery his intention to give the said slaves in trust for the sole and only purpose of the complainant's use and comfort during her life, and at her death the title and fee simple interest to descend and vest in her children or issue, which she might thereafter have; that the slaves remained in the possession of her husband from the time of said delivery until his death, without any effort on his part in any single instance, and without the assertion on his part, during all that time, of any claim or right in opposition to the said limitation and trust;" that in addition to the limitation and trust declared at the time of the delivery, the father of the complainant, in 1813, shortly previous to his death, made his will, which was duly recorded in the county court of Amherst, in which, out of abundant caution, and for the purpose of committing the title of said slaves to record, he confirmed the gift of them to the complainant and her children, in the manner and under the limitations and trust before mentioned; that since the said gift, Parmelia has had four children, Henry, Edmund, Fleming and —; that in 1823 complainant's husband died intestate, largely indebted by specialty and simple contracts; that she qualified as his administratrix, and has administered the whole of his personal assets (with the exception of a small sum retained to cover future contingent and unavoidable expenses) in the payment of specialty debts, leaving a large amount of them still unpaid, and the whole of the simple contract debts; that her husband died seized of several tracts of land amounting to between 1500 and 1600 acres, no part of which has been subjected to the payment of his debts; that among the specialty debts left unpaid is one of large amount, to wit, 857 dollars 81 cents, besides interest and costs, due James Marr deceased for the purchase

405 \*of a part of the said land, for which debt William Turner is bound as the surety of her husband; that Turner having paid 300 dollars, part thereof, to Alexander Marr the personal representative of the said James, recovered, upon motion in the superior court of Amherst county, a judgment against the complainant as administratrix as aforesaid, for the said sum of 300 dollars with interest from the 24th of July 1826 till paid, and the costs of the motion; that upon this judgment he has sued out a fieri facias, which he has caused to be levied on the negro boy Henry, a child of Parmelia; that he alleges he has now paid the balance of the debt to Marr's administrator, and will obtain a judgment against the complainant as administratrix for the same, and upon such judgment will cause execution to be levied on the remainder of the said slaves; that whatever right her husband had in the usufruct of the said slaves by virtue of his marital rights, was sold by the complainant as his administra-

trix, at a sale of his personal property made when Turner was present, to wit, in December 1823, at which time she became the purchaser at the price of 201 dollars, which sum she was enabled by the bounty of her brother to pay, and which, as administratrix, she has appropriated in payment of her husband's debts; that she is advised now that she acted under a mistaken idea of her own rights in purchasing the said slaves and paying the said sum of 201 dollars of her own money for them, because, upon the death of her husband, no right or interest in said slaves was transmitted to his representatives; that the complainant has by the said John London six children, to wit, Frances Jane, John James, Anne Eliza, Daniel H., Mary Banks and William Augustus London, of whom Frances Jane has intermarried with Winston Woodroof, and the remaining five are infants under the age of 21 years; that the said Turner has heretofore exhibited several bills in chancery against the complainant and

406 \*her children, to subject her husband's lands to the payment of his debts, which suits are still pending, and she is at a loss to conceive why he should have relinquished the pursuit of those lands to invade the rights of herself and her children, of which rights he must have been apprised, and in which he had heretofore acquiesced. The bill makes Turner, Woodroof and wife, and the complainant's other children, parties defendants. And it prays that Turner be enjoined from selling Henry, and from levying upon or selling the other slaves; that if it be found necessary, an account may be taken of the complainant's administration, and if it shall appear that she has paid the said sum of 201 dollars under a mistake of her rights, that she may be reimbursed out of the rents of the real estate.

Chancellor Taylor denied the injunction, but it was awarded by one of the judges of the court of appeals.

Turner, by his answer, after objecting to the jurisdiction of equity, stated that he thought it probable the marriage took place at least a year anterior to the time stated in the bill; that there was no material lapse of time between the date of the marriage and the time of the delivery of the slaves; that it is untrue that the delivery of the slaves was accompanied by any such declaration as is stated in the bill, or clogged by any condition or limitation whatever, but on the contrary the said slaves were fairly and unconditionally given by the father of the complainant to herself and her husband, for her advancement in marriage, and the husband claimed the slaves as his own property, and treated them as such, from the time they came into his possession until he died; that for these reasons the title to the slaves was not subject to the will of the complainant's father, and that will can have no influence upon the case; that respondent is advised the personal estate of the complainant's husband must be exhausted before his realty can be reached; but at all events, as the complainant \*and her children have the same interest in the personal as in the real estate it is more just and equi-

table that the personal estate should be given up for the benefit of creditors, and the matter of subjecting the lands adjusted between the widow and heirs, than that a suffering surety should be delayed.

Daniel Higginbotham, the brother of the complainant, deposed that some time in the year 1809 (as well as he remembers) and previous to the intermarriage of the complainant with John London, the deponent was in company with his father John Higginbotham, who informed him that in the event of the marriage of his daughter Terza with London, he intended to settle some negroes upon her and the issue of the marriage. The names of the slaves were Jenny and her children. He said he intended so to settle them, or any thing else he might think proper, upon his daughter and the heirs of her body, that in the event of her dying without issue, they should return to his estate. He requested deponent at the time to draw up such an instrument as would secure to the said Terza, and her children by the said intended marriage, the said slaves according to his intention, and the deponent thinks he drew such an instrument and left it with his father. Some short time after this the marriage took place, and some time thereafter (perhaps two or three months) the slaves were delivered into the possession of the said John London, as the property of the said Terza for life, and at her death to go to her children. Deponent was informed this was the character of the gift and the delivery, by conversation with his father, not only at the time first referred to previous to the marriage, but after the marriage and previous to the delivery. The intention of his father is the more strongly impressed upon deponent's memory, by the remark made by his father in one of the conversations alluded to, that he wished to secure the property to his daughter and her children 408 dren in such a way as to \*leave no question of its validity, and that he did not wish to encounter again such a controversy as he had had with his son in law Isaac Rucker.\* Since deponent drew the instrument referred to, he does not remember to have seen it, and cannot say what has been done with it. It may be that his father determined to substitute his will in lieu of that instrument, as the provisions of the will in relation to the property given to Terza London are substantially the same (so far as deponent recollects) with those contained in the said instrument. In the year 1812 or 1813 (deponent is not certain which) he was in company with John London, when there was a conversation about the negroes given by deponent's father, in which London told deponent that two of the negroes had died, and he was apprehensive there was some defect of constitution attaching to the rest, and he believed the interest of the family would be promoted by a sale or exchange of the rest, and he would sell them or put them off if he had the right to do so; but he said, "You know how they are given, and that I have no right to do so,

\*The case of Higginbotham v. Rucker is reported in 2 Call 818.—Note in Original Edition.

and therefore have not attempted and would not attempt to do so."

Frances R. Coleman, the sister of the complainant, deposed that the marriage took place in 1809 or 1810, and her father's death in 1813; that her father gave to the complainant at the time of the marriage, and for the sole benefit of herself and children, a negro woman Jenny and her children Celia, Parmelia and Elvira; that Celia has since died, and Parmelia has several children, Henry, Edmund, Fleming, Jane, and an infant whose name is not known; that the witness heard John London state, on one or more occasions, that he wished to sell the said slaves, but could not, on account of the slaves having been given to his wife.

Jesse Higginbotham, a brother of complainant, in answer to interrogatories of her counsel, said, "I do not  
409 \*recollect in what year she was married, nor in what year my father died. I know the slave Parmelia was the daughter of Jenny, given by my father to my sister at or after her intermarriage. The said Elvira I believe to be the daughter of Jenny, but do not know it. I never heard John London say any thing about the character of the gift."

The affidavits of Charles Palmer and Alexander Jewell were taken for the defendant. Palmer deposed that he lived within 9 or 10 miles of London, and never heard that London held the property which came by his wife in any other way than as his own. He always understood and believed the property was London's. Jewell resided nearer to London. He deposed that he considered the slaves as London's own slaves, and never heard any thing said to the contrary. London offered to sell him one of the women. "I had," says this witness, "no doubt about the title, when he offered to sell me the woman. I think her name was Jenny. My wife observed to Mr. London, that probably his wife would not be willing for him to sell that woman, coming by her. His reply was, that he cared nothing about that; that the property given to him by her father he would sell as soon as if he had laboured for it." This conversation took place 15 or 16 years before the date of the deposition, which was October 1828. Witness did not want to buy the woman, and for that reason the sale was not made.

The clause in the will of John Higginbotham referred to in the bill and relied on by the complainant is in these words: "Item, I do also confirm the gift or gifts which I occasionally made to my daughter Terza London, hereby declaring the same is made to her in trust for the sole and only purpose of her immediate use and comfort in life, and after her decease the title and fee simple interest to be vested forever in the children or issue lawfully begotten  
of her body, free from the claim, con-  
410 trol \*or direction of any other person whatever." The will bore date the 22d of June 1813, and was admitted to record in the court of Amherst county on the 19th of September 1814.

On the motion of the defendant Turner, the court of chancery, on the 19th of May

1830, ordered that the injunction be dissolved. And from that order the complainant appealed.

Lyons and Stanard for appellant.  
Johnson for appellee.

BROOKE, J. I do not think that parol evidence is admissible to prove a trust in the slaves delivered by the father to the wife of London. The act of 1787 concerning slaves (1 Rev. Code of 1819, ch. 111, § 51, p. 432), adopts the provision of the act of 1758, which required that gifts of slaves should be by will or deed duly proved and recorded; but provides that that provision should not extend to gifts of slaves where the possession was in the donee or those claiming under him; evidently intending to apply to the case of absolute gifts, and leaving the cases of special gifts with limitations and trusts for others than the donee, to be provided for by will or deed duly proved and recorded according to the act of 1758. The delivery of possession by the donor to the donee would be insufficient evidence to all the world of the right of property in the donee, but would be no evidence of any trust or limitation for others; and to admit parol evidence to prove such trust or limitation, would let in all the frauds intended to be prevented by the will or deed required in the first provision of the section in the case of special gifts of slaves. In the case before us, the delivery of the slaves by the father to his daughter Mrs. London vested the property in them in her husband, by virtue of his marital rights, and left nothing in the father  
411 to be disposed of by his \*will: which disposition, by the way, appears to me, upon the testimony in the case, to have been an afterthought, when London the husband had become much involved, and to have been designed to protect the property in the slaves from his creditors.

I prefer this view of the case to putting it on the last provision in the 2d section of the act to prevent frauds and perjuries, 1 Rev. Code, ch. 101, p. 373, as upon the evidence in the case the possession of the slaves had not remained in the donee five years before the will of the father was duly proved and recorded; a point much pressed in the argument.

The order must be affirmed.

TUCKER, P. From the evidence in this case I am satisfied that very soon after the marriage of Mrs. London, her father made her a gift of the slaves, from one of whom the slave in question descended. The testimony does not furnish the slightest foundation for the opinion that the transaction was a loan; and hence the notion of a reclamation by his will, according to the principles of *Beasley v. Owen*, 3 Hen. & Munf. 449, is out of the question. The will can have no influence except to confirm the position that there was a gift, and not a loan. If it applies to this transaction at all, it recognizes it as a gift; if it does not, it can have no effect in confirming the rights of Mrs. London.

Considering it as a gift, and admitting that it was to the daughter for life, with remainder to the children, what was its effect? It is contended that it was designed as a trust for the daughter, and equity will

consider the husband as trustee, if none other be named. The legal title is cast upon him by the gift without the intervention of a trustee, and equity will affect his conscience with the trust, if he received the property upon confidence that he would hold it for her use. This is indeed

true as between the parties themselves; but the \*question is not between them, but between the wife and the creditors of the husband; and then we are to say whether equity will set up a secret parol trust in behalf of the wife against the creditors of the husband. The statement of the question at once suggests the answer. If there were no statute of frauds, such a course would be against the best received principles of equity. The creditors have the law in their favour, and the equity set up against them is secret and eminently calculated to defraud and deceive. But the statute places the matter beyond question. Here is a limitation of an use pretended to have been made by way of trust, in this property which was given to the wife, and the legal title and possession whereof eodem flatu vested in the husband. This limitation is by the statute denounced as fraudulent, and the absolute property is declared to be with the possession.

The pretension of a remainder in the children is yet more unfounded. If they take any thing, it is a legal estate in remainder, and not a mere equitable interest. Now it may well be doubted whether a remainder in chattels can pass without deed or will. At common law, such remainders were in no case permitted. Afterwards they were recognized in deeds and wills (5 Bac. Abr. 720; 1 Burr. 284; Bradley v. Mosby, 3 Call 50), but I have found no case where a parol remainder has been sustained. But be this as it may between the parties, the statute of frauds very clearly declares such a limitation invalid as to creditors.

It is suggested, however, that there being no children in esse when the parol gift was made, the remainder was for that cause void, and so the right after the daughter's death would revert to the father, and was therefore liable to be disposed of by his will. I do not think so. The father by the gift intended to pass away the property altogether from himself; and where such intention appears, the absolute property vests in the first

taker, if the remainder over is void. 1 P. Wms. 666; 5 Bac. Abr. 722. A gift of personality, on common law principles, passed the absolute right. The courts afterwards modified that general principle, in behalf of certain remainders and limitations which the law recognized as good. But if the remainder limited is not good, the original rule prevails. So that here the estate of the daughter was absolute if the remainder was void, and the marital rights of the husband were commensurate with hers.

If may be proper to observe that if, contrary to this view of the matter, a reversion was reserved to the father, dependent upon the daughter's life, it would be as literally within the statute of frauds as a

remainder is, and would accordingly be void, since it would set up a secret interest in derogation of that absolute property which the law infers from possession, unless it be limited by deed or will duly proved and recorded. There is indeed nothing against which the act is so distinctly directed, as a parol reservation of rights in the donor, while to all the world the donee retains that principal indicium of property, the possession of the chattel.

As to the alleged purchase of London's interest by his wife, that was so far from being made the foundation of her title, that she alleges it was made under a mistaken view of her rights. The defendant therefore was not called to answer to it. If, upon the cause going back, she choose to amend her bill and rest herself upon this purchase, the defendant will then answer, and that matter will be determined upon such evidence as she shall produce.

I am of opinion to affirm the order.

CABELL, J., concurred in the opinion of the president.

Order affirmed.

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\*Kevan v. Waller.

November, 1840, Richmond.

(Absent STANARD, \*J.)

Wills—Appointment of Testamentary Guardian—

Case at Bar.—Testator bequeaths \$15000 to his infant son, to be vested in bank stock or such other stock as his executors shall think more profitable, and from the proceeds or dividends to educate him in the best manner under the direction of his executors, and the surplus if any to be vested in like manner; and appoints two executors: HELD, this was not an appointment of the executors testamentary guardians of the infant son.

Same—Appointment of Two Testamentary Guardians—Either May Qualify.—If two persons be appointed testamentary guardians, the office is joint and several, and either may qualify without the other, and without summoning the other to accept or renounce the guardianship.

John Myrick late of the town of Petersburg, in and by his last will and testament, bequeathed and provided as follows—"I give and bequeath to my son John L. Myrick the sum of 15000 dollars to be vested in bank stock or such other stock as my executors may think best and more profitable, and from the proceeds or dividends to educate him in the best manner under the direction of my said executors herein after named, and the surplus, if any, to be vested in like manner or stock." "I give and bequeath to my friend and sister in law Mary Turner, in consideration of the trouble she has had, and will hereafter have, in raising and attending to my said son from his infancy, the sum of 3000 dollars." And

\*He had been counsel in the cause.

†Appointment of Testamentary Guardian.—In Boyd v. Townes, 79 Va. 122, it is said: "As was said in this court in a noted case, had the testator designed to confer the guardianship, he would have conferred it *totidem verbis*, since it would have been the most natural and obvious way of expressing himself. *Kevan v. Waller*, 11 Leigh 430." See monographic note on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

after sundry other legacies and provisions, the testator appointed William Clarke (his father in law, and the grandfather of his infant son) and dr. William J. Waller his executors, and desired that they should not be required to give security. The will was dated the 28th December 1831.

415 The executors Clarke and \*Waller proved the will in the hustings court of Petersburg at January term 1832, and both qualified as executors.

The testator's son and legatee John L. Myrick was, at the time of the testator's death, an infant of very tender years. The hustings court of Petersburg, at its August term 1837, appointed Andrew Kevan guardian of the infant. But at the next September term, on the motion of the executor Waller, who represented that he was appointed testamentary guardian of the infant by his father's will, that he desired and intended to qualify as such, and that Kevan had been appointed guardian, without previous summons or notice to him as the statute required, the hustings court made a rule on Kevan, to shew cause why his appointment should not be revoked. Both parties appeared at November term: Waller insisted that Kevan's appointment was irregular and illegal, and that it should be revoked, and moved the court to permit him to qualify as testamentary guardian; and Kevan insisted that his own appointment was regular and legal, and opposed Waller's motion for permission to qualify as testamentary guardian of the infant. The hustings court revoked Kevan's appointment, but at the same time overruled Waller's motion to be permitted to qualify as testamentary guardian. Kevan excepted to that part of the sentence which revoked his appointment to the office of guardian, and Waller to that part of it which denied him permission to qualify as testamentary guardian. And both parties appealed to the circuit superior court of Petersburg. Waller carried up his appeal. But Kevan did not prosecute the appeal he had taken. However, upon the hearing of Waller's appeal in the circuit superior court, Kevan appeared and contested Waller's claim to the wardship as testamentary guardian.

The circuit superior court held, that, as Kevan had failed to prosecute his  
416 appeal from the sentence of the \*hustings court which revoked his appointment to the office of guardian, the propriety of that revocation was not examinable there: that the sentence of revocation was to be considered as in full force.

The circuit superior court also held, that the executors of the testator John Myrick were by his will appointed testamentary guardians of his infant son; but yet held it proper to hear parol or any other legal evidence to shew, that Waller ought not to be permitted to qualify as guardian. On this point, then, a good deal of evidence was introduced on both sides, which was made part of the record by bill of exceptions filed by Kevan; but it is unnecessary to state it here, since the cause was decided by this court upon the construction and effect of the will. The circuit superior court thought, that no good reason was shewn by the evidence, why Waller should

not have the wardship; and therefore reversed the sentence of the hustings court which denied it to him, and remanded the cause to that court, with directions to permit him to qualify as testamentary guardian, according to the provisions of the statute concerning guardians &c.\*  
417 From which sentence Kevan \*by petition to a judge of this court, prayed an appeal; which was allowed.

The cause was argued here, by Macfarland, Rhodes and Leigh, for the appellant, and by Johnson and Taylor, for the appellee.

The counsel for the appellant maintained, that the will of the testator John Myrick did not appoint his executors guardians of his infant son. The provisions of the first section of our statute concerning guardians &c. were taken (not literally indeed, but substantially). from the english statute 12 Car. 2 ch. 24, and, therefore, the adjudications of the english courts on their statute would afford us a guide for the exposition of our own. The best and fullest judicial exposition of the english statute would be found in the opinion of the chief justice in *Bedell v. Constable*, Vaugh 177, the material points of which were well abstracted in 3 Bac. Abr. Guardian, A. 3. p. 405. The english and the Virginia statutes both authorized a father, by deed or will, to grant or devise "the custody and tuition" of his infant child. They said, the word tuition in those statutes, did not mean education in the ordinary sense of of that word: it was used there in its proper sense, and meant guardianship. At all

\*1 Rev. Code, ch. 108, p. 405,—§ 1, provides "that any father, even if he be not of the age of twenty-one years, may by deed or last will and testament, either of them being executed in the presence of two credible witnesses, grant and devise the custody and tuition of his child (which had never been married) although it be not born, during any part of the infancy of such child, to whomsoever he will; and such grant or devise, heretofore or hereafter to be made, shall give the grantee or devisee the same power over the person of the child, as a guardian in common socage hath, and authorize him, by actions of ravishment of ward or trespass, to recover the child, with damages for the wrongful taking or detaining of him or her for his or her use, and for the same use to undertake the care and management, and receive the profits, of the ward's estate. real and personal, and prosecute and maintain any such actions and suits concerning the same as a guardian in common socage may do.—§ 2. Any guardian, so appointed by the last will and testament of any person, which shall be legally proved and recorded in any court, shall appear openly in such court, before the exercise of any authority over the minor or his estate, and declare his acceptance of the guardianship, which shall be recorded, and shall give bond and security in the manner herein after directed, unless the testator has otherwise directed by his will.—§ 3. If any such guardian shall fail or neglect to appear in the court where such last will and testament shall be recorded, within the space of six months thereafter, he may be summoned and compelled to declare his acceptance or renunciation of such trust; and if every such guardian, appointed by any such last will and testament, shall renounce the same, which renunciation shall be recorded, the said court may and shall proceed to appoint and qualify some other person or persons to the guardianship."—Note in Original Edition.



events, the phrase "custody and tuition" was the exact definition of guardianship; and so it had always been understood.

418 Neither statute \*prescribed any particular form of such appointment; and it was equally true in the construction of both, that it was immaterial by what words the guardian was appointed, provided the father's intent was sufficiently apparent. But then, the father's intent must distinctly appear, to give the custody and tuition of his child's person, not merely the care of his estate; to appoint a guardian for the child, not a trustee to manage the estate given to the child, and to apply the profits to his use, whether for his education or otherwise. This appeared clearly from the propositions, deduced from the opinion in *Bedell v. Constable*—that neither before nor since the statute of 12 Car. 2, ch. 24, might an infant directly devise his lands, yet an infant might within that statute dispose of the custody of his child, and that disposition would draw after it the land as incident to the custody, *Vaugh. 178*, and that the testamentary guardian would, as incidental to his office, have the custody, not only of the lands descended from or left by the father to the child, but of all lands and goods in any way acquired or purchased by the infant, *Id. 185-6*, but that if a father of full age should devise his land to J. S. during the minority, of his son and heir, in trust for the son, and for his maintenance and education during his minority, "this would be no devising of the custody within the statute, for he might have done this before the statute," *Id. 184*. The devise of the custody of the child's person, then, the appointment of a testamentary guardian, carried with it authority over all the ward's estate: the devise of a trust or authority over the estate given by the father to the child, with whatever latitude of discretion or for whatever purpose, even for the express purpose of his maintenance and education, did not carry with it the custody of the child's person, the tuition, the guardianship. Then, advertg to the will in the present case, whereby the father gave 15000 dollars

419 \*by his executors in bank or other stock, as they should think most advantageous to the legatee, and from the profits "to educate him in the best manner under the direction of his executors, and the surplus to be vested in like manner or stock;" they insisted, that the trust here confided to the executors, was to invest, manage and improve that particular fund, and at the most, to direct the manner of his education, and out of the profits of that fund to defray the expense of the best education; that there was not the least manifestation of any intent to give the executors the care and management of any other estate of his son but that which the testator bequeathed to him, or any authority to apply the profits of any estate which his son might otherwise acquire, to the purpose of his education, or to his use in any other way. And if the testator's intent was only to confide to his executors the care and management of the estate he had given to his child, and the direction of his education to be defrayed out of the profits of that estate, he intended to confide a trust to them far short

of the office of testamentary guardians. Here was "no devising of the custody within the statute, for he might have done this before the statute."

The testator expected and intended, that Mrs. Turner should have the care of his child's person, during the early part of his infancy at least: he gave her a handsome legacy, in consideration of the trouble she had had, and would afterwards have, in rearing and attending to him. Now, if the will had appointed the executors guardians of the child, and Mrs. Turner had insisted on keeping him under her own care during his early infancy (as probably she did), the statute would have given the testamentary guardians an action of ravishment of ward or trespass against her, to recover their ward and damages for her detention of him. But to hold that they would have been entitled to such an

420 action against \*Mrs. Turner, were to set at naught the plain wishes of the father in regard to the care of his child's person, the preservation of his health and life. And if they could not have recovered the custody of the child from her, they were not testamentary guardians. Indeed, Mrs. Turner might have claimed the custody, the testamentary guardianship, of this infant, with much more plausibility, than the executors.

Granting that the testator meant to give his executors the utmost latitude of discretion that can possibly be inferred from his will, in respect to the manner and expense of his infant son's education, yet the grant of such control and discretion over his education would not have constituted them his guardians: for the guardianship of an infant may be expressly devised to one, and the direction, or a share in the direction, of his education, confided to another. *Duke of Beaufort v. Berty, 1 P. Wms. 702-6; Gaines v. Spann's ex'ors, 2 Brock. C. C. R. 81*. They said, it would be found, on examination of the cases which had arisen upon testamentary appointments of guardians, that either the custody of the infant was expressly devised; or there was an express appointment of a guardian or tutor, *eo nomine*; or all (not a part) of the powers essential to the office of guardian were granted. They referred for instances, to *Bedell v. Constable, Duke of Beaufort v. Berty*, and *Gaines v. Spann's ex'ors*, (before cited); *Eyre v. Countess of Shaftsbury, 2 P. Wms. 103; Storke v. Storke, 3 Id. 51; Ex parte Richards, 3 Atk. 518; Dillon v. Lady Mountcashell, 4 Bro. P. C. 306, (new ed.); Ward v. St. Paul, 2 Bro. C. C. 583; Peckham v. Peckham, Id. 584, in note; Ex parte Earl of Ilchester, 7 Ves. 348*.

In *Mendes v. Mendes, 3 Atk. 619, 624*, the testator having directed that £600. a year should be given to his wife for the maintenance and education of his children whilst they should continue to live with her and at her charge; lord Hardwicke said, "I 421 should apprehend this might \*amount to a devise of the guardianship, but do not give an absolute opinion." If, even in that strong case for implying a grant of guardianship, lord Hardwicke saw some room for doubt, it could not possibly be maintained, that the provisions of Mr. Myrick's



will appointed his executors guardians of his infant son by fair implication.

The only case they were aware of, that furnished any colour of authority to support the claim of the appellee to the guardianship, was that of *Reynolds v. Lady Tenham*, 9 Mod. 40; 2 Eq. Ca. Abr. 486, pl. 16, best reported by the name of *Lady Teynham v. Lennard*, 4 Bro. P. C. 302. Accordingly to the two former reports, the infant's father said, on his deathbed, that he expected his father would take care to educate his child in the protestant religion, and not leave the education of it to his wife (she being a papist); and these words were held a good appointment of the grandfather guardian. According to Brown's report, the state of the case was thus—"Richard Barrett (whose wife was a roman catholic) being sensible of the prejudice it might be, not only to his child and family, but also to the protestant religion, especially in Ireland, did, in his last sickness and not long before his death, direct that his father should have the care and tuition of such child when born, alleging that his wife had always promised it should be bred up a protestant; and this direction was reduced to writing, by way of memorandum or instructions for a will, but before the same could be prepared in form, Barrett died." The contest for the guardianship of the infant was between the roman catholic mother, and the protestant grandfather, who being himself infirm, named two person to whom he desired the guardianship might be committed. The court of chancery appointed the grandfather's nominees guardians of the infant. On appeal to the house of lords, the appointment of the grandfather's nominees to be the guardians, 422 was reversed; but \*it was decided, that the guardianship was not assignable, and that the grandfather in person should have the guardianship. Now, they said, it was plain, that there was, in that case, no testamentary appointment of a guardian, within the statute 12 Car. 2, ch. 24, for by that statute, such appointment could only be made by deed or will in writing in the presence of two or more credible witnesses; but the father's directions on his deathbed were, at the most, only a nuncupative will. Nor was it pretended, in the argument, that the grandfather had been appointed testamentary guardian of the infant, but only that the lord chancellor, to whom by the law of the land it belonged to appoint guardians for infants, did right in giving the guardianship to the protestant nominees of the protestant grandfather, to whom the father wished to confide the care and tuition of his child, in preference to the roman catholic mother. The religion of the parties to the contest for the guardianship, was the real ground of decision.

They concluded, that the appellee Waller had no claim to the guardianship of this infant by testamentary appointment of his father. And on this point they rested the case. But they suggested, that even if the circuit superior court was right in holding that the will made an appointment of testamentary guardians for the infant son, the appellee was not the sole guardian; both the executors had equal right to participate in the guardianship; and the circuit court

erred in directing that Waller alone should be permitted to qualify, without summoning the other executor Clarke to say whether or no he also would qualify as guardian, according to the second section of the statute concerning guardians &c.

The counsel for the appellee argued, that as the testator gave to his executors the whole care and management of the estate he had given to his infant son, during his minority, and gave them the direction, in other words, the control, of his education, he confided 423 to them all the \*essential attributes that belong to the office of guardian. Of these, the direction of the education of the infant was far the most important. Education, they said, comprised the training of the body, of the understanding, of the heart; the breeding of the youth, nurture, instruction in letters, manners, morals and religion. The executors could not direct the education of the infant in the best manner according to their own judgment, without having the disposal of his person, to place him where such best education could be bestowed on him. The right conferred on the executors to direct the infant's education, therefore, carried with it, by plain and inevitable implication, a perfect right to the custody and disposal of his person. If the right and duty to hold and manage the infant's estate, and to direct the manner of his education, and dispose of his person so as best to accomplish the purpose of educating him, and the consequent right and duty to maintain him, did not constitute all the attributes of the office of guardian, what attribute of that office was withheld?

They insisted, that the grant of the education of the infant in this will, was exactly tantamount to the grant of the tuition in the statutory sense of the word; and entered into a criticism of those words to shew that they were equally comprehensive.

They said, the case of the Duke of Beaufort v. Berty established no such proposition as that an absolute control and direction of the education, could be separated from the guardianship, of an infant, and the guardianship confided to one, and the education to another. In that case, the testator expressly appointed two of his friends guardians of his infant sons, and only recommended to the guardians to take the advice of the duke of Ormond in the education of his eldest son; there was no question who were entitled to the guardianship; the only question was whether the guardians should con-

sult another who was not appointed one 424 of the guardians, \*in the education of the infant. It was determined, that the guardians, in the execution of their office, ought to follow the testator's recommendation, and consult the duke of Ormond, or the persons whom the court substituted for him; not that the persons with whom the guardians were to advise, might direct and control them in the education of their ward. In the present case, the absolute uncontrolled right and duty to direct the education of the infant, as well as the care and management of the estate given to him, was confided by the testator to his executors.

The argument for the appellant rested mainly on propositions extracted from the opinion of the chief justice in *Bedell v.*

Constable; but it nowise appeared what was the point in controversy in that case, or who were the parties to it, or how it was decided, or whether it was ever decided; it only appeared, that the court was equally divided upon the case before it, whatever it was. The case could not be considered authority to any purpose. In *Mendes v. Mendes*, the testator did not confide to his wife the care and management of the whole property which he had given to his children, which was very large, but only directed that £600. a year should be given to his wife, out of his own estate, for the maintenance and education of his children, while they should continue to live with her and at her charge; and lord Hardwicke thought, that might amount to a devise of the guardianship, but he gave no absolute opinion; not because he doubted, but because the case did not require him to decide the point. The present case, they said, afforded far stronger grounds to imply a grant of the guardianship of the infant: the care and management of the infant's whole estate; the right and duty to direct his education (which included, as they had shewn, his maintenance, his nurture, and the disposal of his person) with no limitation but that the expense should be defrayed out of the profits of the estate (the very

425 \*limitation imposed by our statute on all guardians, 1 Rev. Code ch. 108, § 9, 26); every authority, every duty, which concerned the welfare of the testator's infant son, was confided by this will to the executors. If lord Hardwicke doubted in *Mendes v. Mendes*, whether the testator's will devised the guardianship of his children to his wife, he could hardly have doubted, whether mr. Myrick's will devised the guardianship of his child to his executors. Taking Brown's report of *Lady Teynham v. Lennard*, as the best and fullest report of that case, it is apparent, that Barrett's deathbed direction being, that his father should have the care and tuition of his child, in order that he should be bred up a protestant, that is educated in the protestant religion; these were held apt words to appoint the grandfather guardian of the child; else, why was it held by the house of lords, that the grandfather could only take and exercise the office of guardian in person, that the office confided to him was not assignable to others, and that the court of chancery had no authority to appoint other fit persons to be guardians?

The legacy bequeathed to mrs. Turner in consideration of the trouble she had had, and would afterwards have, in rearing and attending to the testator's son from his infancy, did not warrant the inferences which the appellant's counsel deduced from it. She had had the same care of the child during the father's life, which she was expected to have after his death; and as the care she had had of him during the father's life, was nowise incompatible with the father's right of custody and guardianship of his child, so neither was the care she was expected afterwards to have in rearing and attending to him, incompatible with the office of the testamentary guardians who were placed in loco parentis.

As to the objection to the sentence of the circuit superior court, because it directed that

426 Waller should be permitted to qualify as testamentary guardian, without \*sum-

moning Clarke to accept or renounce the office, they said, the authority of testamentary guardians was joint and several, like that of executors, and, therefore, either of several testamentary guardians might qualify alone. *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 103, 107-8. Besides, the permission of Waller to qualify as guardian, would nowise hinder Clarke also from qualifying as such, if and whenever he thought proper to do so.

Lastly, they submitted, that Kevan had no right to appeal from the sentence of the circuit superior court, declaring Waller's right to qualify as testamentary guardian. The hustings court had revoked its appointment of Kevan to the office of guardian; and though he had appealed from the order of revocation, he never prosecuted that appeal, and therefore the propriety of that revocation was not examinable in the circuit superior court, and of course could not be examined here; he was no longer guardian, and had no interest in the controversy as such. In the separate question, whether Waller was appointed testamentary guardian or not, after his own office of guardian was revoked, he had no interest whatever. A person could not make himself party to any controversy, without shewing some interest in the subject or the question.

TUCKER, P. The difficulty which was supposed to exist as to the jurisdiction in this case, disappears when we look to the position of the parties. Kevan, the appointed guardian of young Myrick, was summoned, at Waller's instance, to shew cause why he should not be removed, he Waller claiming that he had been appointed testamentary guardian, and not having been summoned or notified according to law, to declare his acceptance or renunciation of the office. Kevan was removed by the hustings court of Petersburg by which he had been appointed. Waller then moved to be permitted to qualify:

427 Kevan opposed this motion; and it was entered \*of record that he did so. The hustings court rejected Waller's motion; and Waller appealed. Now although, if the two cases are considered as distinct, Kevan's right of appeal might have created some doubt, if he had failed in the hustings court; yet as he succeeded, and Waller appealed, Kevan was properly before the circuit superior court as a party; and as that court reversed the sentence of the hustings court, and gave judgment against him for costs, there can be no doubt, I think, of his right of appeal from that judgment. The question is then fairly brought up as to the merits of the sentence.

I put out of the case all question as to the power of one of two testamentary guardians to qualify without the other. I take it to be clearly and properly settled, under the statute concerning testamentary guardians, that the authority conferred is joint and several; that it is not a naked authority, but coupled with an interest; that if one dies, it will go to the survivor; that where one refuses, the other may qualify without him: that each is a complete guardian, if the other does not qualify. It would be most mischievous if, where there are several appointed, and some refuse to act, the rest should not be able to do any thing; and yet this must be the

consequence, if the appointment of several should be held to be one joint naked authority; a construction which would make the act of little force, and the more guardians a father should appoint for the security of his child, the less secure he would be, since the refusal of one would defeat the authority of all. 2 P. Wms. 102, 107-8.

The real question in the case is, whether the will of Myrick constituted Waller and Clarke the guardians of his child? And here I shall concede, that it has been decided (whether wisely or not, may perhaps be questionable) that the use of the term guardian, or other express words of appointment, is not necessary, nor is it material by what words

the guardian is appointed, provided the  
428 \*father's intent be sufficiently apparent. Yet, with this concession, I am still of opinion, that, as the father's authority is an innovation upon the common law, and in derogation of the rights of the mother or other kindred who would be entitled to be guardians by nature, the declaration of his intention should be distinct and unequivocal, and in terms inconsistent with the existence of the power and authority of the natural guardian. And if the language of his will is clearly reconcilable with the rights of such natural guardian, it should not be strained, by piling inference upon inference, so as to take them away. Thus, in the present case, the mother if alive, or the grandfather if she be dead, are the guardians by nature of this child. From the tie of blood, the law looks upon them as his natural protectors. But as the father may be presumed to know to whom it would be safest to entrust him, the law defers to his judgment: yet it surely will not be eager to presume that the father intended to tear his child from the tender cares of a mother, or other kindred, and to place his person, his fortunes and his education, in the hands of a stranger. Before we arrive at such a conclusion, the language must be clear and cogent; and moreover, the direction given to the stranger must be incompatible with the guardianship in the next of kin, or it cannot fairly be presumed to be designed to take it away. For if the intent can be fully satisfied short of annihilating the natural guardian's power, we are not authorized to go one step farther.

Such appears to me to be the present case. Here is a grandfather of the child yet living. Why should we presume, that the father intended to take from the grandfather, his natural friend and protector, this only child, and place his person and all his property, in the hands of Waller and the grandfather jointly? Because he has ordered, that he shall be "educated in the best manner, under the direction of his executors?"

429 Is \*this order incompatible with the rights of the natural guardian? What more was meant, than that Waller and Clarke should prescribe the course, and point out the mode, of his education to the person having the guardianship? Such directions that person would indeed be bound to follow; because, even before the statute, the father had the power of directing the course of his child's education, and a court of equity would enforce a compliance with his will. Since the statute, it is yet more clear; the greater

power of appointing a guardian comprehending that of directing the education, or giving power to direct it. Accordingly, in the case of Beaufort v. Berty, where the testator appointed two guardians, and recommended that they should take the advice of the duke of Ormond as to the education of the wards, lord Macclesfield recognized the validity of this recommendation, but the duke of Ormond being attainted, the authority was held to devolve upon the great seal, and the chancellor thereupon directed that the guardians should take the advice and follow the counsel of the duke and duchess of Crafton, who were relations of the wards. Here, then, the guardianship was in two persons and the "direction of the education" in two others. And is any thing more common, than for a father who is solicitous about his child's education, to declare his wishes that some friend, in whom he has confidence, should have the direction of his education, without designing to burden him with the guardianship, the custody of his person, and the management of his fortunes? Such a construction would defeat its very object; for a friend might be very willing to discharge the duty of an adviser or director of the child's education, who would be unwilling or unable to take upon himself the guardianship. That great and excellent man, our former fellow labourer, and one of the lights and ornaments of this court (the late judge Carr), recommended that his son

430 should be educated \*under the direction of myself in conjunction with his wife. It may be safely affirmed, that he never designed to take the guardianship of his boy from that excellent lady, or to vest in me any power over his person or his estate. Certain it is, I never dreamed of such a construction of his will, whilst I should have faithfully complied, as far as I was able, with his wishes. I should never have supposed it necessary to enter into bond with security before I could have recommended a course of study or instruction, nor should I have thought myself entitled to qualify as guardian, and take the child and his estate from his mother's hands, in case she did not qualify also. I have mentioned this case, merely as furnishing an actual instance of a provision similar to that at bar, in which the construction contended for by the appellee, would obviously have violated the wishes of the testator.

From what has been said, I think it clear, that an authority to direct the education of a child, may be exercised by one, while the guardianship (that is, the custody of his person and property) may be in another. The two things, then, are not incompatible; and if not incompatible, the gift of the former is no derogation of the latter. To me, indeed, it appears, that the very provision, that a child shall be educated under the direction of an individual, implies the custody by one person and the direction of the education by another. Had the testator in this case, designed to confer the guardianship, he would have conferred it totidem verbis, since it would have been the most natural and obvious mode of expressing himself; or had he designed, that his child's education should be directly conducted by the executors, he would have said, that he should be educated by

them; but in declaring that he should be educated under their direction, there is the strongest implication of agency in some other who was to be subject to their direction. That other was the guardian.

431 The clause in \*question is indeed imperfect: he gives his son 15000 dollars, "and from the proceeds to educate him." Here is something wanting, something to be supplied; but what, is not so clear. Yet it is clear, that the words "my executors" are not the omitted words; for if they are inserted, it will make the sentence absurd. It will make the testator provide that his executors shall educate him, under the direction of his executors. Either the testator intended some other person, or he intended to speak impersonally; and, in either case, he seems to have looked to his child's education being conducted by others, though under the direction of the executors.

The statute concerning guardians &c. and the interpretation of the word tuition there used, were the subject of much discussion at bar. That word I certainly do not understand in the narrow sense of instruction or education; it is used in the broader sense of protection, superintendence, guardianship; it comes from the latin *tueor*, to defend; and hence its radical signification is defence. This is also implied by the word guardianship; which, however, is yet broader, for it implies custody; its root is the anglosaxon *wardian*; which signifies to look, to look after, and thence by transition, to guard, to keep; and so implies custody. The word guardian is derived immediately from the french *gardien*, which itself comes from *wardian*; the *w* being converted, as is usual, into *g*. Richardson's Dict. 1 Tooke's diversions of Purley, 332-4; 2 Inst. 305. Thus, guardianship includes the idea of custody; and custody and tuition, as used in the statute, constitute guardianship.

Admitting, therefore, that no particular words are necessary in a will for the appointment of a testamentary guardian, it may safely be affirmed, that the language must be such as to imply a right to the custody, control, and protection of the ward. This I do not think can be fairly implied from the provision, that the child shall be educated under the direction of the executors.

432 The word \*education, here, is obviously used in the narrow sense of instruction, and does not imply tuition, and much less custody. But it is contended, that we must infer a right of control over the education, from the right of direction; a right to the possession of the person from such right of control; and the powers of a guardian over the estate from the right to the possession of the person; and thus, from the simple power to direct the course of education or instruction, the appellee claims to be invested with the custody of person and estate, and a guardian's power over both. I cannot consent thus to build inference upon inference, of which I am persuaded the testator never dreamed. I must have somewhat more than a single case, and that too of doubtful authority and analogy, before I will pile consequence upon consequence, for the purpose of vesting in a party the largest powers over the person and estate of an orphan from so remote an implication.

If indeed we look to authority, I think the case of the appellee will not be much better than without it. The case of lady Teynham v. Lennard stands alone, and may well be suspected to have been partly decided under the influence of religious jealousy and intolerance. It occurred in the very heat of sectarian controversy, early in the reign of George I. and turned on the dangers of entrusting the education of a child to a papist mother. It was, moreover, stronger than this case; for there were in that case words of exclusion of the natural guardian: the testator said, he "expected his father to take care of the education of his child in the protestant religion, and not leave the education of it to his wife." Against this case may fairly be opposed the case stated in *Bedell v. Constable*, where even a devise of land to J. S. during the minority of the testator's child, for his maintenance and education, was held not to constitute him guardian.

433 \*This view of the case renders it unnecessary to enquire, whether the evidence adduced to shew Waller's unfitness for the office, would have justified the refusal to permit him to qualify, even if he had been really appointed a testamentary guardian.

Upon the whole, I am of opinion, that the sentence of the circuit superior court be reversed with costs, and the sentence of the hustings court refusing Waller permission to qualify as guardian, affirmed.

The other judges concurred. Sentence reversed.

### Botts v. Pollard.

November, 1840, Richmond.

**Practice—Rule Days—Construction of Statute Relating to.**—Construction of the statute 1 Rev. Code, ch. 128, § 60, which provides that the rules in the clerk's office "shall be holden on the first monday in every month, and may be continued from day to day, not exceeding six days."

On the 16th of March 1837, George W. Pollard sued out of the circuit court of Henrico a writ of *capias ad respondendum* against Charles T. Botts, of a plea of debt, returnable to April rules. The declaration was filed at April rules, and was upon a specialty for the payment of money. Whereupon the defendant being arrested and not appearing, it was ordered that judgment be entered for the plaintiff, unless the defendant should appear and plead to issue at the then next rules. At which day, to wit, at the rules held on the first day of May, the defendant still failing to appear, the conditional judgment was confirmed.

434 \*At the next term† of the court, when the cause was called, the defendant by his counsel moved the court to remand it to the rules, as being improperly placed upon the court docket by the clerk; and as the ground of his motion, he proved that he the said counsel for the defendant had appeared at the rules held in the clerk's office on the

\*The principal case is cited in *Commercial Union Assurance Co. v. Everhart*, 88 Va. 957, 14 S. E. Rep. 836.

†The term did not commence during the rule week, but on monday the 8th of May.—Note in Original Edition.

first monday in May, enquired into the state of the cause, and expressed his intention to set aside the common order by pleading to the declaration at some subsequent day of the rule week; that he was informed by the clerk, that unless he pleaded during that day, he the said clerk could not receive his plea at any subsequent day of the rule week, as it was his intention to close the rules on that day, in order to be prepared for the court, which would commence its session on the monday following; that to this statement of the clerk, he the said counsel replied that he had not time to prepare his pleadings, in this and the other causes in which he was engaged that stood in the same situation, during that day, and left the office; that afterwards, to wit, on the fifth day of the said rule week, the said counsel for the defendant again appeared in the clerk's office, and tendered a plea of payment, in writing, but the clerk refused to receive it, assigning as his reason for such refusal that he had closed the rules in this cause on the first day of the rule week, entered the common order as confirmed, and set the cause down upon the office judgment docket of the court. The clerk stated to the court, that though it was his usual practice to keep the rules open in his office the whole rule week for some purposes, such as the return of process and reception of declarations, he had usually, as to causes situated as this was, closed them on the first day of the week, if he had an opportunity of doing so, and that he considered

his practice in this respect sanctioned  
435 by the decisions \*of judge Brockenbrough, when sitting in this court, and particularly by the decision referred to in 1 Rob. Prac. 202. It was, however, stated that many members of the bar, whose practice in the court was extensive, did not understand the practice of the clerk as he had stated it. The court, after fully hearing and considering the motion of the defendant's counsel, overruled the same, and refused to remand the said cause to the rules. Whereupon the counsel for the plaintiff offered to permit the defendant's counsel to plead then any plea which he could have pleaded at the rules, provided that the cause should not be thereby delayed beyond the term of the court; but this was not assented to by the counsel for the defendant. A bill of exceptions was filed by him to the court's opinion. And final judgment being then entered for the plaintiff, the defendant applied for a superseas to the same, which was allowed.

Brooke for plaintiff in error.

Daniel for defendant in error.

TUCKER, P. I am of opinion that the judgment in this case is erroneous. The question turns upon the true construction of the act, 1 Rev. Code, ch. 128, § 69, p. 506. By that section it is provided that rules shall be holden in the clerk's office on the first monday of every month, and may be continued from day to day, not exceeding six days.

If the clerk is to be considered as having a discretion as to the time of closing the rules in any cause, I should not hesitate to say that he has exercised his discretion unsoundly, and that the general principles which he has avowed as to the conduct of the rules are altogether inadmissible. He tells us it is his

usual practice to keep the rules open the whole week for some purposes, such as receiving declarations and return of process, but that as to causes situated as this was,

436 he usually \*closed the rules on the first day, if he had an opportunity of doing so. Now this seems to me unequal, unjust, and contrary to law. All parties, defendants as well as plaintiffs, are entitled to the same measure of indulgence in the administration of justice; and if the rules can be kept open for the accommodation of plaintiffs, the same accommodation should be extended to the defendants.

In the case at bar, the rules were peremptorily closed on the first day, though by law, for the convenience of suitors, they are authorized to be kept open for six days. If there is little business in a court, this cannot be necessary; if there is much it cannot be proper; for the very object of enlarging the rules is to give time to the suitors and officers to do the business as it ought to be done. So far from hastening to close the rules, so as to exclude defendants from their right to plead, the clerk (if he has a discretion) should so exercise it as to give to the party the last convenient moment for making his defence. What that time may be, need not be decided. It is enough to say that if the clerk could close the whole rules in a day, there could have been no press of business which could make it unreasonable to keep them open, even to the last hour of the six days. I think, therefore, that the proceeding in this case was altogether irregular and unreasonable, and should have been corrected, even if we admit the discretion claimed for himself by the clerk.

Whether the clerk has any discretion in this matter, further than to reject the pleading where it is offered so late in rules that he has not time to enter it before the last hour of the sixth day, I very much question. That they cannot legally be closed on the first day as to all matters, is obvious from this, that a writ may be duly executed at any time before the return day has passed; that is to say, a writ returnable to the rules may be lawfully executed at any time before sunset of the first rule

437 \*day. But if the rules are closed on that day, how is the defendant to appear? He is to appear, indeed, on the return day of the writ. But it was always held by that able officer judge White, that the six days are by a fiction of law but one day, as in the case of the court itself, and that the defendant might therefore appear on any of the rule days of the rules to which the writ is returnable. If so, the rules cannot be closed as to him, and he may appear at any time before the last hour of the sixth day, in convenient time to have the entry made. If he is too late to have the entry made, it is his own fault, and he pays the penalty; for by his negligence he loses the opportunity of appearing. But if the defendant has a right to appear at any of the six days, because the six days together make but one day, why shall he not have the six days also to comply with the terms of the common order? That order, indeed, expires on the next rule day; 1 Rev. Code, ch. 128, § 74. But that rule day is composed of six days, and if he appears before the end of

them, in time to have his appearance entered, he complies with the rule, and the order must be set aside. And should it be asked, "Suppose he should appear so late that there is not time to enter it?" the answer is, he must lie down under the consequence of his own delay. Or if it be asked, "Suppose numbers of defendants should apply at the eleventh hour to appear and plead?" the answer is, the first who comes must be first served, and the rest must suffer for their laches. It seems to me, then, that although the rules in each cause may be closed where the party called upon by the preceding rule has taken the step required of him, yet they must be kept open until he has done so, or until the last convenient hour for doing so on the sixth day; and that this is the true meaning of the provision that they may be continued from day to day, not exceeding six days.

438 \*As to the offer of the plaintiff to permit the defendant to plead upon a condition; that formed no ground of the court's judgment, for it was subsequent, and moreover the defendant was in nowise bound to accept it, and to surrender his rights under the statute.

In like manner, I deem it unimportant to enquire whether he has sustained any injury by the decision. It would not only be difficult to ascertain this, but it would be improper to deny him what he had by law a right to demand, upon a mere speculation as to the detriment which he has received.

I am, on the whole matter, of opinion to reverse the judgment, and send the cause back to the rules.

Judgment reversed, all the proceedings subsequent to the common order set aside, and cause remanded to the circuit court, to be sent to the rules and further proceeded in.

439 \*Anderson v. Thompson.

November, 1840, Richmond.

(Absent STANARD,\* J.)

**Equity Practice—Suit by Legatees against Another Legatee and Administrator—Liability of Administrator to His Codefendant—Case at Bar.**—Bill filed by two legatees against another legatee and the administrator, for a settlement of the administration account, and distribution of the estate; and question whether, upon the pleadings and proofs in the cause, the administrator should be held liable to his codefendant for his share of certain slaves, claimed and forcibly taken from the administrator by the plaintiffs, under an alleged parol gift of the decedent in his lifetime.

**Slaves—Parol Gift in Remainder—Effect.**—A father delivers a slave to his infant son residing with him, and calls upon persons present to take notice that he gives that slave to the son, but says at the same time, that he claims an estate in the slave for his own life: HELD, nothing passes to the son by such parol gift.

**Guardians—Disbursement for Maintenance and Education of Ward—To What Extent Allowed.**—A guard-

\*He had been counsel for the appellant.

†Executors and Administrators.—See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

‡Guardian and Ward.—See monographic note on "Guardian and Ward" appended to Barnum v. Frost, 17 Gratt. 398.

ian shall not be allowed, for his disbursements for the maintenance and education of the ward, more than the profits of the ward's estate; and those profits shall be taken exclusive of the increase of slaves belonging to the ward.

Berryman Johnson, late of Louisa county, died in the year 1805, having duly made his last will, by which he bequeathed one third of his personal estate to his wife Augusta A. and the remaining two thirds to his sons Pulaski A. and David B. to be equally divided between them. He appointed his brother Thomas Johnson executor of the will, and his wife Augusta A. guardian of the two children. The will was proved and admitted to record in Louisa county court, the 14th of October 1805; when Thomas Johnson renouncing the executorship, the court granted letters of administration to the widow, cum testamento annexo. But she never qualified as guardian of the children. In the year 1808, she intermarried with William L. Thompson.

On the 14th of June 1813, the county court made an order that Thompson and wife should deliver to Thomas \*Anderson, upon his giving bond and security according to law, the unadministered estate of the testator remaining in their hands. This order was made on the motion of Anderson, who was bound as the surety of the administratrix in her official bond, and in consequence of the failure of Thompson and wife to give him countersecurity, they having been ruled to do so. In 1816, Anderson obtained possession of 25 slaves, which were admitted by Thompson to belong to the estate of Berryman Johnson deceased.

At August term 1819, the county court made an order appointing commissioners to settle the account of the administration of Berryman Johnson's estate by William L. Thompson and wife. By an instrument under the hands and seals of Pulaski A. Johnson and David B. Johnson, dated the 28th of August 1819, those parties bound themselves to Thomas Anderson and William L. Thompson in the penalty of 5000 dollars, with condition "to abide by and stand to the award and arbitrament, or the report," of the commissioners appointed by the county court. And by another instrument dated the 1st of September 1819, purporting to be an agreement between Thomas Anderson "appointee to the estate of Berryman Johnson deceased," William L. Thompson "administrator of said Berryman deceased," Pulaski A. Johnson and David B. Johnson, but signed and sealed by Anderson and Thompson alone, those parties bound themselves, "severally, distinctly and apart, in the penalty of five thousand dollars each, to abide by, ratify, acknowledge and confirm the report, award and decision" of the said commissioners.

The certificate of the commissioners, dated the 11th of September 1819, is in the following terms: "Agreeably to an order of the county court of Louisa bearing date August term 1819, to us directed, we have proceeded to examine, state and settle the account of William L. Thompson administrator, 441 and Augusta Ann his \*wife, administratrix, on the estate of Berryman Johnson deceased, and find a balance due said estate of 1358 dollars 65 cents. We beg leave further to state, that upon a second

view of the subject, under which are included accounts in favour of William L. Thompson administrator and Augusta Ann administratrix, against the heirs of Berryman Johnson deceased, for board, schooling, clothing &c. supported by various vouchers to our satisfaction, we find a balance of 1746 dollars 91 cents due said administrator and administratrix." The accounts referred to in this certificate, being returned to the county court, were severally ordered to be recorded on the 13th of September 1819.

One of the accounts is headed, "D'r, David B. Johnson and Thomas Anderson appointee to the estate of B. Johnson, in account with William L. Thompson :"; another has a caption precisely similar, except that the name of Pulaski A. Johnson is substituted for that of David B. Johnson. From 1806 to 1813 (both years inclusive) the sum of 120 dollars per annum "for board, schooling, clothing &c." is charged in each of these accounts; and in that of David B. Johnson, charges at the same rate per annum are made for board during portions of the years 1816 and 1817. Interest on the several charges, from the expiration of the years to which they respectively apply, is allowed and included in each account. No credits whatever are given in either, except that a deduction of 5 dollars, "for services," is made from the amount of David B. Johnson's board for the year 1817.

In January 1820, Pulaski A. Johnson and David B. Johnson exhibited their bill in the superior court of chancery holden at Richmond, against William L. Thompson and Thomas Anderson; setting forth the will of their father Berryman Johnson, the qualification of his widow as administratrix with the will annexed, her intermarriage with

Thompson, and the order of the county court \*of Louisa by which the estate of the decedent was committed to Anderson: stating that Mrs. Thompson the former administratrix died in 1814: charging that the order of the county court appointing commissioners to settle the administration account of Thompson and wife was made ex parte, on the motion of Thompson; that the settlement was made by the commissioners in the absence of the complainants, and without due notice to them; that several of the charges which the commissioners allowed against the estate of the testator were improper, and unsupported by vouchers; that several of the credits given to the estate were less in amount than they should have been; that the charges against the complainants for maintenance and education were also improper and excessive, as the complainants were thereby brought largely in debt to their guardian, though the profits of the estate bequeathed to them ought to have been amply sufficient to maintain and educate them; that the estate of the testator was still in the hands of Anderson, under the order committing the same to him as aforesaid, and Anderson was about to sell a portion thereof, in order to discharge the debt pretended to be due from the complainants to Thompson. The bill prayed, that Thompson might be compelled to settle an account of his own and his wife's administration of Berryman Johnson's estate; that Anderson might also be compelled to settle the account of his administration of

that estate, and to deliver up the property in his hands, for distribution according to the testator's will; that he might be enjoined meanwhile from paying away or delivering any portion thereof to Thompson; and for general relief.

The injunction was awarded.

Anderson answered, that three of the slaves belonging to the estate, valued at 1725 dollars, had been delivered by him to the complainants as part of their proportion of said estate, they promising to account for the same in the final distribution; that another slave, valued at \*550 dollars, had been delivered by him to Thompson on the same terms; and that the plaintiffs, claiming 16 of the negroes received by respondent as part of the estate, under an alleged verbal gift of their father in his lifetime, instituted a suit in the county court of Louisa to recover them, pending which they took forcible possession of the said negroes, and had retained them ever since. He submitted whether the plaintiffs should not be compelled to give such security for the return of those slaves, as might be sufficient to indemnify the respondent, in the event of that suit being determined in favour of the estate. He declared his readiness to settle the account of his administration, and to deliver up the part of the estate which yet remained in his hands, to the parties entitled thereto. The questions touching the accounts impeached by the bill, he submitted to the court.

Thompson, in his answer, denied that the order of Louisa county court for the settlement of the administration account was made ex parte. He alleged, that it was made with the consent and approbation of the plaintiffs; and that they moreover had notice of the time and place appointed for the settlement, were present during the first day, and afterwards voluntarily absented themselves. He set forth the instrument by which the plaintiffs bound themselves to abide by the report of the commissioners; insisted that the settlement ought not to be disturbed; and prayed that the injunction, awarded to restrain Anderson from paying the balance which appeared to be due him, might be dissolved.

The plaintiffs replied generally to the answers of the defendants.

The facts alleged in the answer of Thompson were substantially proved by the evidence in the cause.

On the 9th of June 1823, the court made an order directing a commissioner to examine, state and settle the \*account of the administration of Berryman Johnson's estate by W. L. Thompson and wife; and on the 14th of June 1824, made another order, directing the same commissioner to state an account of the transactions of Thomas Anderson as appointee of Berryman Johnson deceased.

Commissioner Thomas Ladd, to whom the execution of the foregoing orders was referred, made his report on the 2d of June 1826. He returned five several accounts: 1. An account of the administration of W. L. Thompson and wife; 2. An account of the administration of Thomas Anderson appointee; 3. 4. 5. Accounts of W. L. Thompson, David B. Johnson and Pulaski A.



Johnson, respectively, with Thomas Anderson appointee. By the three accounts last-mentioned it appeared, that on the 31st of December 1825, there was due from W. L. Thompson a balance of principal and interest amounting to 149 dollars 14 cents; from David B. Johnson a balance of principal and interest amounting to 430 dollars 74 cents; and from Pulaski A. Johnson a balance of principal and interest amounting to 165 dollars 65 cents. These balances were on account of the hires of slaves belonging to the estate.

In the account of the administration of Thompson and wife, the commissioner adopted the settlement made in 1819 by the commissioners of Louisa county court. He charged Thompson and wife with 1358 dollars 65 cents, the balance appearing by that settlement to be due from them to the estate on account of their transactions in the proper character of administrators; to which he added a charge of 32 dollars 30 cents, principal and interest, for the hire of a slave in 1807, not included in the settlement by the commissioners of the county court: making the whole amount chargeable against them on the 1st of September 1819 (the period of the settlement by those commissioners) 1390 dollars 95 cents, of which 957 dollars 99 cents was principal. The entire

balances reported by the same commissioner to be due to Thompson and wife, for the board, schooling and clothing of David B. and Pulaski A. Johnson, that is to say (an error of excess in addition being corrected) 1699 dollars 36 cents on account of David B. and 1506 dollars 20 cents on account of Pulaski A. Johnson, amounting in the whole to 3205 dollars 56 cents, were credited to Thompson and wife. The excess of the credits was therefore 1814 dollars 61 cents, as of the 1st of September 1819, of which 1155 dollars 68 cents was principal: and calculating interest on the last-mentioned sum to the 31st of December 1825, the commissioner produced a balance in favour of Thompson and wife, on that day, of 2253 dollars 63 cents.

In the account of Thomas Anderson's transactions as appointee, the hires of slaves belonging to the estate constituted the only items of charge against him, and a balance of 910 dollars 57 cents, principal and interest, was reported to be due from him to the estate on the 31st of December 1825. But the facts relating to the disposition of sundry slaves belonging to the estate were stated by the commissioner in the following terms:

"1819.—William L. Thompson had Micajah in October this year, valued at 550 dollars. David B. and Pulaski A. Johnson had Edmund, Charles and Kate early in this year, valued at 1725 dollars. Pulaski A. Johnson took forcible possession of Polly and all her children this year; and David B. Johnson took forcible possession of Jenny and all her children this year: see the depositions of P. Wade and A. Bowles.

"1820, Dec'r 31. By the hire of Mary Ann till fall, to W. L. Thompson—when Pulaski A. Johnson took her by force and sold her: see P. Wade's deposition.

"1821, Dec'r 31. By the hire of Jem this year to D. B. Johnson, and sold by him: see P. Wade's deposition.

"1822. Delivered William L. Thompson the 31st of October, Lewis at 275 dollars, Eliza at 200 dollars, and Polly at 150 dollars."

446 \*In addition to the accounts above described, the commissioners made a statement of the number, names and value of the slaves which W. L. Thompson, David B. Johnson and Pulaski A. Johnson had respectively received. The value of the slaves Edmund, Charles and Kate, received by David B. and Pulaski A. Johnson in 1819, with interest thereon to the 31st of December 1825, was stated at 2346 dollars, so that the amount chargeable to each of those parties at that date was 1173 dollars. The value of the slaves Micajah, Lewis, Eliza and Polly, received by W. L. Thompson, with interest thereon to the same date, was stated at 1485 dollars 50 cents. Polly and her children (seven in number) stated to have been forcibly taken by P. A. Johnson, were valued at 1675 dollars, and Mary Ann, stated to have been also taken and sold by him, was valued at 250 dollars; making together the value of 1925 dollars. Jenny and her children (five in number) stated to have been forcibly taken by David B. Johnson, were valued at 1175 dollars, and Jem, stated to have been also taken and sold by him, was valued at 350 dollars; making together the value of 1525 dollars. On the values of these slaves, no calculation of interest was made.

By the evidence in the cause it appeared that the three slaves Edmund, Charles and Kate were delivered by Anderson to the plaintiffs about the month of May 1819. It appeared also that the slaves Jenny and Polly, and their children, were forcibly taken possession of by the plaintiffs in the same year, as stated in the commissioner's report; and that this occurred at an early period of the year; probably as early as February, but certainly prior to the delivery of the slaves Edmund, Charles and Kate.

In relation to the alleged parol gift from Berryman Johnson, under which the plaintiffs claimed the slaves Jenny and Polly and their children, the evidence was as follows:—

447 Thomas Johnson and his wife, being examined \*as witnesses in the cause, deposed that in the year 1805, about the end of summer, they were at the house of Berryman Johnson, and he called on them, as well as other persons present, to take notice that he was about to give away two negro girls to his two sons. He then called the girl Polly, took her hand, and put it into the hand of Pulaski A. Johnson; he also called the girl Jenny, took her hand, and put it into the hand of David B. Johnson: and then he requested these deponents and the other persons present to take notice, that he gave those two negro girls to his two sons aforesaid. He further stated that he claimed a life estate in them. This occurred about three or four weeks before his death. These girls, whenever the deponents heard them afterwards spoken of by the family (which was frequently), were considered as the property of the two sons to whom they were respectively given and delivered as aforesaid.

Two of the witnesses examined in the cause deposed, that although the slaves claimed and taken by Pulaski A. and David B. Johnson, respectively, were retained by them in the



neighborhood of Anderson for a considerable time afterwards (perhaps as much as six months), yet Anderson, so far as the witnesses knew or had heard, took no steps whatever to regain the possession of them. But by other evidence it appeared that Anderson did retake from David B. Johnson the slave Jenny and several of her children; though it seemed that all of these were afterwards sold to pay David B. Johnson's debts. According to the deposition of one witness, "Anderson had more trouble about the estate than he ever knew any man to have about an estate of the same size. Many of the slaves were taken from his possession by the legatees, and the said Anderson was riding to and fro, to try and reclaim them. One of the legatees went so far, as to be taken up and tried before Louisa court for stealing one of the negroes."

448 \*Pending the suit, Anderson purchased of Pulaski A. Johnson all his interest in his father's estate, for the sum of 65 dollars. The precise time of this purchase did not appear; but it was prior to the year 1823.

In January 1821, a negro boy named Phil, one of the children of Polly, was seized by the sheriff of Louisa, as the property of Pulaski A. Johnson, under a writ of fieri facias sued out against the said Pulaski A. by William L. Thompson. An indemnifying bond was required by the sheriff and executed by Thompson, and the slave was thereupon sold. In April 1822, the slave Jenny was seized by the same sheriff, as the property of David B. Johnson, under two writs of fieri facias sued out against the said David B.—one of them by William L. Thompson, the other by Nathaniel Thompson. Indemnifying bonds were required by the sheriff of those parties respectively; which being executed, the slave Jenny was thereupon sold. In the indemnifying bond given by Nathaniel Thompson, William L. Thompson was the surety.

In February 1821, two attachments were sued out against Pulaski A. Johnson and David B. Johnson, as absconding debtors; one by a creditor of both the defendants, against both; the other by a creditor of Pulaski A. Johnson, against him alone. Both attachments were levied on the negro woman Polly and one of her children.

In the year 1800, Berryman Johnson had bound himself as the surety of John B. Anderson, in a bond executed by the latter as executor of John Anderson deceased. The bond was in the penalty of £1500. By a certificate from the clerk of Hanover county court (in which court the executor qualified) it appeared that on the 20th of April 1824, the date of the certificate, a suit in chancery was pending in the said court, in the name of the legatees of John Anderson against his executor and others, wherein a large balance had been reported due from the said executor to the estate of his testator.

449 \*The plaintiffs Pulaski A. and David B. Johnson excepted to commissioner Ladd's report, because it adopted the settlement made by the commissioners of Louisa county court, "the irregularity of which report was the foundation of this suit, and to correct which report the court ordered a statement of accounts to be made by its own

commissioner." Various objections to the settlement made by the commissioners of the county court were specified; among others the objections, that the expenditures mentioned in the guardianship account "were incurred without legal authority, as the said Thompson was not the guardian of the plaintiffs; that the expenses charged are beyond the portion (the revenue) of orphans' estates which can be applied to the purpose of maintenance; and that, in the said guardianship account, the estates and the pretended wards are credited with nothing, but all the disbursements are charged to them as if supplied by the defendant Thompson from his exclusive private funds." No exceptions to commissioner Ladd's report were filed by either of the defendants.

Several depositions were taken in reference to the reasonableness of the charges made for the board, schooling and clothing of the plaintiffs. It appeared that the sum paid for their schooling in the year 1811 was about 10 dollars 80 or 90 cents; that their clothing was of plain and ordinary description; and that the profits of Berryman Johnson's estate at the time of his death were only from 50 to 100 dollars.

On the 13th of April 1830, the cause came on to be heard upon the bill, answers, exhibits, examinations of witnesses, the report of the commissioner, and the exceptions thereto. The court approved the report, and overruled the exceptions thereto: and being of opinion that the defendant Thompson was entitled to recover the sum of 2253 dollars 63 cents, with interest on 1155 dollars 68 cents part thereof from the 31st of December 450 \*1825 till paid; also the sum of 303 dollars 52 cents, being one third of 910 dollars 57 cents reported due from the defendant Anderson, with interest thereon from the same date till paid; and the further sum of 625 dollars 86 cents, with interest from the same date, that being his one third of the whole value of the slaves as reported by the commissioner, after deducting therefrom 1485 dollars 50 cents, the value of slaves received by him, and 149 dollars 14 cents, the amount reported due from him for slave hire; and that, although there appeared to be in the hands of the defendant Anderson, of the funds from which these several sums ought to be paid, only the sum of 165 dollars 4 cents, the balance of the 910 dollars 57 cents aforesaid, after deducting therefrom the three sums of 430 dollars 74 cents, 165 dollars 65 cents, and 149 dollars 14 cents, reported to be in the hands of the plaintiffs and the defendant Thompson, yet the said defendant Anderson was primarily liable to Thompson for the whole amount due to him, inasmuch as the funds aforesaid, at the instance of Anderson, were committed to his keeping, and had been in part voluntarily surrendered to the plaintiffs, and in part improperly permitted to be taken by them and removed from the state, or otherwise disposed of: and being farther of opinion that the plaintiffs, who had received, as nearly as could be estimated, equal portions of the funds aforesaid, in maintenance, in slaves, and in the hires of slaves, and who, pending the suit, had without authority taken possession of the residue of the slaves held by the defendant Anderson, were bound to refund to him moieties of the

sums which he would be compelled to pay to the defendant Thompson, with the exception of the said sum of 165 dollars 4 cents;—therefore decreed that Anderson pay to Thompson 3183 dollars, with interest on 2085 dollars part thereof from the 31st of December 1825 till paid; that Pulaski A. Johnson and David B.

Johnson each pay to Anderson 1508  
451 dollars 98 cents, with \*interest on 1042 dollars 50 cents part thereof from the same date till paid; and that the plaintiffs and the defendant Anderson pay to the defendant Thompson his costs.

After the term at which the foregoing decree was rendered, to wit, on the 3d of July 1830, Anderson exhibited a bill of review, reciting the previous proceedings, and alleging, that at the term when the decree was rendered, he was without counsel; that he had employed as his counsel John Forbes esq., and he had been informed by that counsel, that by reason of some inadvertency or forgetfulness the case had escaped his notice, and hence he had failed to perform the part of counsel for this complainant. The bill further shewed, that in no part of the pleadings and proofs was an effort made or a pretension insinuated by Thompson, to subject this complainant to liability on account of the slaves claimed by P. A. and D. B. Johnson as gifts from their father, and taken possession of by them; and charged, that there was good reason for such forbearance, because Thompson knew that in the several suits prosecuted by this complainant to recover the said slaves, the title had been decided to be in the said donees, and because Thompson himself had procured an execution to be levied on one of those slaves as the property of P. A. Johnson, and the slave to be sold under that execution, and was privy to and participated in the levy of other executions on the said slaves. In addition to these allegations, the bill of review contained the following assignment of errors apparent on the face of the proceedings and decree.

"I. To arrive at the result which the decree exhibited, this complainant was subjected to liability for the negroes that had been taken and disposed of as aforesaid by the plaintiffs; and this was grossly erroneous:

"1st, Because no claim had been made in the pleadings of either of the parties,  
452 or before the commissioner, \*to charge this complainant with those slaves. The claim was for the first time heard of (and then not by this complainant, as he had no counsel) in the note prepared for the decree by Thompson's counsel, and it was therefore a complete surprise on him to have it so asserted. If the claim had been ostensibly justified by the documents and proofs then in the record, it was wholly irregular to decree on it as a matter of account, as it had not been asserted before. On the supposition that such seeming proofs were in the record, the claim ought to have been asserted by an exception to the report; and if that exception had been sustained, the report should have been recommitted, and a reformed report, on notice (to give this complainant an opportunity of resisting the claim), should have been required before he was made chargeable therewith.

"2dly, Because some of the documents and proofs furnished the most satisfactory reason why the claim to make that charge had not been asserted, and cogent evidence against it, if it had been asserted; and if this complainant had had the slightest warning that any such claim was pretended, that proof would have been strengthened by record evidence that would have rendered it impregnable. This complainant is made chargeable to Thompson, claiming in right of his wife as legatee of B. Johnson, with certain slaves as part of the estate of B. Johnson, that had been claimed and taken by his sons as gifts made to them by their father in his lifetime: and this is done not only in the face of the proofs in the record that such gifts were made, but of the solemn and deliberate acts of the said Thompson affirming the title of the sons under the said gifts, and causing a part of those slaves to be sold as the property of the sons, to pay debts due by them to him and others.

"II. To arrive at the result the said decree exhibits, the court assumed that  
453 Thompson was entitled to charge \*the estate of B. Johnson with the balance he claimed to be due to him from the plaintiffs on the guardianship accounts, after a setoff of the balance due from Thompson on the administration account of himself and wife. Nothing could be more erroneous. If any thing was due on the guardianship accounts, they were respectively individual debts of the wards (the plaintiffs) which in no wise charged the estate of B. Johnson, and could on no conceivable principle be made a charge on this complainant for that part of the estate of B. Johnson which the plaintiffs had taken or received from him.

"III. If the claims of Thompson on the guardianship accounts could in any manner be made to affect this complainant's responsibility to the estate of B. Johnson, then he insists that those claims were not substantiated, but on the contrary the plaintiffs' exceptions to those claims should have been sustained. By overruling those exceptions, the extraordinary result is produced of suffering a guardian to recover of his ward, for board and schooling during a part of his minority, his entire estate, and leaving him indebted to the guardian, while the established principles of law forbid the guardian to apply to the ward's support and education more than the profits of the estate.

"IV. By the decree, this complainant is not only made chargeable with the said slaves as a part of the estate of B. Johnson, though the slaves were claimed and taken by the plaintiffs as their property, so treated and admitted to be by Thompson, and so adjudged in the suit for the slaves, but he is made chargeable with the shares of the plaintiffs (supposing them to belong to the estate of B. Johnson), made a debtor to the plaintiffs for those shares, though they had all the slaves, and then made liable to Thompson for this debt so created in favour of the plaintiffs, in order to discharge the claim of Thompson on the plaintiffs.

Taking the decree on its own principles,  
454 the plaintiffs are liable to this \*complainant for the whole value of the slaves, yet he is made debtor to them for their shares of the value thereof, and then, instead

of setting off these liabilities, leaving the plaintiffs indebted to him for the excess, he is made to pay to Thompson the amount of the plaintiffs' shares of the value of the slaves, and the plaintiffs (notoriously insolvent) are decreed to pay to this complainant the full value of the slaves.

"V. Were it conceded that this complainant was justly accountable, as far as Thompson is concerned, for the said slaves as part of the estate of B. Johnson, still the decree is erroneous and flagrantly unjust. On this postulate, the whole of the estate of B. Johnson would be constituted of the following items, shewing together the aggregate of the estate, to one third of which each of the plaintiffs, and the defendant Thompson in right of his wife, is entitled.

"Balance due on the administration account of Thompson and wife...	\$1390.95
Amount of negroes delivered to Thompson .....	1485.50
Amount of negroes delivered to plaintiffs.....	2346.00
Balance of this complainant's administration account.....	910.57
Amount of negroes claimed and taken by P. A. Johnson.....	1925.00
Amount of negroes claimed and taken by D. B. Johnson.....	1525.00
Total.....	9583.02
Plaintiffs and defendant Thompson each entitled to one-third, or.....	3194.34

"The defendant Thompson then, as his full share of the estate, is entitled to.....	\$3,194.34
and is chargeable with balance of his administration acc't.....	\$1390.95
455 *with negroes received by him.....	1485.50
with balance due this complainant.....	149.14
	3025.59
leaving due to him from the estate of B. Johnson but .....	168.75

And this would probably be extinguished by the charge of interest on the balance due on his administration account.

"P. A. Johnson, as his share of the estate, would be entitled to .....	\$3194.34
and he is chargeable with negroes received by him	\$1173.00
negroes claimed and taken by him.....	1925.00
and the balance due this complainant .....	165.65
	3263.65

leaving him indebted the sum of... \$ 69.31

which would be augmented by the charge of interest on the value of the slaves taken by him.

"D. B. Johnson, as his share of the estate, would be entitled to.....	\$3194.34
and he is chargeable with negroes received by him	\$1173.00
negroes claimed and taken by him.....	1525.00

and the balance due this complainant .....	430.74
	3128.74

leaving balance due to him from estate..... \$ 65.60

which would be reduced by the charge of interest on the value of the slaves taken by him.

456 "And yet, from these materials, this complainant has been subjected to the said decree, totally ruinous to him, for the payment to Thompson of 3183 dollars with interest.

"VI. The said decree is erroneous though the sum decreed to be paid by this complainant were actually due from him as administrator of B. Johnson, because no bond of indemnity was required by it to be given to this complainant, though the decree is, in effect, one for the payment of the assets of the estate to the legatees, and though it appears from the documents in the case that B. Johnson was responsible as a surety for the administration of John B. Anderson on the estate of John Anderson deceased, that a large claim is made on B. Johnson's estate on account of that responsibility, and that a suit is depending to enforce it."

With the bill of review, the complainant exhibited attested copies of the executions sued out by Nathaniel Thompson and William L. Thompson, respectively, against the goods and chattels of David B. Johnson, and levied on the negro woman Jenny as his property, as before stated; attested copies of the indemnifying bonds given by those plaintiffs, respectively, on occasion of that levy; and attested copies of portions of the record in three suits, instituted upon the said indemnifying bonds in the superior court of law for Louisa county. Two of these suits were against Nathaniel Thompson, at the relation of Thomas Anderson appointee of the estate of Berryman Johnson deceased. In these the jury found that the title to the negro woman Jenny, in the respective declarations mentioned, was not in the relator of the plaintiff, and the court rendered judgment for the defendant. The third suit was against Nathaniel Thompson and William L. Thompson, at the relation of Anderson Bowles, to whom David B. Johnson, by a deed dated the 10th of December 1820,

457 and recorded in Louisa county court the 12th of February 1821, had conveyed the negro woman Jenny and four of her children, upon trust for the purpose of indemnifying Richard A. Perkins as his bail in sundry suits specified in the deed, and as his surety in a bond to Charles Thompson. In this action, verdict and judgment were rendered for the plaintiff. The two judgments first mentioned were rendered in October 1826; the other in October 1828. There were also exhibited with the bill of review, attested copies of the before mentioned attachments against Pulaski A. and David B. Johnson, as absconding debtors; and a like copy of the proceedings at a court held by the justices of Louisa county, the 21st of February 1821, for the examination of Pulaski A. Johnson upon a charge of "feloniously stealing a negro woman named Mary, the property of Berryman Johnson's estate in the hands of

Thomas Anderson appointee of the said estate." The prisoner was acquitted.

The chancery court refused to allow the bill of review to be filed.

Whereupon Anderson, by petition to a judge of this court, referring to the bill of review for the errors imputed to the decree, and complaining also of the error in refusing to allow the bill of review to be filed, prayed an appeal from the said decree, and from the said order of rejection: which was allowed.

Leigh and R. C. Stanard, for appellants.

Johnson, for appellee.

TUCKER, P. In the examination of this case, I think it unnecessary to advert to the bill of review which was offered and rejected, because the question whether the decree is erroneous on its face, is fairly presented by the appeal from that decree. It is proper also to dispose succinctly of some minor points which have been much insisted on in the argument, and have been deemed all-important by the respective counsel.

458 It has been contended that the arbitration bonds, as they are called, conclude all objection to the award of the commissioners. And so far as the administration account is concerned, that might safely be admitted; for I think all parties are content with the report of 1390 dollars 95 cents as due from Thompson on that account. But the guardianship account formed no part of that reference. There does not appear to be any such order of reference, nor do the bonds make any allusion to such an account. And though it is contended that the charges for board &c. should be considered as distributions, and therefore as belonging to the administration account, yet such a course would not only be inconsistent with the principles laid down in *Garrett &c. v. Carr &c.*, 3 Leigh 407, but it would lead to the absurdity of considering the defendant Thompson as making distribution after his powers were revoked; for part of his charges are subsequent thereto. Nor did Thompson himself ever consider his charges against the children as so much distributed; as appears by his account as stated by the commissioners at his instance. I think, therefore, the guardianship account was coram non iudice, and that it has not yet been settled, for commissioner Ladd was no more authorized to settle it than the former commissioners, and if he had been, he has merely taken their report (which was without authority) as the foundation of his.

But admitting the guardian's account to have been before the first commissioners, how have they settled it? They have reported annual charges against the two boys, without one cent of credit for the profits of their estate. Either there were profits, or there were not. If there were, they should have been credited. If there were none, there could be no propriety in raising such an account for board and education against these youths. The law expressly provides (1 Rev. Code, ch. 108, § 25, p. 410.)

459 that if an orphan hath no estate, or not sufficient for a maintenance out of its profits, he shall be apprenticed to learn a trade, or some occupation which will enable him to get an honest livelihood. What has been done with these boys? What education has been given them in return for

absorbing the whole of their little property? What occupation have they been brought up to, to fit them to struggle for themselves? I see nothing. Eleven dollars seems to have been the cost of their instruction for one year, and their style of living appears to have corresponded. The account therefore seems to me inadmissible. The self-constituted guardian should be strictly confined to the profits of the estate, wherever it is so scanty. He should not be permitted to keep his wards idle and unemployed, and eating up their little patrimony, so that when they come of age their whole property goes into his hands for board, and they are turned adrift without a cent, and what is worse, without a trade or calling to support them. Were it otherwise, a small property would be worse than none. A penniless orphan stands a chance, by being bound out, to learn a trade and get the rudiments of education; while the boy who has a pittance is kept at home in idleness, and his guardian swallows up the pittance in charges for board. In this case the boys, who were old enough in 1805, in their father's lifetime, to be brought in to receive possession of two slaves, must soon have been able to get their own living, instead of spending what their father left. I am therefore of opinion that not a cent above the profits of the estate should have been allowed to their father in law, and the accounts should be restated upon this principle.

As to the pretended gift of the slaves by Berryman Johnson to his sons, I am clearly of opinion it gave them no title. He did not intend they should have them till after his death, and such a gift in remainder cannot be made by parol. I am also of opinion that

Anderson was answerable for them. 460 They were in his possession, \*and forcibly taken from him by the sons of the testator. He ought to have reclaimed them. But he not only failed to do this, but voluntarily afterwards delivered others to the sons. The abduction was in February, and the delivery to them of other slaves was in the May following. If therefore they have too many, he is clearly responsible, for he might at least have retained those he afterwards gave up, as an indemnity in part of those taken away.

It is objected, however, on the part of Anderson, that the attempt to charge him with these slaves is nowhere made in the pleadings. This is true, but it may and does result from the settlement of the administration account of Anderson, if, by the eloigning of the slaves through his fault, they cannot be had in specie. The demand against him must be for their value, which enters therefore properly into the account. But if this were not so, the pleadings may be amended, or a cross bill filed, on the going back of the cause.

Upon the whole, I think the decree should be reversed, and the decree entered which has been prepared.

The decree of the court of appeals was as follows:

"The court is of opinion that although, as between Pulaski A. and David B. Johnson and the appellee, on a bill to resettle the administration account, it was competent to the latter to offset against the distributable

surplus (if any) in his hands due to them, such proper advances as he may have made for their support and education, not exceeding the profits of their estate, yet it never could be competent to him to make such offset against the appellant, the personal representative, or to recover any part of such advances out of the testator's estate in his hands to be administered, if the portions of the said Pulaski and David had been fully satisfied by payments, or by the property forcibly taken by them. The court is further

of opinion that the settlement of 461 \*the guardianship account by the county commissioners in the first instance, and afterwards by commissioner Ladd, was without authority, and therefore not binding, no order for such settlement having ever been made, and none such having been contemplated by the bonds of the parties: and further, that if regularly before the said commissioners, it is grossly erroneous on its face, as it presents very large debits against the wards, without a single credit for profits of their estate; that if there were profits, they should have been credited; and if none, the wards should have been bound out, instead of being incumbered at maturity with a heavy debt for the charges of their infancy. The court is further of opinion, that upon the present aspect of the case, the pretended gift of Berryman Johnson to his two sons is unsupported, and that the appellant is responsible on the settlement of his account, for the value of the slaves eligned (except the slaves Jenny and Phil, whom the appellee is proved to have had sold under execution for his benefit), the said appellant having not only failed to reclaim them or their value, after they had been forcibly abducted, but moreover delivered others to them voluntarily, when they had already more than their share. The court is therefore of opinion that the said decree is erroneous, and that the same should be reversed; that the account of advances by the appellee, the self-constituted guardian, should be referred to a commissioner, with instructions to allow no more for advances for the maintenance and education of the complainants, than the profits of their estate (exclusive of the increase of young negroes, which are not in this regard to be estimated as part of the annual profits); that the accounts of the administrator Anderson should be also re-committed for the purpose of ascertaining the distributable surplus, in which account should be charged the value of the slaves eligned, except the slaves Jenny and Phil

462 should \*appear to be due to the appellee in right of his wife as distributee, after charging him with the balance due on his administration account, and with what he has already received, a decree for the same against the appellant should be made; for, as against him, the appellee stands in the relation of a distributee seeking his portion of the residuum from the administrator, instead of being turned over to make reclamation from other legatees who are overpaid, or from wrongdoers who have carried off the estate. Therefore it is decreed and ordered that the said decree and order be reversed and annulled," with costs

to the appellant. And cause remanded to the circuit court, to be further proceeded in pursuant to the principles of the foregoing opinion and decree.

#### 463 \*Burchard and Wife v. Wright &c.

November, 1840, Richmond.

**Executors and Administrators\*—Legacies—Assent—Proof—Case at Bar.**—A testator having a leasehold estate producing a yearly rent, bequeaths to his father \$50 per annum during his life, to be paid out of the rent, and to his wife one half, and to his daughter the other half, of the rent remaining after paying the legacy to his father. The wife is appointed executrix, and qualifies as such. Afterwards she sells the leasehold estate, and makes a deed in her individual name (not calling herself executrix) transferring to the purchaser all her right, title, interest and property in the premises. On a bill by the daughter against the purchaser, HELD, the execution of the deed by the executrix in her individual name does not prove that the act was done in the character of legatee, and she must be considered as holding as executrix at the time of the deed, unless there be evidence establishing that she had previously taken as legatee. Accord. Doe. e. d. Hayes v. Sturges, 7 Taunt. 217, 2 Eng. Com. Law Rep. 77.

**Same—Same—Same—Same.**—It appears, that before the deed to the purchaser, a payment had been made to the father on account of his legacy, and a receipt given, stating that the money paid "was passed to the credit of mrs. L. W. executrix of D. W. deceased:" HELD, such payment does not shew an assent by the executrix to her own or the daughter's legacy.

On the first of August 1804 a lease was made from Stephen Wright to Dudley Woodworth of a lot in Norfolk borough, for seven years, at a yearly rent of 300 dollars. Woodworth covenanted to put on the lot a brick house, of a particular description, specified in the lease. And it was agreed that at the expiration of the seven years, Wright should have the liberty of taking the buildings at a fair valuation, to be made in the following manner: Wright having given Woodworth or his representatives sixty days notice previous to the end of the lease, each party was to choose one person, and those two another, and the three together two others, making five persons in the whole, who were to fix a value on the buildings; payment to be

464 made to Woodworth \*or his representatives at such valuation, in three instalments of two, four and six months, and thus the lease to end: but in case Wright should think proper to continue the lease for the further term of seven years, he had a right to do so, on the same terms and conditions specified for the first seven years. At the expiration of the fourteen years, Wright might still continue the lease for successive terms of seven years.

On the 17th of May 1806 Dudley Woodworth made his will, whereby, after bequeathing to his wife Lucretia Woodworth his household furniture, to his sister in law Elizabeth Nestle 100 dollars, and to his sister Clarissa Roath 100 dollars, he then bequeathed as follows: "Item, I give and

\*See monographic note on "Executors and Administrators" appended to Rosser v. Depriest, 5 Gratt. 6.

bequeath unto my respected father Jasper Woodworth 50 dollars, per annum, to be paid out of the rent arising from the brick house which I hold on a piece of land leased of Stephen Wright, during the term of his natural life and no longer. Item, I give and bequeath unto my beloved wife Lucretia Woodworth one half of the rent arising from the brick house which I hold on a piece of land leased of Stephen Wright, after deducting and paying the legacy to my father Jasper Woodworth, during her natural life and no longer. Item, I gave and bequeath unto my daughter Harriet Woodworth one half remaining of the rent arising from the brick house which I hold on a piece of land leased of Stephen Wright, after deducting and paying the legacy to my father Jasper Woodworth, to her and her heirs; and in case of her death, it is my will and desire that the whole shall go to my wife Lucretia Woodworth after the above-mentioned legacy to my father is paid." After a further devise and bequest to his daughter, the testator desired that all the residue of his property should be sold for the payment of his debts; and what might remain of the proceeds after paying his debts, he gave to his wife. The will was admitted to record on the 28th of July 1806, and Lucretia Woodworth qualified as executrix.

465 \*On the 15th of March 1810, a deed was made from Lucretia Woodworth (by her individual name, not calling herself executrix) to John Bonnaud, assigning and transferring to Bonnaud, for the consideration of 6000 dollars, all her right, title, interest and property in the leased premises. Bonnaud gave a deed of trust to Peter Nestle as trustee, to secure to Lucretia Woodworth 5000 dollars of the purchase money. It was made for her benefit, by her individual name.

A valuation of the buildings was made the 27th of June 1811. It amounted to 5642 dollars. Wright, on the first of August 1811, paid that sum to Bonnaud, and Bonnaud on the same day conveyed the buildings to Wright, who from that time had possession.

At the time of the death of Dudley Woodworth, his daughter Harriet was from three to five years old. Peter Nestle was the father of Lucretia Woodworth, and the grandfather of Harriet. Nestle qualified as guardian of Harriet in December 1811, and died two or three years after the last war. Lucretia Woodworth married Francis Wright about the year 1814 or 1815, and removed to the city of Washington in 1816 or 1817. They carried Harriet Woodworth with them to that city, and she was not in Virginia afterwards.

Harriet having married Jabez Burchard, Burchard and wife, on the 18th of January 1832, filed their bill in chancery, to obtain the benefit of the provision which the testator intended for his daughter by the clauses of the will above recited. Lucretia Wright, in her own right and as executrix of Dudley Woodworth, John Bonnaud, Stephen Wright and Jasper Woodworth were made defendants. Francis Wright died before the suit was commenced.

The bill prayed, amongst other things, "that the said Lucretia, executrix as aforesaid, may be required to assent to the legacy bequeathed to your female complainant aforesaid." Whereas the bill was obviously

466 framed \*upon the idea that the deed to Bonnaud passed the right which Lucretia Woodworth had as legatee, and nothing more.

Bonnaud answered, that his contract with Lucretia Woodworth was in the character of executrix; that he paid her 1000 dollars in that character on the delivery of possession, and secured the payment of the residue, which he shortly after paid.

Wright answered, that finding the property in the occupancy of Bonnaud, who appeared by a conveyance from Lucretia Woodworth to have purchased the lease and improvements, he treated with him as the assignee of the lease, paid to him the valuation thereof, and took from him a deed for the same.

Upon these answers (supposing the allegations of the bill to be sufficient) the question arose whether Lucretia Woodworth had held as legatee, prior to her deed to Bonnaud?

On this question, the fact principally relied on was a payment on account of the legacy to Jasper Woodworth, the evidence of which was the following receipt: "Norfolk, April 29th 1809. Received from capt. Peter Nestle ten barrels of flour, amounting to 77 dollars and 50 cents, and 50 dollars cash; the whole of which is on account of a legacy due to Jasper Woodworth, and is to be passed to the credit of Mrs. Lucretia Woodworth executrix of Dudley Woodworth deceased, the cash being just given by Mrs. Lucretia Woodworth for the purposes aforesaid.

(Signed) Benjamin Ames.

"Teste, Frs. Foster,  
Wm. Seymour."

The bill charged that the testator died wealthy, owing little or nothing, and the evidence tended to shew that there was no occasion to sell the leasehold estate for the payment of debts. For the 5000 dollars for which Bonnaud had credit, he gave a note, as well as the deed of trust before mentioned, and this note appeared to \*have been assigned by Mrs. Woodworth to her cousin John P. Dietrick.

The circuit court of Norfolk borough decreed that the bill of the plaintiffs should be dismissed as to the defendants John Bonnaud and Stephen Wright, and that the plaintiffs should pay them their costs.

From which decree, on the petition of the plaintiffs, an appeal was allowed.

Robinson, for the appellants. What will amount to an assent to a legacy is treated of in Sheppard's Touchstone 456, 7, and the passage for which Plowden 540, is there cited as authority is applicable to this case. The doctrine was discussed in this court in Lynch v. Thomas, 3 Leigh 687. But the case most in point is Young v. Holmes, 1 Str. 70. For the legacy to Jasper Woodworth being payable out of the rent, and a charge upon it, the payment of that legacy was, according to the case just cited, an assent to the legacy of the rent to the wife and daughter. The circumstances too support this idea. The bill charges that the testator died wealthy, owing little or nothing. The will shews that for the payment of debts other property was directed to be sold. It is not pretended by the answers that there was any occasion to sell this property for debts; and the proofs shew that there was none. Moreover, the deed from Lucretia Woodworth

is made in her individual name, the deed of trust from Bonnaud is for her benefit in her individual character, and the note secured by that deed was not used by her as executrix in paying creditors, but was transferred by her to a near relation.

The attorney general, for the appellees, called the attention of the court to the allegations and prayer of the bill, and insisted that the complainants had not taken the ground in the court below, which they now relied upon, and therefore they were precluded by the cases of *Gibson v. Randolph*, 2 Munf. 310, and *Parker v. Carter & others*, 4 Munf. 273, from taking that ground here.

468 \*He also urged the lapse of 22 years before the suit was brought, as fatal to the claim. And upon the merits, he insisted that the bequest by the testator to his daughter Harriet was not a bequest of the lease itself, but merely of a part of the rent, and that even if the lease was bequeathed, the evidence did not sufficiently establish an assent to the legacy, and the recourse of the daughter was against the executrix alone.

Robinson, in reply, said, that the act of limitations was not relied on in the pleadings, and the mere delay to sue had no force. For the daughter was an infant between three and five years old when her father died, and there had been no unreasonable delay since she had knowledge of her rights. He admitted that the bill was rather unskillfully drawn, especially the praying part of it. But he said that as, under the general prayer, relief might be granted if consistent with the case made by the bill, the material enquiry upon the pleadings was, what was the case made by the bill and answers? He then examined the allegations in the bill, and the statements in the answers, and insisted that the question properly arose, whether or no the legacy was assented to before the deed to Bonnaud.

TUCKER, P. The appellants' counsel concedes that if, prior to the deed to Bonnaud, the executrix had not assented to the legacy of the term, the decree is right: but he contends that there was proof of that assent, in the payment of the legacy to Jasper Woodworth. I think not. The testator gave to Jasper Woodworth, during his natural life, "fifty dollars per annum, to be paid out of the rent arising from the brick house." This was an annuity or money legacy to Jasper Woodworth, chargeable upon the rents. It gave to him no estate in the lease. It did not make him tenant in common with Lucretia and Harriet, or with the former only. For if it gave him title to any part of the lease, to what portion had he title? His legacy was fixed, while the

469 rents were variable. Hence one year he might have title to an undivided half, or indeed to the whole (if the rent did not exceed 50 dollars), and the next year to only one undivided thirtieth, which was the proportion his legacy bore to the whole rent when the testator died. This would be absurd. He must therefore be construed to have a fixed annuity in money, payable out of the rents, and not an undivided part or interest in the term.

Such being the case, I cannot perceive how the payment of his annuity by the executrix can be taken to be an assent or the leg-

acy to Harriet or to herself. His legacy was to be first paid out of the rents, and they were only to receive the residuum. It might therefore very well happen, that there might be enough to pay him, and nothing left for them. The executrix might, without a devastavit, pay him, if the residue of the rents would satisfy the debts. She might therefore willingly assent to his legacy, which was to be first paid, but be unwilling to assent to her own or to Harriet's legacy, as their portion might be necessary for payment of debts. I am therefore of opinion that, from the payment to Jasper Woodworth, we are not at liberty to infer an assent by the executrix to the legacies to herself and Harriet; and her subsequent sale very strongly fortifies the construction I give of her conduct.

The case of *Young v. Holmes*, 1 Str. 70, is by no means analogous to this. There the testator devised the term to the executor for life, he paying £50. to another. This was not £50. out of the testator's funds, but £50. of his own money. He paid it; and when he had thus paid the consideration, who could doubt his intention to take the term to himself?

The case in *Plowden* 540, is one replete (as is usual in that excellent work) with sound principles and good sense; but it is very different from the case at bar. The testator gave the rents and profits of a term to his executrix during his son's minority, to educate his children, and the remainder to

470 the son when he came of age. \*Such at least was the construction given to the will. The executrix did support the children out of the lease, which she could not have done without a devastavit, unless by assenting to the legacy: and having assented to the particular estate to herself, it was taken to be an assent to the remainder to the son, who was obviously the favoured legatee. In this there is certainly no analogy to the case before us.

This view of the case renders it unnecessary to present at large some other considerations which weigh heavily against the appellants. The point on which their counsel now places their case is an afterthought. It is nowhere made in the pleadings, and the defendants have had no opportunity of controverting it. Moreover the great length of time (from 1810 to 1832) which has been suffered to elapse without the assertion of their claim, and the acquiescence in the sale by the executrix, have been well calculated to lull the purchasers into security, and to prejudice them unjustly if the pretensions of the appellant should be sustained. Lastly, although the doctrine is unquestionable, that the assent of the executor to a specific legacy vests the legal title in the legatee (1 Wash. 312; 5 Munf. 103, 175), yet I am by no means prepared to say that where the assent of the executor is by no act of notoriety, and the possession remains uninterrupted with him, a sale by him to a purchaser without notice of the assent shall be held void. On the contrary, I incline to think that upon the principle of *Edwards v. Harben*, 2 T. R. 587; *Hamilton v. Russel*, 1 Cranch 309, and other like cases, the assent should be taken to be void and ineffectual as to purchasers, where there is no change of



possession, and the executor continues to exercise acts of ownership and to dispose of the property, without opposition.

On the whole, I have no hesitation in affirming the decree.

Decree affirmed.

#### 471 \*Fitch v. Leitch.

January, 1841, Richmond.

(Absent STANARD,\* J.)

#### Pleading and Practice—Assumpsit—Account—Statute.

—Construction of the act, 1 Rev. Code, ch. 128, § 86, which declares that "in every action of indebitatus assumpsit, the plaintiff shall file with his declaration an account, stating distinctly the several items of his claim against the defendant; and in failure thereof, he shall not be entitled to prove before the jury any item which is not so plainly and particularly described in the declaration, as to give the defendant full notice of the character thereof.

**Same—Same—Effect Where Proof Sustains Count of Insimul Computassent.**—If the proof offered by the plaintiff be such as to sustain the count of insimul computassent, it is of no importance whether there be any account filed or not; for this count does so describe the plaintiff's demand, as to give the defendant sufficient notice of the character thereof.

#### Same—Same—Insimul Computassent Count—Proof

**under—Case at Bar.**—The plaintiff in assumpsit files with his declaration an account commencing in these words, "1833, Jan'y 1. To balance due per account rendered, \$1405.07." which account he produces at the trial, and a witness is introduced to prove, that, at the date of this item, the plaintiff delivered to the defendant a full bill or account to the amount of 1405 dollars 7 cents, and that the defendant acknowledged the same, and promised to pay it: HELD, such proof may be received under the insimul computassent count.

Action of assumpsit in the county court of Albemarle, by Samuel Leitch j'r against William D. Fitch. The declaration contained four counts: 1. indebitatus assumpsit for goods, wares and merchandise sold and delivered; 2. quantum valebant; 3. for money lent and advanced, paid, laid out and expended, and for money had and received; 4. insimul computassent.

The account filed with the declaration was in these words:

#### 472 \*Mr. William D. Fitch in account with Samuel Leitch j'r.

" 1833, Jan'y 1.	
To balance due per account rendered,	1405.07
Interest on the same till 1 Jan'y 1834,	84.30
	<hr/> 1489.37

\*He had been counsel for the plaintiff in error.

†**Pleading and Practice—Assumpsit—Account.**—In *Johnson v. Fry*, 38 Va. 600, 12 S. E. Rep. 973, it is said that, where the declaration does not plainly describe the items, and the account filed with it merely states the sums paid, without giving any information about them, the account is insufficient. Citing *Fitch v. Leitch*, 11 Leigh 471, and *Burwell v. Burgess*, 32 Gratt. 472. The principal case is also cited in *Walsh v. Schilling*, 33 W. Va. 113, 10 S. E. Rep. 55. See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.

C'r.

" 1833, Aug. 13.	
By cash,	\$100.00
By interest on same till 1 Jan'y 1834,	2.25
Sept. 1.	
By cash,	100.00
By interest on same till 1 Jan'y 1834,	2.00
	<hr/> 204.25
Balance due 1 Jan'y 1834,	<hr/> \$1285.12

" 1834, Jan'y 1.	
To balance 1 Jan'y 1834,	\$1285.12
To interest to 1 Jan'y 1835,	77.10
	<hr/> 1362.22

C'r.

" 1834, April 7.	
By John Vowles's bond	\$633.07
By interest on same till 1 Jan'y 1835,	38.45
	<hr/> 871.53
Balance due Sam'l Leitch jr. 1 Jan'y 1835,	<hr/> \$490.70
Interest to 1 Jan'y 1836,	29.44
	<hr/> 520.14

" 1835, Nov. 10.	
By cash on acc't Wm. D. Fitch,	\$100.00
By interest to 1 Jan'y 1836, 1 mo. 20 days,	82
	<hr/> 100.82
Balance due 1 Jan'y 1836,	<hr/> \$419.32
Interest on balance to 3 June 1836,	10.48
	<hr/> 429.80

" 1836, June 3.	
By cash on acc't.	\$100.00
	<hr/> 100.00
Int. on balance to 7 Sept. 1836,	32.80
	<hr/> 5.17
Balance due,	<hr/> \$384.97

" 1837, March 4. By cash \$100."

473 \*At the trial, which was upon the general issue, the plaintiff produced this account, and introduced a witness to prove, that, at the date of the first item therein, the plaintiff delivered to the defendant a full bill or account to the amount of 1405 dollars 7 cents, and that the defendant acknowledged the same, and promised to pay it. Whereupon the defendant moved the court to exclude from the jury all evidence in support of the items of debit in said account, upon the ground that the said items did not state distinctly the character of the claim against the defendant; which motion the court overruled, and permitted the evidence to be heard in support of the said account. To which opinion the defendant excepted.

The jury found a verdict for the plaintiff for 239 dollars 69 cents, with interest from the 4th of March 1837 till paid; upon which verdict a judgment was rendered.

On a supersedeas to that judgment, the circuit court affirmed the same. And then, on the petition of Fitch, a supersedeas was awarded to the judgment of the circuit court.

Stanard for plaintiff in error.

Patton for defendant in error.

TUCKER, P. This case seems to me without difficulty. The statute requires that in every action of indebitatus assumpsit the plaintiff shall file with the declaration an account stating distinctly the several items of his claim; and on failure, he shall not be entitled to prove any item which is not so particularly described in the declaration, as to give the defendant notice of the character thereof. Now if the proof offered by the plaintiff is such as to sustain the count of



insimul computassent, it can be of no importance whether there be any account filed or not; for this count does so particularly \*describe the plaintiff's demand, as to give the defendant notice of the character thereof. On the trial, however, the plaintiff can in such case offer no evidence of anything but an adjustment of a balance upon a settlement, or an acknowledgment of a balance due. He can go into no evidence of items, not only because he has not filed an account of items, but because the character of the count forbids it. If this be so, then it only remains to see whether the evidence offered tends to prove, or even forms a link in the chain of testimony to prove, the insimul computassent count. If so, it was properly admitted. For we must remember that this is an exception to the admissibility of the evidence, and not a demurrer to evidence. The sufficiency of the evidence is not the question. If it was, I should still be of opinion that it was sufficient. The presentation of an account for payment, and the acknowledgment of it and promise to pay it, seems to me to be full proof of an accounting together, and of the indebtedness of the defendant. But if it be not, can it be denied that it tends to prove it,—that it may be an important link in the chain of proof? And if so, upon what ground could it have been excluded? The defendant himself does not pretend any other objection than the failure to file an account of items. But that failure does not forbid the proof of a balance due upon settlement, which is distinctly described in the declaration as constituting the plaintiff's demand in this count.

I am, indeed, further of opinion that the specification was sufficient under any count in the declaration. It is in these words, "To balance due per account rendered," and the date of January 1, 1833 is prefixed to the item. Did not this give the defendant an account of the items of the plaintiff's demand? The plaintiff had rendered an account to the defendant, the balance of which was, on the 1st of January 1833, 1405 dollars 7 cents. And he here informs the plaintiff, by the specification \*filed with the declaration, that his demand is for the balance due by that account which had been rendered, and of which the defendant then had, or ought to have had, the possession. If he then had it, what more perfect account of items could he have than that afforded? Does the construction of the law require that a detailed account of items shall be filed, when the defendant already has the same detailed account in his pocket, to which he is referred by the specification? Cui bono? The object of the law is to give the defendant notice of the items of the demand. The plaintiff tells him, "My demand is for the very items contained in the account which I rendered you." Is not this notice? I think it is.

The case of *Moore v. Mauro*, 4 Rand. 488, seems to me clearly to sustain this opinion. There the specification was, "Merchandise per bill due 10 July 1819." The court held it sufficient. It is true that there the specification stated the demand to be for merchandise; but the declaration had sufficiently given notice of that fact. No evidence of any

thing but goods, wares and merchandises could have been introduced. The only thing wanting was an account of the items of merchandise; and these having been already furnished by the account or bill rendered, it was unnecessary to set forth those items in the specification.

It is true that in these cases a preliminary step is necessary. It is necessary to prove that an account was rendered, and so the defendant had full notice of the demand. But this was done in this case, and therefore I think it would have been even competent to the plaintiff to go into the items on the other counts, if it had been necessary. It was not so, however, the evidence of the balance due being admissible under the insimul computassent.

As to the objection that parol evidence could not be given of the contents of the account, there is, I think, \*nothing in it. And if there was, the objection was not made. The evidence was opposed on the ground alone of the want of a bill of particulars. Had the objection now made been insisted on, it might have been removed, if it was a valid one, by proof that the defendant had been called on to produce the account. Where the admissibility of testimony is contested on a particular ground, it is not competent to the party, in the appellate court, to rely upon other grounds of objection, which he did not make, perhaps because he well knew they could be removed.

Judgment affirmed.

### Harrison &c. v. Carroll &c.

January, 1841, Richmond.

(Present TUCKER, P. and BROOKE, CABELL, STANARD and ALLEN.\* J.)

**Husband and Wife—Relinquishment of Dower—Parol Agreement to Settle Personal Property on Wife in Consideration of—Effect as to Creditors—Case at Bar.**—Husband and wife agree by parol, that the husband shall settle personal property to the separate use of the wife, and that the wife shall relinquish her contingent right of dower in certain lands of the husband, which he proposes to convey for the benefit of creditors. The settlement upon the wife is executed accordingly. Afterwards a creditor of the husband obtains

\*Of the cases reported in this volume, this is the first which was argued before JUDGE ALLEN.

†**Husband and Wife—Settlements—Consideration—Relinquishment of Dower.**—In the opinion of the district judge (whose decree was affirmed by the circuit judge) in *Smith v. Kehr*, 22 Fed. Cas. 587, it is said: "Where a post-nuptial settlement is made in consideration of relinquishment of dower, and of maintenance, especially where the wife's trustee joins in the covenants, that the wife will, in consideration of the settlement made, relinquish all claims to dower in her husband's estate, and will contract no debts on his account, etc., such a settlement is for valuable consideration, and will be upheld in law, and cannot be assailed in equity by the husband's creditors, unless the amount so settled on the wife is unreasonable or excessive: *Worrall v. Jacob*, 3 Mer. 268; *Stephens v. Olive*, 2 Brown. Ch. 75; *Clancy Mar. Wom.* 358; *Compton v. Collinson*, 3 Brown Ch. 804; *Hale v. Plummer*, 6 Ind. 123; *Harvey v. Alexander*, 1 Rand. (Va.) 219; *Wiler v. Gray*, 36 Miss. 510; *Bullard v. Briggs*, 7 Pick. 586; *Harrison v.*

judgment against him, sues out a fieri facias thereon, and delivers it to the sheriff. And then the wife, in pursuance of her agreement, joins her husband in a deed conveying the lands. HELD, the property settled on the wife is liable to the execution of the judgment creditor, and equity will not restrain him from proceeding to make his debt out of the same.

By a deed dated the 5th of May 1822, between William Brent junior of Stafford 477 county of the first part, \*John M. Conway and Philip Harrison of the second part, and Winifred L. Brent, wife of the said William Brent, of the third part, reciting that the said Winifred had "agreed to make a surrender of dower in various valuable tracts of land, and in sundry lots and houses in town property, in consideration of the said William Brent's promising and agreeing to settle the following described and named property to the separate use of the said Winifred," it was witnessed that the said William Brent, in pursuance, fulfilment and execution of the said agreement on his part, and in consideration thereof, and also in consideration of one dollar paid him by the parties of the second part, had granted, sold and conveyed, and did thereby grant, sell and convey to the said parties of the second part, twenty-five slaves and a large amount of other personal property, upon trust, to be held by them for the separate use of the said Winifred during the life of her husband; and at his death, if she should survive him, to be transferred and delivered to her; or if she should die before him, then to be transferred and delivered to such persons as she, by writing in the nature of a last will and testament, should appoint, or, in default of such appointment, to her right heirs. The deed was admitted to record in the office of Stafford county court the 7th day of May 1822.

By another deed, dated the 17th of June 1822, between William Brent junior of the one part, and Philip Harrison and John M. Conway of the other part, it was recited as follows:

"Whereas Winifred L. Brent, wife of the aforesaid William, has agreed, in consideration of a proper provision and settlement to be made upon her, and for her sole and separate use and behoof, free from all manner of control on the part of her said husband, to sell, convey and surrender her right of dower in and to all the real estate of her aforesaid husband, consisting of various large tracts of land, and various 478 houses and lots \*in the city of Richmond, and the towns of Manchester, Fredericksburg and Alexandria, and elsewhere; and has relinquished her

right of dower in a large real estate sold by the said William unto one W. H. Fitzhugh, to enable the said William, out of the proceeds of the sale of the same, to discharge and satisfy large debts due and owing by him to various persons, and which purchase money has been applied to that object: and whereas the said William has, in pursuance of the agreement aforesaid made upon the aforesaid consideration, heretofore by deed of bargain and sale bearing date the 5th day of May 1822, and now of record in the office of the county court of Stafford, conveyed unto the aforesaid Philip Harrison and John M. Conway, in trust for the sole and separate use of the aforesaid Winifred, certain slaves and other property in the aforesaid deed mentioned, and herein after mentioned: and whereas it is doubted whether the aforesaid deed does sufficiently and clearly set out and specify the consideration upon which the same was made: and whereas, since the execution of the aforesaid deed, the aforesaid Winifred,—in consideration of the agreement of the said Williams, made with the aforesaid Philip and the aforesaid John M. Conway her trustees, for her and for her benefit, to execute another deed for the aforementioned property conveyed as aforesaid, to them, in trust for her sole use and benefit, so that the same conveyance shall be free from all exception and made more perfect,—has agreed, and in execution of the said agreement has, by various deeds and indentures bearing date on the day of the date of this indenture, conveyed, renounced and relinquished unto trustees, for the purpose of discharging certain large debts of the aforesaid William, her right of dower in very large and valuable real estate of the said William, as in the said several deeds will be more at large seen:"

479 \*In consideration of which premises and agreements aforesaid, and of one dollar to him in hand paid, William Brent granted, bargained and sold to Harrison and Conway, the same slaves and other personal property which had been conveyed by the deed of the 5th of May, to be held for the separate use of Winifred L. Brent in the same manner as specified in that deed.

This second deed was executed and acknowledged by William Brent on the 17th of June, the day of its date, before his execution of any other deed of the same date, and was, on the same 17th of June, admitted to record in the officer of Stafford county court.

The deeds of trust from William Brent and wife, referred to in the recital of the last mentioned deed, were three in number. All of them bore date the 17th of June 1822, and were duly admitted to record in the office of Stafford county court on the following day. That which was first executed and acknowledged by William Brent, and first admitted to record, contained a recital substantially the same with that in the deed admitted to record on the 17th of June; it recited also that Brent and wife, by their deeds of even date therewith, had granted to Eliza J. Carrington an annuity or rent-charge of 666 dollars 67 cents, and to John Moncure and Hancock Eustace, in trust for

*Carroll, 11 Leigh 484; Hargroves v. Meray, 2 Hill Eq. 226; 35 Pa. St. 357; 2 Story, Eq. Jur. § 1437 et seq.; Madd. Ch. Prac. 275, 387.* The principal case is also cited for this proposition in *William & Mary College v. Powell, 12 Gratt. 286, and note; Foot-note to Burwell v. Lumsden, 24 Gratt. 443; Gatewood v. Gatewood, 76 Va. 412; Strayer v. Long, 86 Va. 562, 10 S. E. Rep. 574.* See monographic notes on "Husband and Wife" appended to *Cleland v. Watson, 10 Gratt. 159.* "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris, 11 Gratt. 348, and "Dower" appended to Davis v. Davis, 25 Gratt. 587.*

Adelaide Elwes, an annuity or rentcharge of 250 dollars, both of which were charged upon and to issue out of a tract of land in Stafford county, containing 824 acres; and then, in consideration of the premises, and of one dollar paid to the grantors, it conveyed to Harrison and Conway the said tract of 824 acres (subject to the said annuities or rentcharges) upon a trust for the separate use of Winifred L. Brent, similar to that contained in the said deed recorded on the 17th of June. But the trustees were authorized, for the purpose of extinguishing the annuities, to make sale of the land conveyed to them, except a part lying

within certain specified bounds, and containing \*337 acres; and the surplus proceeds of such sale, after extinguishing the annuities, were to be applied by the trustees in payment of such debts of William Brent, secured by the two other trust deeds of the 17th of June (to be presently mentioned), as should remain unpaid. It was also provided that if the provision for the said Winifred, made by this and the previous deeds to Harrison and Conway, in lieu and satisfaction of her right of dower in the real estate of the said William Brent, should, contrary to the opinion and expectation of the parties, upon legal investigation and decision be deemed excessive, the trustees should make sale of such excess, and apply the proceeds to the payment of the debts secured by the other deeds aforesaid.

By the deed which was next in the order of execution, acknowledgment, and admission to record, Brent and wife conveyed to John Macrae and Walter Jones a tract of land in Stafford county, containing 499 acres, and several other lots and parcels of land, constituting in the whole a large and valuable property, upon trust to make sale of the same, and apply the proceeds in payment of certain debts of William Brent, which were specified in the deed and in a schedule annexed thereto. The debts specified in the deed itself were to be paid first, in a certain order; and after they should be fully satisfied, the surplus of the proceeds of sale was to be applied in the ratable payment of the debts mentioned in the schedule. Among these was a debt stated to be due to Charles Carroll of Carrollton, by a judgment recovered in the superior court of law for Stafford county, amounting to about 7500 dollars. The deed provided also that the trustees "shall pay and satisfy any other debts for which the said William Brent or his estate may be liable, if any there be not included in the schedule hereto annexed, and of which he the said William will furnish a schedule hereafter." And there was a further provision that the trustees should hold the surplus, if

\*any, after payment of the said debts, to the sole and separate use of Winifred L. Brent, in the manner specified in the deeds already mentioned.

The last of the deeds in the order of execution, acknowledgment, and admission to record, was one by which Brent and wife conveyed and assigned to Philip Harrison certain lots in Richmond and Manchester, and all other real estate of Brent whatsoever and wheresoever, not included in any

of the deeds already mentioned, together with all debts of every description due to him, upon trust to sell the real estate and collect the debts, and apply the proceeds to the payment of the same creditors, for securing whose demands the trust deed to Macrae and Jones was executed. This deed contained also the following provision: "And moreover the said William being desirous of paying and satisfying all his just debts, and apprehending that he may, from forgetfulness, have omitted to place upon the annexed list and schedule all such as may be due and owing by him, it is required that the said Philip, out of the trust funds aforesaid which may come to his hands, if sufficient there be, shall pay and satisfy such other claims as may now exist, and may be hereafter placed upon schedules and lists aforesaid, and in such priority as the said William may direct." The surplus after payment of all the debts was to be held by the trustee for the sole and separate use of Winifred L. Brent.

In October 1822, Harrison, Conway, and Mrs. Brent, by Harrison her next friend, filed their bill in the superior court of chancery held at Fredericksburg, against Charles Carroll of Carrollton, William Brent, and Enoch Mason, the deputy sheriff of Stafford; setting forth the agreement between Mrs. Brent and her husband, (to the same effect as recited in the deeds), and the execution of the several deeds of the 5th of May and 17th of June, in pursuance and fulfilment of that agreement; that Mrs.

Brent was at all times willing and ready to \*perform the agreement on her part, and the delay to perform it by executing the deeds relinquishing her right of dower, arose without her agency, from her husband's impression that such delay would not jeopardize the provision made for her, or prejudice her interests, and from the consumption of time in ascertaining and classing his debts, and preparing the deeds; that the defendant Carroll, having obtained a judgment against William Brent at the preceding May term of the superior court of law for Stafford county, for £1340. 13. 1. sterling, with interest from the 7th of June 1816, and costs of suit, had, on the 13th of June 1822, sued out a fieri facias thereon, which on the 15th of the same month was delivered to the defendant Mason, the deputy sheriff; that Carroll, pretending that the deeds of settlement on Mrs. Brent were fraudulent and void as to him, had urged the said deputy to levy the execution, and the same had accordingly been levied on a part of the slaves and other property settled, which had been advertised for sale by the sheriff. The bill prayed that Carroll and the deputy sheriff might be restrained from further proceedings under the execution, and that the property levied on might be restored to the possession of Mrs. Brent.

An injunction was awarded according to the prayer of the bill.

The answer of Brent conformed to the statements made in the bill. Mason failing to answer, the bill was taken pro confesso as to him.

Carroll, in his answer, admitted that his execution was sued out, delivered to the

sheriff, and levied, as stated in the bill. He insisted that the whole of the transactions between Brent and his wife were fraudulent as to him: that at all events the deed of the 5th May was not valid, and his execution having been delivered to the sheriff, and a lien thereby acquired on the property in question, before the deeds  
483 of the 17th \*June were executed, those deeds could not affect the lien, or give validity to the first deed.

The only testimony in the cause was that of a witness who deposed to a conversation held with mrs. Brent herself, about the end of March or beginning of April 1822, in which mrs. Brent stated that her husband and herself had made such an agreement as that set forth in the bill.

The cause coming on to be heard the 10th of May 1823, the court of chancery was of opinion that the deed of the 5th of May, as well as the deeds of the 17th of June, were fraudulent and void as against the execution of the defendant Carroll; and therefore dissolved the injunction, and dismissed the bill with costs. From which decree the plaintiffs appealed to this court.

Harrison, for appellants.

Morson, for appellees.

STANARD, J. I am of opinion that the decree of the court below, dissolving the injunction that had been awarded the appellants, and dismissing their bill, is right, and ought to be affirmed. To entitle the appellants to the relief they sought, it behoved them to shew an unexceptionable title, paramount to and overreaching the lien of the creditor whose execution they sought to intercept and defeat. Such title is not shewn. The conveyance of the 5th of May, standing alone, must, I think, be taken as voluntary and as to existing creditors. The alleged consideration of that deed is a parol agreement between husband and wife, that the wife should convey her dower interest in certain real estate of her husband, which he intended to devote to the payment of debts. Assuming that such parol agreement, precise and definite in its terms, was distinctly proved to have been made before the execution of the conveyance of the 5th of May, but still re-

484 mained wholly \*unexecuted on the part of the wife at the time the lien of the creditor, by force of his judgment and execution levied, attached, the deed, as to such creditor, must be treated as voluntary and without valuable consideration. The agreement which is the ostensible consideration, in no wise bound the wife, and in respect to every legal obligation on her, or remedy on the part of the husband or his creditors, was a mere nullity. It is not questioned by me that the dower interest of the wife may constitute a valuable consideration that will support a postnuptial settlement, and that such settlement, made in consideration of the conveyance or surrender of such dower interest, may be supported against the claims of creditors. In such case, a consideration passes from the wife beyond recal. In the case of a mere parol unexecuted contract between husband and wife, (if indeed such communications, imposing no obligation and giving no remedy, can be properly dignified by the name of

contract) nothing passes from the wife, no obligation is incurred, and no remedy exists to compel her to convey any thing. Value cannot be predicated of that which imposes no obligation and gives no remedy. The deed of the 5th of May remained in the predicament of a voluntary one without valuable consideration, when the lien of the creditor, by his judgment, and execution thereon delivered to the sheriff, was consummated; and that lien was in full force, and ought to have full effect, unless it be dislodged by the subsequent deed of the 17th of June. The only way in which that deed can operate that effect is by connecting it with the deed of the 5th of May; by considering it as supplying that valuable consideration, in the dower rights actually conveyed, of which the deed of the 5th of May was destitute, and by relation giving that deed effect from its date, as one for valuable consideration. This pretension ascribes to the wife, or rather to

485 the husband and wife, (for she could not convey \*without his concurrence,) the faculty, on their mere volition, to cancel and defeat the lien of the creditor. It would make one of the firmest liens that the creditor can acquire, effectual or nugatory at the irresponsible will of the debtor. To state such a pretension is to condemn it. The deed of the 17th of June, under the most favourable view, and giving it the utmost effect that a deed of that date can have, did not displace or overreach the lien of the creditor, and gave no just warrant to the court of equity to interfere by injunction to arrest the creditor in his course. On this insulated view of this case, and without expressing any opinion on several other objections, taken and very forcibly urged in the argument, to the interference of the court of equity in this case (some of which would in all probability equally sustain the opinion I give), I am of opinion that the decree dissolving the injunction and dismissing the bill was right, and ought to be affirmed with costs.

Decree affirmed.

#### 486 \*Aylett's Ex'or v. King &c.

January, 1841, Richmond.

(Absent CABELL, J.)

**Executors—Bill by Legatees to Settle Account\*—Case at Bar.**—Bill filed by legatees in 1834, after decease of executor, of his executor, and of all the sureties of both, to resettle account of first executor's administrations, settled by second executor in 1818; one of the plaintiffs having attained full age in 1821 the other in 1823: and bill sustained upon the other circumstances of the case, notwithstanding the lapse of time, and death of executors and their sureties.

**Same—Liability of Sureties—Order of Liability—Case at Bar.**—An executor dies indebted to his testator's estate, but leaving assets sufficient to discharge the debt, which are received by his executor, who, instead of making payment to the legatees of the first testator, distributes the

\*The principal case is cited in *Lacy v. Stamper*, 27 Gratt. 56, 57.

See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

assets among the legatees of his own testator : HELD, 1. the surety of the first executor is responsible for the amount due to the first testator's legatees ; but 2. equity will not subject him to the payment thereof, until the legatees of the first executor, who received the assets of his estate, and the sureties of the second executor, have been brought before the court, and an effort to collect from them the amount due has proved unavailing.

Thomas King, of the county of King William, died in 1807, having made his last will, by which he devised and bequeathed his estate to his wife and his two children Allen and Ann, and appointed John Lord his executor ; who qualified as such in February 1807, and gave bond in the penalty of 12000 dollars, with Philip Aylett as his surety.

John Lord died in 1814, having never settled the account of his administration of Thomas King's estate. He left a will, by which Robinson Lord was appointed executor ; who qualified as such, giving a bond wherein George Johnson, Billy Hargrove, and Julius E. Moore were his sureties. In 1818, Robinson Lord settled the account of John Lord's administration of Thomas King's estate, before auditors

appointed by the county court of 487 \*King William ; by which account it appeared that John Lord was at his death indebted to King's estate, for proceeds and profits of real and personal estate (blended together), the sum of £278. 14. Previous to the settlement of this account, namely in June 1815, a division of John Lord's estate among the devisees and legatees named in his will, had been made under an order of King William county court. The property divided comprised slaves to the value of £557.

Allen King, the son of the testator Thomas King, attained his full age in the year 1821, and Ann, the daughter of the said testator, in the year 1823.

In February 1834 (Philip Aylett the surety of John Lord as executor of Thomas King, Robinson Lord the executor of the said John Lord, and George Johnson, Billy Hargrove and Julius E. Moore, the sureties of the said Robinson Lord as executor of John Lord, being all dead) Allen King the son, and Ann Neale (now the widow of John Neale) the daughter, of the testator Thomas King, exhibited their bill in the circuit superior court of King William county against Thomas Dabney the sheriff of that county, administrator de bonis non with the will annexed of John Lord, Philip Aylett executor of Philip Aylett deceased, Smith Ellis sheriff of Henrico and administrator of Robinson Lord, William R. Richardson and Elizabeth his wife, administratrix of George Johnson, Jane Hargrove administratrix of Billy Hargrove, and the said sheriff of King William, administrator of Julius E. Moore ; alleging that the estate of Thomas King had been wasted and mismanaged by those who undertook to represent it ; surcharging and falsifying, in several particulars, the account of John Lord's administration, settled in 1818 ; praying that that account might be resettled in a proper manner ; that the account of Robinson Lord's administration of Thomas King's estate, the account of his

administration of John Lord's estate, 488 and all other proper accounts, \*might be taken ; that any balance appearing to be due from John Lord as executor of Thomas King, or from Robinson Lord as executor of John Lord and Thomas King, and the respective sureties of the said John and Robinson, might be decreed to the plaintiffs ; and for general relief.

The executor of Philip Aylett, the administrators of George Johnson, and the administratrix of Billy Hargrove, answered the bill. As to the other defendants it was taken pro confesso.

Aylett's executor, in his answer, insisted that the property of John Lord which came to the hands of Robinson Lord his executor, ought to have been applied by him in payment of the balance due from his testator's estate to that of Thomas King ; and that as he had misapplied that property by delivering it to John Lord's legatees, the sureties in his executorial bond were liable for such misapplication. Respondent relied upon the lapse of time since the plaintiffs attained their full age, as a bar to the opening of the account settled in 1818, of John Lord's administration of Thomas King's estate.

The administratrix of Billy Hargrove, and the administrators of George Johnson, in their respective answers, said, that they had received no assets of their intestates, applicable to the payment of the plaintiffs' demand : that the sureties of Robinson Lord were not liable for profits of Thomas King's real estate, received by him, or by his testator John Lord : that if such profits were excluded from the account of John Lord's administration settled in 1818, the balance appearing to be due the estate of King would be only about £45. which these respondents believed and charged to have been fully paid : that the estate of John Lord in the hands of his devisees and legatees, and the estate of Robinson Lord in the hands of his heirs and distributees, ought to be subjected to the payment of the plaintiffs' demand, before the sureties of 489 Robinson Lord could be \*made liable ; and to that end, respondents prayed that those parties might be made defendants to the suit. They also prayed the full benefit to which they might be entitled from the act of limitations or the lapse of time.

The court made an order directing its commissioner to state and report accounts of the administration of Thomas King's estate, by John Lord and Robinson Lord, respectively ; of the administration of John Lord's estate, by Robinson Lord and Thomas Dabney the sheriff and administrator de bonis non, respectively ; of the administration of Robinson Lord's estate by Smith Ellis sheriff of Henrico, his administrator ; and of the administration of the estates of Philip Aylett, George Johnson, Billy Hargrove and Julius E. Moore, by their respective representatives, defendants in this suit.

To the report returned by the commissioner in pursuance of the foregoing order, no exception was filed by any party to the suit. In stating the account of John Lord's administration of King's estate, the commissioner charged that executor with vari-

ous bonds and articles of personalty which appeared by the inventory, and with some which were clearly proved by the testimony of witnesses, to have come to his hands, but which had not been credited to the estate in the account settled before auditors in 1818: he also charged interest on the annual balances in the hands of the executor, which had not been done in the said settlement. The result was, that (excluding all proceeds and profits of real estate received by the executor) there was due from the executor, on the 1st of November 1814, a balance of 1083 dollars 45 cents, of which 946 dollars 30 cents was principal, bearing interest from that date.

Upon the account of Robinson Lord's administration of King's estate, a balance of 578 dollars 13 cents was reported to be due the estate on the 31st of December 1819.

But this balance was wholly composed 490 of the \*rents of land received by that representative, and interest thereupon.

Aylett's executor having failed to furnish the commissioner with materials for stating any account of his administration, the commissioner reported that fact, together with a copy of an account settled by auditors under an order of the county court of King William, by which it appeared that on the 19th of July 1833, Aylett's executor was indebted to his testator's estate in a balance of 5781 dollars 77 cents.

The commissioner reported also a copy of an account, settled under an order of King William county court, of the administration of George Johnson's estate by William R. Richardson and wife, shewing a balance due from them to the estate, on the 15th of October 1828, of 34 dollars 59 cents, with interest from that day. Richardson and wife, the commissioner stated, declared that they had no assets of their intestate in their hands, having lawfully administered the whole; but it had been proved to him by satisfactory evidence, that they were then in possession of five or six slaves which formerly belonged to George Johnson, and of which he died possessed.

An account of Jane Hargrove's administration of the estate of Billy Hargrove was settled and reported by the commissioner, by which it appeared that on the 31st of December 1831, a balance of 23 dollars 87 cents was due from the administratrix, with interest on 17 dollars 76 cents part thereof from that date.

As to the administration of the estates of Robinson Lord and Julius E. Moore, and of the estate of John Lord by the administrator de bonis non, the commissioner merely reported the declaration of the administrators respectively, that no assets had ever come to their hands.

On the 26th of May 1838, "by consent of parties and with the assent of the 491 court," the plaintiffs' bill \*was dismissed as to the defendants William R. Richardson and wife, and Jane Hargrove.

The cause came on to be heard the 25th of May 1839; when the court (reciting, that it appeared there were no assets of John Lord or Robinson Lord, in the hands of either of the defendants their administrators) decreed, that Aylett's executor pay

to the complainants, out of the estate of his testator in his hands to be administered, 1083 dollars 45 cents, with interest on 946 dollars 30 cents from the 1st of November 1814 till paid, and costs of suit.

Aylett's executor applied by petition to a judge of this court for an appeal from the decree; which was allowed.

Robinson, for appellant.

R. T. Daniel, for appellees.

ALLEN, J. It is contended that the demand of the appellees is one of those stale claims not entitled to the countenance of a court of equity; and there is some force in the objection. The appellees have slept upon their rights for a long period after the disability of infancy was removed, and no excuse has been offered for this unreasonable delay. Prior to the act of 1826, no certain and definite period was limited for going into such an account; but in the exercise of a sound discretion arising on the circumstances of each case, the courts have refused to decree an account where the transactions have become obscure and involved; or where the representatives would be subjected to insuperable difficulties or great inconvenience in hunting up testimony; or where, from the loss of vouchers or death of witnesses, any injury was likely to result; or where, from the relation of parties to each other, a presumption of satisfaction fairly arises upon the whole case.

But it seems to me, none of these ob- 492 stacles to a fair adjustment \*of the accounts present themselves in this case. Much the greater part of the demand consisted of a balance ascertained to be in the hands of the executor by the report returned and filed in 1818. It has been increased, by restating the account upon proper principles; by a few items disclosed by the inventory, with which the executor omitted to charge himself; and by some additional charges, sustained by clear testimony. No loss of vouchers or testimony is averred, no difficulties are suggested in the way of a fair settlement, and the account was settled with so much facility that no exception has been taken to it. Under such circumstances, it seems to me that it would be going much farther than the courts have yet done, to hold that the mere lapse of time in this case should operate as a bar.

But if the parties are entitled to be entertained, it remains to enquire against whom they should in the first instance seek relief. After such neglect, they cannot complain if they are still farther delayed by the operation of that rule of equity, which requires the creditor applying to it for aid, to proceed against the estate of the principal, before resorting to the sureties. The assets of Thomas King's estate were fully administered by the first executor, John Lord: it does not appear that any of them went into the hands of Robinson Lord, his executor, in kind. John Lord therefore, at his death, was indebted the whole balance found to be in arrear, and his estate should in the first instance be subjected to the claim. The answer of the executor of the surety prays that the devisees and legatees of John Lord should be made parties. It was proper that they

should have been made parties, not only because they were primarily liable, but because, from their connexion with the executor, they would probably be better acquainted with his dealings and transactions than the sureties in his official bond. For though I do not consider that the lapse

of time in this case, under the circumstances disclosed \*by the record, should operate as a bar to the recovery of the appellees, still the great delay which has occurred excites suspicion. The claimants cannot object to the strictest scrutiny, or that every opportunity should be afforded to those most immediately interested in contesting the matter, to prove an actual payment, or to strengthen the presumption of satisfaction. John Lord's estate was divided and distributed among his devisees and legatees, in 1815; and from the report of the commissioners, it plainly appears that there were assets sufficient to discharge the balance due to King's estate. This fund should have been applied to the payment of the debt, and they who received it are responsible for the amount to King's legatees. Robinson Lord the executor of John Lord, committed a devastavit, by permitting the distribution of the personal estate among the legatees, instead of applying it to the discharge of the debt due from his testator to King's estate. From the commissioner's report it seems that no assets of Robinson Lord came to the hands of his administrator. But one of the sureties for him as executor of John Lord is shewn to be solvent. If the debt cannot be made from those who have received John Lord's estate, the sureties of Robinson Lord should be charged, and the burthen should not be thrown on the appellant until the attempt to procure satisfaction from those first chargeable shall prove unavailing. The case of Dabney's adm'r & al. v. Smith's legatees, 5 Leigh 13, was different from the present case. There it appeared very clearly that no assets had come to the hands of the personal representatives of Claiborne the sheriff, or of Dabney the deputy who actually administered Smith's estate, and no account of the administration of those estates was required. Still the court decreed against their personal representatives, and did not subject the sureties until after an execution was returned no assets. It was contended

494 that the plaintiffs \*should have proceeded to have the accounts of the administrators of Claiborne and Dabney settled, in order to a decree against them personally if a devastavit should be established. Judge Tucker, in his opinion, with which the other judges concurred, remarks, "This would indeed be to impose too onerous terms on the creditor. He ought not to be delayed in his recovery until he has pursued the personal representatives of the principal to the utmost limit of litigation." In that case, it nowhere appears that the personal representatives of Claiborne or Dabney, or their sureties, could be presumed, from their connexion with the parties, to have any particular knowledge of the transactions in relation to Smith's estate. No assets were shewn to have come to the hands of the administra-

tors, and it would therefore have subjected the creditor to an unnecessary delay, to send him upon a pursuit which in all probability would have been unavailing. But in this case, the persons holding the estate of John Lord are his immediate legatees, most probably acquainted with all his transactions, and therefore the best qualified to litigate this claim; and it appears that they had received enough of the estate of John Lord to satisfy the debt. I think, therefore, the court erred in decreeing against the appellant, before the parties in possession of John Lord's estate, and the sureties of Robinson Lord as executor, had been brought before the court, and an effort made to collect from them any balance which the appellees should shew themselves to be entitled to; and that for this cause the decree must be reversed, and the cause remanded, with leave to make the legatees of John Lord, and the sureties of his executor, parties defendants.

TUCKER, P. It was said (and, I think, truly) in the case of Dabney's adm'r & al. v. Smith's legatees, 5 Leigh 18, that where a creditor, instead of proceeding at 495 law \*against the sureties in the executor's bond, institutes his suit in equity against them and their principal, he is bound to submit to the rule of equity, which will first decree against the principal, and subject the sureties only in the event of that decree being unavailing. It is natural justice that the debt should be paid out of the estate of the debtor; and in equity the creditor ought to resort to it in the first instance, where that resort will be attended by no material injury or delay. It would seem to follow, that where the principal is dead, and his estate is in the hands of his personal representative, it ought to be pursued, and he and his sureties ought to be first charged, unless there are circumstances in the case which would render the pursuit unreasonably onerous to the creditor. In the case of Dabney's adm'r & al. v. Smith's legatees, the decree rendered against the sureties was affirmed, because it appeared that Claiborne the committee administrator was insolvent at the time of his death, as also was Dabney his deputy, who in fact conducted the administration. It was contended that Claiborne had some land in Ohio, and that the plaintiffs should first resort to that land. This court thought otherwise, for reasons assigned by them. It may be added to those reasons, that there can be no obligation on the creditor to pursue the heirs, instead of the sureties who have guaranteed the due administration of that fund which he has a right to resort to for payment. As to the sureties of Dabney, though they certainly were ultimately responsible, yet it would have been going far to say that the creditor should be bound to look to them, with whom he had no privity, instead of charging the surety of the administrator himself. Dabney indeed was substituted by Claiborne to the administration; but the creditor had nothing to do with that substitution; and though it is true that the deputy and his sureties would have been responsible, if the creditor found it 496 necessary to pursue them, yet \*it



could not be reasonable to require him to do so, instead of taking his decree against the solvent sureties of the administrator himself. I think therefore, upon a review of the case, that it was properly decided.

How is this case? First, is the surety of John Lord responsible at all? Secondly, if he be, should he be charged in the first instance? I answer the first question in the affirmative, and the second in the negative.

That the surety of John Lord is responsible, admits, in my mind, of no doubt. Lord died indebted to King's estate to a considerable amount. He had, it is true, been guilty of no wrong in not paying over that amount to the legatees, because their tender years forbade it. But when his executor failed and refused to pay the debt, the condition of the bond was violated, and by one who, by his appointment, represented both himself and his testator. For this breach the surety of John Lord is responsible.

But, secondly, he ought not to be held responsible in the first instance. Robinson Lord, the executor of John, received assets amply sufficient to discharge the debt to King's estate. The assets thus received should be first applied to the payment of that debt; they being estate of the principal obligor, which ought to be charged in preference to the surety. Had Robinson Lord been living and solvent, this would have been obvious. But he died insolvent, after having wasted the estate, partly by distributing it to the legatees of John Lord. The sureties of Robinson Lord are responsible for this devastavit, and they should have been charged before the surety of John Lord; for the wrong done has been the wrong of their principal, and not of Aylett's principal. I think, therefore, that the plaintiffs in this case, instead of dismissing their bill against them, should have pursued them; and the rather, as, after their long delay in prosecuting their suit, they have little reason to complain of those difficulties which time may have thrown in their way.

497 \*I am moreover of opinion that if upon settling the account of Robinson Lord as executor of John Lord, there should appear to be in the hands of the executor, over and above the amount distributed by him, assets sufficient to discharge the plaintiffs' demand, a decree for the amount of that demand should be rendered against Robinson Lord's sureties, who should be again made parties in the cause: if otherwise, then the plaintiffs should proceed against John Lord's distributees for satisfaction; on failure whereof, and not till then, they will be entitled to a decree against the surety of John Lord.

The decree of the court of appeals was as follows:

"The court is of opinion that the decree of the circuit court is erroneous, in decreeing against the appellant before the parties in possession of John Lord's estate, and the sureties of Robinson Lord as executor, had been brought before the court, and an effort made to collect from them any balance which the appellees should shew themselves to be entitled to. Therefore" decree

reversed with costs, and cause remanded to circuit court; "with directions to make the legatees, and sureties of the executor, of the said John Lord parties defendants, and to be further proceeded in pursuant to the principles of the foregoing opinion and decree."

#### 498 \*Street's Heirs v. Street.

January, 1841, Richmond.

(Absent BROOKE,\* J.)

**Executors and Administrators—Settlement of Account—Examination of Vouchers.**—An administrator's account of administration having been audited by commissioners of a county court, and the account being controverted in a court of chancery, and referred to a commissioner of that court, the administrator's vouchers, being ostensible, must be produced if required, and submitted to the examination, not of the commissioner only, but of all parties interested.

**Same—Ex Parte Settlements—Effect as Evidence in Suit by Administrator against Heirs for Reimbursement.**—An administrator's account, settled ex parte by auditors, reported and recorded, shews that the personal assets have been exhausted, and that the administrator has paid out of his own funds debts of his intestate due by specialties binding his heirs: upon a bill in chancery by the administrator against the heirs, to be reimbursed the amount of such specialty debts so paid by him out of his intestate's real estate: HELD, the audited account is not evidence at all against the intestate's heirs;

**Same—Same—Acknowledgment by Some of Heirs That Account is Just—Effect as to Others.**—And though some of the heirs acknowledged in writing that the audited account was just, such acknowledgment will not suffice to establish it against the others; and if such an account be not established as against all the heirs, it cannot avail as to any.

**Wills—Full Probate—Right to Controvert as a Will of Lands after Seven Years.**—A will devising or charging lands is admitted to full probate, without proof appearing in the sentence of probate, that it was duly attested by witnesses, or that it was wholly written by the testator: HELD, that according to our laws and course of judicial decisions, the will cannot be controverted as a will of lands after the lapse of seven years from such full probate:

\*PARKER, J., was dead, and ALLEN, J., had not been appointed when the cause was argued.

†**Executors and Administrators—Ex Parte Settlements—Effect as Evidence of Overpayments.**—The ex parte settlements of executors or administrators are not evidence of overpayments by them, or that the claims stated in such accounts were debts justly due by the deceased, and if an executor or administrator, after exhausting the assets which properly came into his hands, pays debts of the decedent out of his own estate, he can only claim to be substituted to the rights of the creditor, and must prove his demand by the same kind of evidence that would be demanded of such creditor. *Leavell v. Smith*, 99 Va. 379, 38 S. E. Rep. 202, 7 Va. Law Reg. 191, citing *Street v. Street*, 11 Leigh 498. See also, citing the principal case on this question, *Brewis v. Lawson*, 76 Va. 40; *Robertson v. Wright*, 17 Gratt. 540, and note.

See generally, monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

‡**Wills—Probate—Conclusiveness.**—The principal case is cited in foot-note to *Parker v. Brown*, 6 Gratt. 554; *Ballow v. Hudson*, 13 Gratt. 678 (see note).



**Same—Probat—Effect Where Sentence Shows Will Not Duly Executed to Pass Lands—Quere, as to Personality.**—But if the sentence of probat distinctly shews that the will was not duly executed to pass real estate, quere whether the sentence of probat, though general, ought not, in such case, to be understood in the restricted sense of declaring the instrument a good will of personality only?

John Street the younger died intestate in the year 1797. His father John Street the elder was his heir at law. Administration of his estate was granted by the county court of Hanover to his brother Parke Street.

499 \*John Street the younger had been in his lifetime, for some years, a deputy sheriff of the county of Hanover. He died indebted on account of sundry liabilities which he had incurred in his official character, and otherwise indebted by specialties binding his heirs. He owned at his death some lands in the states of Ohio and Kentucky and a lot in the city of Richmond, which descended to his father as his heir at law. His personal estate, which came to the hands of his administrator, was comparatively trivial, so that a very small portion of his debts could be paid out of it; yet the administrator paid all the debts, upon the faith, as he alleged, that he was to be reimbursed out of his intestate's real estate.

John Street the elder died in 1801, having made a will, wherein he devised as follows—"Whereas a considerable portion of the estate of which I am now seized and possessed, is held by me as heir at law of my son John Street the younger deceased, being lands in the state of Virginia and other states of the Union, and the estate of my said deceased son being in an unsettled state, and it being uncertain how it will close, that is, whether his personal estate will be sufficient to discharge all his just debts or not; it is my will and desire, that if his personal estate shall not be sufficient to discharge all his just debts, so much of the real estate of which I am possessed as his heir at law as will be sufficient fully to discharge his debts, even if it takes the whole of it, be sold by my executors as they may think best, and applied by them to the discharge of his debts; but should the estate heired by me as aforesaid, not be sufficient to discharge the debts of my said son John, in that case this clause is by no means to be construed to subject the estate possessed by me independent of such heirship to the payment of the said debts." He appointed his sons William, Parke, George and Anthony Street his executors. And the will being offered by the executors for probat in the county court of Han-

500 over, \*in March 1801, it appeared by the sentence of probat, that "the said will having no subscribing witnesses thereto, three of the sitting members of the court were sworn and examined, and thereupon declared, that the signature of John Street subscribed at the foot of the said will was, from their acquaintance with the handwriting of the said John Street, to their full belief, written with the proper hand of the said John Street; and the same was thereupon ordered to be recorded." It appeared by the evidence in this cause, that,

in fact, the body of the will was not wholly written by the testator, but was written for him by his son Parke Street; so that the will, though admitted to full probat in general terms, was not duly executed as a will of real estate.

John Street the elder left six children, his heirs, devisees and legatees; namely, his four sons abovementioned, and two daughters, Sally Street and Hannah the wife of William Brown.

In September 1819, the county court of Hanover appointed commissioners to audit and settle Parke Street's accounts of administration of the estate of John Street the younger; and on the 29th of that month, the auditors settled and reported an account, whereby it appeared, that, after crediting the estate with all the personal assets that came to the hands of the administrator, and debiting it with all the debts which he had paid, including the debts which his intestate had contracted in his official character, and his other debts by specialties binding his heirs, there was a balance due to the administrator of 4876 dollars. The account referred to vouchers for every item of debit. George and Anthony Street were present at the settlement before the auditors, and subjoined a note at the foot of the account so stated, that they were satisfied it was correctly settled, and that the balance of 4876 dollars was justly due from the estate to the administrator; and William Street, who was not present at the settlement, afterwards subjoined a note

501 \*on his part to the same purpose.

And the account being returned to the court, with these acknowledgments of its correctness thereto subjoined, was in October 1819 ordered to be recorded.

In 1826, Parke Street exhibited a bill in the superior court of chancery of Richmond against his brothers and sisters, William, George, Anthony and Sarah Street, and Hannah the wife of William Brown; in which he set forth (inter alia) the death of John Street the younger intestate, the grant of administration of his estate to him, the nature of the debts due from that estate, the payment thereof principally by himself out of his own funds, the provision of the will of John Street the elder subjecting the real estate he had inherited from his son John to the payment of the son's debts, and the account of administration of the estate of John the younger settled and reported by the auditors of the county court; and the general purpose of the bill was, that the real estate of John Street the younger, which had descended to his father the testator John the elder, should be subjected to the payment of the balance of 4876 dollars appearing due to the plaintiff on his account of administration of the estate of John the younger, and that the same should be sold and the proceeds applied to the payment of that balance.

The defendants, in their answers, mentioned, that the will of John Street the elder was in fact written for him by the plaintiff Parke Street; but they did not impugn the validity of the will as one not duly executed and published to pass, or to create a charge upon, the testator's real estate: they referred to the language of the provision

for the payment of the debts of John Street the younger, stating that "it was uncertain whether the personal estate of that decedent would be sufficient to pay his just debts," as evincing that the testator thought, and that Parke Street the draftsman knew, that the amount of debts of that estate beyond the personal assets \*thereof, could not have been so large as the administrator now alleged it to have been, and as affording reason to suspect and to contest the fairness of the account settled and reported by the auditors of the county court. They stated several specific objections both to the principles and the details of that account; and insisted, that the unjust charges and omissions in the account should be corrected, and the just balance due the administrator ascertained. And the defendants George, Anthony and William Street said, that their acknowledgment of the correctness of the account was made without any examination of it, and was induced by the (unmerited) confidence they reposed in their brother.

The court referred the accounts to one of its commissioners, with general directions to examine, state and report the same.

When the commissioner came to execute this order, the defendants insisted, that he ought to examine and state the accounts of the plaintiff's administration of the estate of John Street the younger, de novo from the commencement, upon the vouchers to be produced by the administrator, without regard to the account stated and reported by the auditors of the county court. But the commissioner thought it proper to make that account the basis of the account to be stated by himself, and to take it as correct, except in such particulars as the defendants should surcharge and falsify it. The defendants then insisted, that as the plaintiff's vouchers were ostensible, and were indeed filed in the commissioner's office, they ought to be submitted to their examination, in order to enable them to surcharge and falsify the account by a comparison thereof with the vouchers. But though the plaintiff had preserved all the vouchers, though he had in fact filed them in the commissioner's office for his examination, and though they were examined by him, yet he insisted, that he was not bound to produce them, to sustain the account  
503 \*stated and reported by the auditors of the county court and recorded by the court, and that the defendants had no right to examine them, as to any particulars in which the account was not impeached by their proofs; and the commissioner being of this opinion withheld the vouchers from the view and examination of the defendants.

Proceeding on these principles, the commissioner stated the account, by correcting trivial errors in the account stated by the auditors of the county court, some for and some against the administrator, and bringing the account down to the date of the report. It appeared by the commissioner's report, that all the debts of John Street the younger, which had been paid by the administrator Parke Street, and charged by him to the estate, were debts due by specialties binding the debtor's heirs, except

debts to the amount of about 114 dollars, and that personal assets exceeding that sum were credited to the estate; so that the whole balance claimed by the administrator was due to him, in effect, on account of debts of his intestate paid by him, which were due by specialties that bound the intestate's real estate. And the balance reported to be due to the administrator was 5257 dollars with interest on 2796 dollars part thereof, being principal, &c.

The defendants filed exceptions to the report in respect to several details of the account. And they especially excepted to it, on the ground that the commissioner had refused to allow them to examine the plaintiff's vouchers, which were laid before him, which he inspected and examined, and to which he made references in his report; an exception which went to the whole report.

It appeared by subsequent proceedings in the cause, that the whole real estate of John Street the younger was not sufficient to pay more than about one third of the balance reported by the commissioner  
504 to be due \*from that intestate's estate to the plaintiff his administrator.

Upon the hearing, the chancellor, overruling the defendant's exceptions to the commissioner's report, directed a sale of the lot in Richmond, parcel of the real estate of John Street the younger; which was sold accordingly, and the net proceeds of the sale were only about 1550 dollars. Whereupon, the chancellor decreed, that that sum should be paid to the plaintiff, in part discharge of the debt ascertained to be due to him from the estate of John Street the younger for which the real estate of that decedent was bound. From which decree the defendants appealed to this court.

Lyons and Johnson, for the appellants, 1. maintained, that the course of the commissioner was wholly unwarrantable. If the account reported by the auditors of the county court, on which the appellee's claim was founded, had really been an account of his administration of his intestate John Street the younger's estate, yet the vouchers on which the auditors stated the account being ostensible, the appellants would have had a right to require the production of them before the commissioner, not only for the purpose of enabling the commissioner to examine them, but especially for the purpose of enabling the parties themselves to examine and scrutinize them. The leading authority for taking administration accounts settled and reported by auditors of the county court as prima facie evidence, and for dispensing with vouchers to sustain those accounts when the vouchers are not ostensible in consequence of lapse of time, distinctly admits, that when the vouchers are in the administrator's possession, they must be produced if called for. *M'Call v. Peachy's adm'r*, 3 Munf. 288, 305. Here, the administrator's vouchers were in fact laid before the commissioner; and the only question was, whether they were examinable by the commissioner \*alone,  
505 and the parties interested had no right to see and examine them? Surely, the parties had a right to see or hear all evidence that could affect their interests

in the cause. But, they said, the account reported by the auditors of the county court in this case, so far as it went to establish a claim for the appellee against the real estate of his intestate, was not, properly speaking, an administration account. The whole personal estate was trivial, and had been exhausted; and when exhausted, the administration was complete. The claim of the administrator to be reimbursed out of his intestate's real estate, the amount of specialty debts binding his heirs, which he had paid, not out of the personal assets, but out of his own funds, was a claim to be subrogated to the creditors whose demands he had satisfied; and though the account reported by the auditors of the county court might have been prima facie evidence against other creditors or the distributees of the intestate, it was not evidence at all against his heirs. *Mason's devisees v. Peter's adm'r*, 1 Munf. 437. The chancellor, then, ought to have set aside the report, and recommitting the accounts with instructions to expose the vouchers to the view and examination of the appellants. 2. They made the point, that the will of John Street the elder, which was not attested by any witnesses, and of which only the signature, not the whole will, was proved to be in the testator's handwriting, was not effectual to pass, or to charge, his real estate. The sentence of the county court admitting the will to full probat upon such defective proof, and the defect of proof appearing in the sentence itself, could not make it, what by law it manifestly was not, a good will of real estate. Therefore, the appellee could not found any claim on the provision in the will, whereby the testator subjected the lands he had inherited from his son John to the payment of the son's debts.

506 \**R. T. Daniel and Leigh*, for the appellee, thought it could hardly be maintained, that wherever an administration account reported by auditors of a county court, shewed that the administrator had administered and exhausted the personal assets, and paid other debts of his intestate out of his own funds, the account, to the extent of his payments beyond the assets, was not an administration account, such as the county court had authority to refer to auditors, and the auditors, upon a general reference of the administration account, to settle and report. But granting that the commissioner allowed an undue weight to the auditor's account, and that he erred in refusing to open the vouchers to the scrutiny of the appellants, yet the error was, in the actual case, rather formal than substantial. For, they said, it appeared by the report, that in respect to every disputed item of the account, the commissioner reported all the evidence appearing in the vouchers. And the account shewed too plainly for cavil, that a much larger sum than the net proceeds of the sale of the lot in Richmond, which was all the chancellor had yet decreed to the appellee, was and must be due to him, and justly chargeable on his intestate's real estate. Neither can the correctness of the audited account be reasonably questioned, seeing that the

three brothers of the plaintiff, all men of full age, deliberately acknowledged its correctness, and that the balance thereby reported to be due him was justly due. Taking all this into consideration, they submitted that the decree ought not to be reversed, so far as it decreed the net proceeds of the Richmond lot to the appellee, though it might be proper to recommit the report, in order that the accounts might be more fully scrutinized, before any further sum should be decreed to him out of the Ohio and Kentucky lands.

2. They said it was quite too late now, to raise the question whether the will of John Street the elder was a good will of lands.

The will had been admitted to 507 \*full probat, as early as 1801; and according to our laws, the sentence of probat, however erroneous in fact, could not be contested after the lapse of seven years. *Bagwell v. Elliott & wife*, 2 Rand. 190; *West v. West's ex'ors*, 3 Id. 373, 378-9, 386; *Nalle v. Fenwick*, 4 Id. 585, 588-9; *Vaughan v. Green*, 1 Leigh 287. And none of the parties in the cause had controverted the validity of the will in any respect.

The point, however, was immaterial in the present case; since, independently of the provision in the will of John Street the elder, the lands of John the younger in the hands of his heir, were subject to his debts by specialties binding his heirs, which the administrator had paid, and which therefore he was entitled to have reimbursed to him out of his intestate's real estate.

TUCKER, P. The principal question in this cause is as to the weight and influence of the audited account; and it only requires that we should advert to the real character of the case, to enable us to see that it is entitled to none. It was not even evidence between these parties in reference to the object and purpose of the suit.

The bill is filed by an administrator, who alleges that he has made large advances for the estate, over and above the assets, and seeks to charge those advances upon the realty in the hands of the heirs. His claims upon the real estate are not then executorial; and they can only be sustained by regarding him in his true light, and substituting him to the rights of the creditors whom he has paid. He stands in their shoes, and must establish his demand precisely as they must have done. Had the bill been filed by the creditors themselves, they must have shewn, 1. the liability of the realty to their demands, and 2. the amount of those demands. Then, admitting the first, how is the second to be established? Certainly not by the settlement of the 508 \*administrator's account by auditors.

That settlement grows out of the obligation of the administrator's bond, that he shall settle his account of the administration of the personality when required. That settlement is made with the court, in their character of a court of probat, having jurisdiction over the personal estate of decedents only. They have no farther power than to audit, settle and allow the disbursement of that estate by the administrator. The limit of their authority is the amount of the personal estate. The question

whether the administrator has paid beyond the assets, so as to entitle him to charge the realty, is, as to that court, *coram non iudice*; the only modes of settling that question being by the agreement of the parties, by action at law, or by bill in equity. With the settlement before auditors, the heir as such has no concern, nor can such settlement be evidence against him either *prima facie* or otherwise. Even a judgment against an executor is no evidence against the heir, of the justice or amount of a creditor's demand; it is *res inter alios acta*. 1 Munf. 437. A fortiori it would seem, that the *ex parte* report of auditors, appointed only to settle the disbursements of the personal assets, cannot be so. The account in this case, then, was no evidence before the commissioner of the court of chancery, except so far as the acknowledgment of the brothers made it so. But in that acknowledgment the sisters did not join, and it did not therefore bind them. Therefore it could not avail the administrator; for he could have no decree for a sale of the realty without establishing his demand in such mode as would bind all the heirs. It is like the case of a confession of judgment by one of two joint obligors, and a successful defence of the action by the other; in which case, the confession avails nothing, and judgment is entered for both defendants. The demand is entire, and if disproved as to one, is disproved as to all, the confession to the contrary notwithstanding. The ap-

509 plication of the principle seems peculiarly proper in the present case, as the confession seems to have been dictated by an overweening confidence of younger brothers in the superior intelligence of an elder brother.

If the audited account be altogether rejected, it is not necessary to say any thing of the unjustifiable course of the plaintiff and the commissioner. But, as a matter of practice, I think it behooves us to express our decided disapprobation of that course. Where the vouchers are ostensible, as they were clearly shewn to have been in this case, the defendants have a right to call for them. Admit the account to have been *prima facie* evidence, still it was only *prima facie* evidence. The defendants had a right to controvert it. Had they not a right to call for the evidence in the possession of the plaintiff, to enable them to controvert it? By what rule or principle of law were the defendants excluded from the right to demand, that the plaintiff should produce the evidence which he had in his pocket in support of his account, in order that it might be seen whether the items were or were not sustained by the vouchers? I know of none.

But the commissioner had the examination of them, though they were denied to the parties. When has this sort of secret inquisition been introduced into the proceedings of our courts of justice? What court would receive as evidence, and act upon, a paper offered by one party, or suffer it to go to a jury, without the inspection or examination of the other? As well might the commissioner have examined

in secret a witness offered by the plaintiff to prove his demand, and have sent the defendants out of his office, thus depriving them of the power of objection, contradiction, and cross examination. His course in this case is as novel and unprecedented, as it is incompatible with those first principles of judicial proceeding, which secure to every party the right of being confronted with the witnesses, \*of knowing the nature of the allegations against him, and of seeing and hearing the evidence by which they are supported. Of what use would be the privilege of excepting to the opinion of a court or the report of a commissioner, if the evidence upon which they have acted be scrupulously hidden from the eyes of the party complaining? It would be practically of no effect; and it is indeed matter of surprise, that, at this day, such an instance should be afforded of a violation of the most familiar principles, as this record presents.

I am clearly of opinion, then, that the decree in this case should be reversed, and the cause sent back to the commissioner, with instructions to disregard the audited account of the Hanover commissioners, and to report the amount and character of the plaintiff's claim against the estate of John Street the younger, whether in his own right, or as substituted for the creditors whom he has paid.

Another question however presents itself, which it is important to settle. The will of John Street the elder by its terms charges that portion of his estate which he derived from his son John the younger, with the debts of his son;—and if the will be executed so as to pass or charge real estate, this will must have that effect. But the will is not attested by any witnesses, and in the sentence of probat there appears no proof that it was wholly written in the testator's hand. It was, however, ordered to be recorded in general terms, and not merely as a will of personalty. In this state of things, it would seem that we must, according to the decisions of this court, cited at the bar, take it to be a good will to charge the realty. To this course of decisions I feel myself bound to defer, where, as in this case, it is possible, evidence may have been given of the whole will being in the testator's handwriting. This, though it be not true, we may be bound to presume to be true. If, however, a case were to occur where upon its face the will could

511 \*not pass real estate, as if it were not signed at all, I should much incline to consider the order to record it, however general, as properly to be interpreted in the more restricted sense of declaring it a good will of personalty only. The other judges concurred, that the decree should be reversed with costs, and the cause remanded, in order that the accounts should be sent back to the commissioner, with instructions to disregard the audited account of the Hanover commissioners, and to report the amount and character of the appellee's claims, whether in his own rights or as substituted in place of the creditors whose claims he had discharged, and to be further proceeded in to a final decree.

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**\*Smith v. Loyd.**

January, 1841, Richmond.

[37 Am. Dec. 621.]

(Absent TUCKER, P., and STANARD, J.)\*

**Payments—Application by Court—By What Governed.†**

—Where one is indebted to another for several debts, and the debtor makes payments, without directing to which of the debts they shall be applied, and the creditor makes no particular application of the payments when received; there is no settled rule that the payments shall be applied either according to the presumed intention of the creditor, or according to the presumed intention of the debtor, or that the payments shall be applied in the manner most beneficial to the one, or the other; but it devolves on the court to apply the payments according to the justice of the particular case, with a view to all its circumstances.

**Same—Same—Same.**—In general, where several debts are due, and payments are made without specific application by either debtor or creditor at the time, the payments ought to be applied to extinguish the debts according to priority of time.

Loyd, a merchant of Alexandria, having many debts due to him from persons residing in the counties of Loudoun and Fauquier, employed Smith, an attorney at law, to collect the same for him. Smith proceeded to collect, and was many years engaged in collecting, the debts; and he made remittances to Loyd, from time to time, on account of his collections. But when the parties came to settle their accounts, irreconcilable differences arose between them. Therefore, Loyd brought a suit against Smith in the superior court of chancery of Winchester, to have the accounts settled before a commissioner under the direction of the court; and Smith readily submitting to account, the court referred the accounts between the parties to a commissioner.

Many and various points of dispute arose before the commissioner. Some of them were mere questions of fact; such as the justice of some of the debts to Smith, particularly, the charge to him of a debt due from one Respass; the rate of commission on the moneys collected by Smith, which should be allowed him as compensation for the service; and the amounts he should be charged with, on account of interest which he had collected, or ought to have collected, along with the principal debts, from the debtors. Others related to the application of the remittances made by Smith to Loyd, to the payment of the debts contracted by the attorney to the client, from time to time, by reason of his collections, and the manner of stating the interest account: and these only need be stated.

The commissioner stated in his report,

\*The president sat in the cause in the court below, and STANARD, J., had been counsel in it.

†**Payments—Application.**—On this question, the principal case is cited in *foot-note* to Chapman v. Com., 25 Gratt. 721; Howard v. McCall, 21 Gratt. 209, and *foot-note*; Lingle v. Cook, 32 Gratt. 272; Coles v. Withers, 33 Gratt. 204; Pope v. Transparent Ice Co., 91 Va. 87, 20 S. E. Rep. 940; Norris v. Beaty, 6 W. Va. 482, 484; Merchants' & Mechanics' Bank v. Evans, 9 W. Va. 389; Genin v. Ingersoll, 11 W. Va. 559; Buster v. Holland, 27 W. Va. 531.

that "where Smith had exercised his right to direct the application of the moneys paid by him, the commissioner so applied them; but where no application had been made by Smith, the commissioner had applied the payment to the discharge of the debts of longest standing." But in the account actually stated and reported, it did not appear that he had carried out this principle; or rather, it did not appear, how he had applied it to the accounts. In numerous instances (it seemed, indeed, in all) he charged Smith, not with the amount of his collections composed of principal and interest, but with the original debts he had undertaken to collect, and with interest upon them, computed to a stated period. In some instances, having charged Smith with the debts, he credited him with payments made on account of them at the dates when made; stating the debts and interest, and applying the payments first to the interest and then to the principal, as in the ordinary case of debtor and creditor; and then carrying the balances of principal to Smith's debit, and computing interest on them to the stated period. In this way, he ascertained an aggregate balance of principal, and an aggregate of interest, due, at the stated period, from Smith to Loyd; and \*thenceforth, he stated the account between the parties, as in the ordinary case of debtor and creditor, applying Smith's payments at the dates when made, first to the extinguishment of interest, and the excess to the principal, and charging Smith with interest on the balance of principal to the close of the account.\*

Smith filed many exceptions to the report, some to the details, and some to the principles of the account; in particular, "he excepted to the mode of making up the entire account, by which an aggregate sum was made up against him, by the addition of several small debts through a course of years, bearing interest throughout that time, and by which an application was made to extinguish the interest on the aggregate sum, instead of making the payments extinguish those items of the aggregate sum, which the payments when made would have extinguished."

The cause coming on for hearing before chancellor Browne, upon the report and the exceptions, he overruled the particular exception above quoted, without giving any reason for overruling it; but sustaining some of the exceptions to the details of the amount, he recommitted it to the commissioner to be reformed. And the account being reformed accordingly, shewed a balance due from Smith to Loyd, of 1135 dollars, with interest on 772 dollars, part thereof, being principal, from the 29th August 1829.

Smith filed numerous exceptions to the

\*The reporter has stated the general scheme of the account as he understands it, and as CHANCELLOR TUCKER and this court seem to have understood it. But he is by no means sure, that it has been correctly understood. It is, indeed, difficult to ascertain any distinct principle on which the commissioner proceeded in stating the account.—Note in Original Edition.

reformed report. And the cause was finally heard before chancellor Tucker, upon the reformed report and the exceptions thereto; whereupon, he overruled the exceptions, on the \*ground that they either  
515 related to matters contained in the original report and not then excepted to, or impeached the reformed report in particulars wherein it conformed with the opinion of chancellor Browne, which he did not think himself at liberty to revise; and he decreed, that Smith should pay Loyd, the sum of 1135 dollars with interest on 772 dollars part thereof &c.

Smith then presented a petition for a rehearing, chiefly on the ground of injustice done him in the manner of applying his payments, and consequently in stating the interest account. Upon which chancellor Tucker said—"I disagree indeed with chancellor Browne as to the mode of stating the account. The error seems to me to be this: Loyd puts into Smith's hands to collect, the bonds of A. B. C. and D. due 1st January 1820. In 1825, Smith receives 120 dollars principal and interest due from A. and immediately remits it. I think it should be applied to A.'s debt; in which case principal as well as interest is paid. But the commissioner, in conformity with the opinion of chancellor Browne, applies it to the interest accrued on all the bonds, say 120 dollars, so that there are only 10 dollars left to sink the principal. Now, as the commissioner charges Smith with all the debts as soon as due, and interest from the time they were due, this operates to keep alive principal sums which should be extinguished." But as there was a difference of opinion between him and chancellor Browne, rather than an error in the report of the commissioner, who had conformed (as he ought to have done) with chancellor Browne's opinion, he thought it best to deny the rehearing, and to put Smith at once to his appeal.

Upon this, Smith prayed an appeal from the decree; which was allowed.

R. C. Stanard, for the appellant.

R. C. Nicholas and Robinson, for the appellee.

516 \*ALLEN, J., after disposing of several controverted points touching matters of detail, said—As to the application of payments, where no specific application was made by the parties, and where it does not appear upon what claim the money was received, generally speaking, the debtor has the right to make the application. If he fails to do so, the creditor, having different debts, may make the application as he chooses. These are familiar and well settled rules. But where neither party makes the application, and the question is referred to the court, upon what principle is the adjustment to be made?

According to the civil law, the presumed intention of the debtor was resorted to, as the rule to determine the application: and in the absence of any express declaration by either, the enquiry was, what application would be most beneficial to the debtor. In England, the question would seem to be still unsettled. The leading cases are reviewed by the master of the rolls in Clayton's case, 1 Mer. 605, and he

remarked, "that the cases set up two conflicting rules, the presumed intention of the debtor, which, in some instances at least, is to govern, and the ex post facto election of the creditor, which in other instances is to prevail;" and concluded that he would be much embarrassed were the point necessarily to be decided in that case. The question has arisen in several cases in the supreme court of the U. States. In *Field v. Holland*, 6 Cranch 27, that court said, that "if the application is made by neither party, it becomes the duty of the court, and in its exercise a sound discretion is to be exercised. It cannot be conceded that this application is to be made in a manner most advantageous to the debtor. If neither party avails himself of his power, and it devolves on the court, it would seem reasonable, that an equitable application should be made. And it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish

517 \*first those debts, for which the security is most precarious." And in accordance with those principles, the application was made in a manner most beneficial to the creditor. In the U. States v. *Kirkpatrick*, 9 Wheat. 737, the court said, "if both parties omit, the law will apply the payments according to its own notions of justice." And in that case, they were so applied as to operate beneficially to the sureties of the debtor and against the creditor. The same proposition is laid down by justice Story in U. States v. *Wardwell*, 5 Mason 82. If neither party makes the application, the law will adjust it, by its own notions of the equity and justice of the particular case. The point has not been decided (so far as I can discover) in Virginia. In the absence of any express authority, I incline to the opinion, that the position taken by the supreme court, is, upon the whole, the best. No general rule applicable to every case could be adopted and adhered to, without producing great hardship. Men keep their accounts loosely: scarcely any case occurs, which does not vary, in some material circumstances, from every other case. Justice to creditor, or debtor, would frequently require exceptions to any specific rule that might be adopted; and these exceptions would multiply with the ever varying dealings and transactions of individuals, until at length the rule itself, and the particular cases in which it could apply, would become exceptions. If the parties, having the power, fail to use it, they cannot complain that the law, not conforming itself to the presumed intentions of either, makes the application according to the justice of the particular case, in view of all the circumstances attending it.

How should the payments have been applied, so as to have done justice to the parties in the case before us? The mode adopted is most favourable to the creditor. A number of claims were added together, interest computed on the principal of 518 each, and the credits applied, \*first to liquidate this interest. In this instance, the rule adopted must operate injuriously to the debtor. For the debts so added together, appear, in most instances,

not to have been collected when charged to the attorney. The debtors when they did make payments to him, would, in most cases, pay a part, and in some, the whole, of the claims. Every such payment would therefore reduce the amount upon which the attorney could collect interest. If, when he makes payment to his client, the credit is applied to the aggregate of interest accruing on many claims, the whole of the principal is an interest-bearing fund against him, whilst he receives interest but upon a portion of the principal from the original debtors. By this operation, the client receives more than his attorney could collect. Even if the precise period at which all the claims were collected could be ascertained with absolute certainty, it seems to me this mode of application should not be adopted, where the relation of attorney and client exists; though as between ordinary debtor and creditor, it may be right to apply the credit first to the interest of the debt. In this case, the attorney was not the original debtor; but the effect of the mode adopted in stating the account, is to substitute him as the debtor of his client in the place of the original debtors, and by a consolidation of the debts to improve the condition of the creditor. It is true, that when he receives it, he holds the money of his client in his hands. But he should not be subjected to the rule which applies between ordinary debtor and creditor, unless a disposition is manifested to appropriate the money of the client to his own use.

The application made by the report conflicts with another rule established by the cases above cited; and that is, that in cases of long standing accounts, where debits and credits are constantly occurring, and no balances are struck otherwise than for mere purposes of making rests, the payments ought to be applied to extinguish \*the debts according to priority of time. In this case, no regular account was made out between the parties: but that does not affect the principle. The matter rested in account; there were debits on one side for claims collected, credits on the other for money paid. These claims on either side, must be brought into the account whenever it is adjusted. And this principle, recognized by all the cases, must govern the application of the payments. For that, it is held, is the legal result of carrying the credits into the general account. I think, therefore, that upon the justice of the case, as well as upon authority, the credits, in this instance, should have been applied to the items charged, according to priority of time; and that the exception of the defendant to the mode of stating the account was well taken and should have been sustained.

I am therefore of opinion, that the decree should be reversed. That the defendant's exception to the charge against him for the debt of Respass, should be sustained. That the cause be remanded, in order that the accounts may be recommitted with instructions to charge the defendant with the claims at the time the same were collected by him, taking the period up to which the defendant, in the account filed with his answer, has calculated interest upon them,

as the period of collection, where the contrary is not shewn: if the account so filed by him omits any claim which he has collected, and there is no evidence of the time of payment, to charge it to the defendant, within a reasonable time for collection after it was placed in his hands; and if it does not appear when the money was paid, or the claim placed in his hands, then he should be charged with it within a reasonable time for collection after it became due. That the commissioner ascertain the amount of each claim, including principal and interest, when collected, or when chargeable to the defendant; and after deducting five per cent. for commission, 520 calculate interest upon the \*whole amount of the claim against the defendant, allowing in each case four months for the defendant to make remittances; and that he apply the payments, where no specific application was made by the parties, and it does not appear upon what claim they were received by the defendant, to the items as they are charged in the account, in the order of time in which they stand charged, applying the credits, first to the extinguishment of the interest, and the residue to the principal of such item.

The other judges concurred. Decree reversed, and cause remanded &c.

## 521 \*Trent and Others v. The Cartersville Bridge Company.

February, 1841, Richmond.

**Ferries—Non-User—Right to Prevent Others from Invading Franchise.**—If a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited on quo warranto or other like proceeding, he is not entitled to the aid of a court of equity, to prevent others from invading the franchise, which he has abandoned by such non-user under the statute, 2 Rev. Code, ch. 237, § 23, 24.

**Same—Same—Same.**—And, it seems, he cannot maintain an action at law to vindicate such a franchise so abandoned by non-user.

**Same—Right of Owner to Object to Private Use of Stream.**—The owner of a public ferry cannot maintain any action against persons, who use their own boats for passage or transportation of themselves, their families and property only, not for the accommodation of the public generally.

**Bridge Company—Private Ferry—Right of Company to**

**\*Franchises—Exclusiveness of.**—In *Parkersburg Gas Co. v. City of Parkersburg*, 30 W. Va. 439, 4 S. E. Rep. 662, it is said: "In *Bridge v. Bridge* it was directly determined by the supreme court of the United States that no franchise was exclusive unless so ascertained to be by the unmistakable terms of the grant. 11 Pet. 544, 7 Pick. 371; *Richmond, etc., R. Co. v. Louisa R. Co.*, 13 How. 71; *Fertilizing Co. v. Hyde Park*, 97 U. S. 650; *Trent v. Bridge Co.*, 11 Leigh 521; *Cooley, Const. Lim.* 394, 395; *Ang. & A. Corp.* § 111."

**Equity Jurisdiction—Taking Private Property for Public Use—Compensation.**—Equity has jurisdiction to restrain the taking or damaging private property for public use without just compensation, even though an action at law will lie for the recovery of damages in such cases, after the property has been so taken or damaged. *Mason v. Harper's Ferry Bridge Co.*, 17 W. Va. 408, citing *Trent v. Cartersville Bridge Co.*, 11 Leigh 521.



**Object.**—A charter is granted to an incorporated company to build a toll bridge across a river, over which there is at the time an ancient ferry near by; but no exclusive privilege is granted to the bridge company for the transportation of persons or property; and other persons, of their own will, establish a ferry at or near the same place, for the use of themselves only, not for the use of the public generally: HELD, the bridge company have no just cause of complaint against such persons establishing such ferry for such purpose, though it may reduce the profits of the bridge.

**Ferries—Invasion of Rights—Case at Bar—Quære.—**

Whether the establishment of a free ferry, or of any ferry without authority of law, for all comers and goers, at or near a public ferry established by authority of law, is an invasion of the rights of the owner of the public ferry for which an action for damages will lie, under the statute law of Virginia? or whether the owner of the public ferry can recover more than the penalty of \$20 given by the statute?

By an act of assembly, passed in March 1819, a company was incorporated by the name of The Cartersville Bridge Company, and privileges were given to the company to build a bridge across James River at Cartersville, and to demand and receive certain tolls for passage and transportation over the same. The company was formed, and the bridge built, according to the charter.

522 \*There was an ancient public ferry across the river at Cartersville, which was still existing at the time the act of incorporation of the bridge company was passed, and of which Randolph Harrison was then the owner. If the building of the bridge might establish a competition with the ferry that might impair or wholly destroy its profits, yet the charter of the bridge company did not directly take away or touch the rights of the ferry owner; and for some time (though not long) after the bridge was built, he kept up the ferry.

In 1836, The Cartersville Bridge Company exhibited a bill in chancery against John Trent and eight others, in the circuit superior court of Cumberland, in which, after setting forth their charter, the erection of the bridge in pursuance thereof, and the existence of Harrison's public ferry, they allege, that after the bridge was completed, some of the members of the company purchased Harrison's right of ferry from him, and then made a lease thereof to the company, whereby they became entitled to the ferry during the term of the lease which was not yet expired. That as the bridge furnished a much more convenient mode of passage and transportation than the ferry, the latter, after the purchase and lease thereof to the company, fell into disuse, though a ferry boat was constantly kept near by, in readiness to be brought into use, if and when it should be required for the accommodation of the public; but it had not been required, (except at intervals when the bridge was out of repair,) till the (then) present year, when a part of the bridge having been destroyed by fire, the company put the ferry and ferry boat into use for passage and transportation while they were repairing their bridge. That early in the (then) present year the defend-

ants, most of whom resided near the bridge or had frequent occasion to cross the river at that point, without having any interest in the ferry, or any pretence of right to have and use a ferry at or near the place, and without owning the lands 523 on either shore of the river at the ferry landings, combined together, and put a boat on the line of the ferry, and had ever since been using the same as a ferry boat there, for the transportation of themselves, their servants, horses and carriages, and of such other persons and things as they have thought proper to transport. That the company were not informed what provision, rules or regulations the defendants had made for the support of their ferry; or whether the expenses thereof were defrayed by contribution among themselves, or by tolls exacted, or moneys taken under the name of gratuities, from persons using the boat; but in whatever way this unauthorized ferry was maintained, it had produced, and was producing, great and increasing detriment to the bridge company by the subtraction of their lawful tolls and profits. That the company was advised that Harrison's ferry was a subsisting franchise, vested in them during the term of their lease, the non-user of which, under the circumstances, was no ground of forfeiture, and if it were, the forfeiture of the franchise could only be accomplished by the judgment of a court of competent jurisdiction; and even if the franchise had been forfeited, it had been thereby reinvested in the public, and could not be exercised except under public authority duly conferred: that if Harrison's ferry was a subsisting franchise, the conduct of the defendants was a plain encroachment upon the rights of the bridge company as the owners thereof for the term of their lease; and if the ferry was forfeited, the conduct of the defendants was an assumption of public rights without authority, and was a fraud upon the rights of the bridge company; so that in every view, the combination and conduct of the defendants complained of, was not less a violation of the lawful rights and privileges of the company than it was detrimental to their interests. That, in fact, tolls and profits had been and were being withdrawn, by the combina- 524 tion and conduct of the defendants, from the bridge company, to such an amount, as to render it certain, that if the combination of the defendants was not suppressed, the bridge, a highly valuable and useful improvement, in which the public was interested, must be abandoned. That the sole motive and design of the defendants in combining to run their ferry boat, was to evade payment of tolls to the bridge company. And that the conduct of the defendants could not be justified or excused by any pretence of misconduct or neglect of the bridge company in the performance of their duties, or any failure, on their part, to furnish at all times prompt and safe passage and transportation across the river, or of superior convenience to the defendants or others in the use of the ferry boat they had put there, over the means and transportation furnished by the company's bridge and ferry. Therefore, the bill



prayed an injunction to restrain the defendants from keeping or using, or causing to be kept or used, the ferry boat they were then using, or any other boat, for the transportation of persons or property across James River at Cartersville, either for toll or free of toll; and general relief.

The injunction was awarded.

The defendants, in their answer, stated, that they had understood, that certain individuals had, within some six or seven years past, purchased Harrison's ferry from the former proprietor thereof, but that they had no knowledge of the lease of that ferry by the purchasers to The Cartersville Bridge Company mentioned in the bill, and called for proof thereof, and of the alleged right of the bridge company in and to the same. That Harrison's ferry had been wholly disused for more than three (and indeed for five) years; and so that ferry,

and the ferry right, had been discontinued and forfeited.\* That it \*was

true the bridge company had built a bridge across James River not far from Harrison's ferry, and had demanded and received tolls for passage and transportation over their bridge; but a competition was for some time kept up between the bridge company and the proprietor of the ferry, to the great convenience and accommodation of all who had to cross the river at Cartersville. That no boat having been kept at the ferry for five years, until recently when the bridge was partially destroyed by fire, the public had been forced during all that time to use the bridge for crossing the river, whether they chose or not, or to adopt some private mode of passage and transportation. That the citizens of the neighbourhood reluctantly acquiesced in this state of things, so long as the bridge company afforded them the accommodation they had always before enjoyed, in the payment of tolls for crossing the river; but the company, during the preceding winter, had determined that no one should cross the river upon their bridge, without paying the tolls in cash at the time of crossing; an exaction most vexatious and oppressive upon those who were obliged to use the bridge weekly and daily in crossing and re-crossing. That the defendants, rather than submit to a regulation so harsh and inconvenient, had resolved to use their own private means of transportation across the river: they had established and kept a ferry boat, for their own use only, from one of the ancient public landings to the other on both sides of the river, as they were advised they had a legal right to do: and though others besides themselves might occasionally have used their boat for passage and transportation, they had never asked or received from them any tolls or reward,

526 but on the contrary \*had expressly forbidden that any should be exacted.

That at the time they established their ferry boat, there was no ferry boat kept at or near the ferry landing on the river; and none had been kept there, nor was any person in actual possession of the ferry, nor had any person been in possession thereof, for more than three years. And that the defendants claimed the right of crossing James River, which was a public highway, when and where, and in any boat or other vessel of their own, as their own convenience, or their pleasure, should dictate, and to land at any public landing on the river which was free for the use of all citizens.

There was no proof, that the bridge and Harrison's ferry were designed and calculated to accommodate the same travel and transportation.\* It was only proved, that the public landings which had been used for Harrison's ferry, and the abutments of the bridge, on both sides of the river, were about three hundred yards apart.

There was no competent evidence, that Harrison's ferry had been purchased from the former proprietor, or that it had been leased to the bridge company, as alleged in the bill; though enough appeared to render it probable, that the allegations of the bill as to those particulars were true.

It was proved, that Harrison's ferry ceased to be used in 1833, and the ferry boat before used there was then transported by the bridge company, to a mill pond about a mile and a half from the ferry, where it could be better preserved, ready for occasional use, than in the river or at the ferry landing; and that after the injury to the bridge by fire early in 1836, the boat was brought back to the river, repaired, and used by the bridge company for the transportation of persons and property at Harrison's ferry, until the bridge was repaired.

527 \*There was no proof, that the defendants had ever demanded or received any toll or reward for the transportation of persons or property in their boat across the river. It was proved, that they kept the boat there in continual use for themselves, crossing to and from the ancient public landings; and that other persons and their property were sometimes put across the river in their boat, but without compensation asked or received.

The loss to the bridge company, by the subtraction of tolls, which the defendants, and other persons who were occasionally accommodated with the use of the defendants' boat, would have had to pay if they had crossed the bridge, was estimated at about a hundred dollars per annum.

Upon this state of the pleadings and proofs, the defendants moved the court to dissolve the injunction, and the court overruled the motion. Whereupon the defendants applied by petition to this court for an appeal; which was allowed.

Robertson, for appellants.

Macfarland and Rhodes, for appellees.

ALLEN, J. I am of opinion, that the appellees have not shewn themselves entitled to the relief they asked, either in re-

\*The general statute concerning ferries, 2 Rev. Code, ch. 237, § 24, p. 260, provides, that "all ferries now established, and which may be hereafter generally disused and unfrequented for the space of two years, shall be discontinued, unless necessary boats and ferrymen are prepared for the same, within the space of six months after the expiration of the said two years."—Note in Original Edition.

\*This, however, was the fact, and notorious in that point of the country.—Note in Original Edition.

spect to their claim to the ownership of Harrison's ferry, or in respect to their bridge. Not as proprietors of Harrison's ferry, 1. because they have adduced no evidence of title to it; 2. because it had been for a long period disused, and according to their own shewing disused by themselves; and 3. because there is no proof, that the defendants have established another ferry at which the public was accommodated generally; the evidence only shewing that they crossed the river themselves in their own boat, which, I conceive, it would have been lawful for them to do,

even though the public ferry had been 528 in full use. Nor as \*proprietors of the bridge; because it is not clearly shewn that the ferry and the bridge are intended to accommodate the same line of travel and transportation, though probably that is the fact; and because the evidence proves that the defendants kept a boat for their own accommodation only, and there is no proof that it was intended for, or that it was used by, the public. For these reasons I think the decree should be reversed, and the injunction dissolved; without expressing any opinion as to the right of a ferry-owner to restrain by injunction, the erection of a new ferry, at which toll may or may not be taken, or as to the right to claim protection by an injunction for a company incorporated to build a bridge or construct a road, or other persons enjoying statute privileges, in the enjoyment of their privileges, against invasion or irreparable injury by the establishment, by individuals, of other means of communication, whether of the same kind or to accomplish the same object.

STANARD and CABELL, J., concurred.

BROOKE, J. I think the appellees have no claim to the relief they asked. They have not shewn themselves entitled to the ferry rights; and if they had, those rights have not been invaded by the appellants. No one is forbidden to pass a river, or to establish a passage across it for others, if they take no toll or reward. The statute concerning ferries, 2 Rev. Code, ch. 237, § 21, p. 260, provides that "if any other person whatsoever shall, for reward, set a person or persons over any river or creek whereon public ferries are appointed, he or she so offending shall forfeit and pay twenty dollars for every such offence," &c. and this is the security provided for the owners of public ferries against any violation of their rights. Neither have the rights of the bridge company been violated.

Their charter does not give them the 529 exclusive right to transport \*passengers or property across the river. It gives them a right to demand and receive tolls for the use of their bridge: and their best security against the violation of that right consists in the superior convenience of the bridge for passage or transportation, which will prevent any injurious competition.

TUCKER, P. I am clearly of opinion that the decree should be reversed. The appellees rest their complaint, and ask relief in equity, upon two separate and distinct rights and franchises; 1. upon their

rights as ferry owners, and 2. upon their chartered rights as a bridge company.

As to the first; it will not be necessary to rest my opinion of their pretensions, either upon the ground of jurisdiction, or upon the supposed forfeiture of their franchise. That, it is admitted, can only be declared on a quo warranto, or some other similar proceeding. But whether the franchise be forfeited or not, it has been confessedly disused; and, considering the question as entirely distinct from and without reference to the bridge, it may be asked, whether the owner of a ferry, who has altogether abandoned the use of it, and who has entirely cast off from himself the duties incident to his privileges, can come into a court of equity, with any title to its countenance, aid or protection? His privileges are given as compensation for the duties and burdens imposed upon him; and when he has utterly disused his ferry, and no longer performs the consideration, what claim can he have in equity to the enforcement of exclusive rights? Nay more; as from disuse of the ferry he can make no profit from it, any violation of his franchise, if it be injuria, at least is not damnum. Will a court of equity, then, which only interferes upon the principle of preventing irreparable mischief, interfere where the party sustains no mischief at all? It may, indeed, well be doubted,

530 whether even an action at law \*could be sustained by a ferry owner, who had abandoned and put down his own ferry. See 2 Rev. Code, ch. 237, § 23, 24, p. 260. It may well be questioned, whether damages could be demanded of a jury, for the illegal use of that which the party himself would not use? and whether an action for a violation of the franchise, might not be successfully defended by shewing that it was disused or abandoned? What profits it yields, and what repair it is in, are proper for the consideration of a jury, to found their damages upon; Blisset v. Hart, Willes 512, note (a). But on these questions I shall express no decided opinion, as in dissolving the injunction, I am willing to do it without prejudice to any action at law the company may be advised to bring.

2ndly, The case of the appellees is not stronger under their chartered rights. The bridge company have no exclusive privilege for the transportation of persons or property over James River at Cartersville. The legislature neither gave nor contemplated such a privilege. For, when the law passed, Harrison's ferry was in full operation; and thus it is clear, that the right to pass the river, without going over the bridge, was left unimpaired, to all the people of the commonwealth. There was no restraint upon the erection even of a new ferry, except the franchise of Harrison. There was no right in the bridge company to prevent any person from ferrying the river whom Harrison would permit to do so; they might even have received tolls, if he chose to permit them; for the charter of the bridge company imposed no restraint upon any one. Much less can we imply from the charter, an inhibition upon one or more neighbours to unite in

building a boat for the transportation of themselves, their families and property, without charging toll to any one. It cannot be denied, I think, that the charter of the bridge company does not operate to prevent any riparian owner from passing on his horse or in his boat, or any 531 traveller from fording \*the river.

Nor do I think, that, by any fair construction, even a ferry owner (whose privileges are certainly more extensive) could gainsay such a right, or even the right of transporting without toll those who may desire to pass the river. His rights are sufficiently guaranteed and protected by the assurance, that self interest would forbid any person from setting up a free ferry, with all its burdens and expenses, to his detriment. Such seems, indeed, to be the spirit of the general statute, which enacts a penalty of twenty dollars for each offence of transportation for reward, but not otherwise. Whether any other recovery can be had than this, which is given by the statute establishing public ferries, may be a matter of grave consideration; but, be that as it may, it would seem fairly to be inferred from the clause referred to, that transportation without reward, was not designed to be made penal, where there is no evidence of fraudulent intent to destroy the franchise.

From this view of the rights of the appellees, whether as owners of the ferry or of the bridge, I am well satisfied, that, in neither character, are they entitled to the aid of a court of equity against the appellants. No toll appears to have been taken, and they say they gave orders that none should be demanded. The extent of the grievance is, that a few persons in the neighbourhood have kept a boat for their own convenience, without proof of any design to put down the bridge. If such design should manifest itself, or if they should demand toll, or establish a free ferry for all comers and goers, it will be competent to the bridge company to institute their action at law to try the right. The pretext of going into equity to prevent multiplicity of actions is without foundation; since there will be need of as many suits in equity as at law, to put a stop to the proceeding; for the injunction will only bind those who are parties to the suit.

Decree reversed, and injunction dissolved.

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\*Smith v. Waddill.

February, 1841, Richmond.

**Mills and Milldams—Ad Quod Damnum—Inquisition—Sufficiency of.**—S. applies to the county court for leave to build a water grist mill and dam: upon an ad quod damnum, the inquisition found, "that the health of the neighbours would be less or as little annoyed as it was possible it should be by the erection of any dam:" upon return of the inquisition, W. opposed the grant of leave, objecting that the inquisition was insufficient and defective in regard to the effect upon health, and

intimating that if that objection should be overruled, he should offer testimony on that point: the county court overruled the objection to the inquisition, and then refused to hear W.'s testimony, and gave S. leave to build the mill and dam: W. appealed to the circuit superior court, which heard the testimony he had to offer, but, without deciding upon it, held that the inquisition was insufficient and defective, reversed the order, directed that the inquisition should be quashed, and remanded the cause to the county court: upon appeal taken by S. to this court, **Held.**

1. **Same—Same—Same—Same.**—That the inquisition was sufficient, and the circuit superior court erred in quashing it, but the county court also erred in refusing to hear the testimony offered by W. and so the orders of both courts were erroneous.

2. **Same—Same—Same—Cause Remanded.**—That the order of the circuit superior court should be reversed with costs, and the cause remanded to that court, to be there heard and decided upon the evidence and the merits: dissentiente **TUCKER, P.**, who held, that the cause should be remanded to the circuit superior court, to be thence remanded to the county court for further proceedings to be there had.

Smith applied to the county court of Hanover for leave to build a water grist mill on Mataduquin creek in that county, and a dam across the stream, he being the owner of the lands on both sides thereof above and below the place where he proposed to build his mill and dam. The court ordered a writ of ad quod damnum, whereupon a jury was regularly summoned by the sheriff, and an inquisition returned, finding "that the lands of no individual would be overflowed or damaged, either above or below, by the erection of a 533 \*falling dam sufficient to hold nine feet of water, save the lands of Smith himself, the applicant; that the water would not overflow the mansion house of any proprietor, or the offices, curtilage or garden thereunto immediately belonging, or orchards; that fish of passage, and ordinary navigation would not be obstructed thereby; and that the health of the neighbours would be less or as little annoyed by the stagnation of the waters as it was possible it should be in the erection of any dam."

Upon the return of the inquisition, Waddill, a mill owner and farmer, residing about a mile and three quarters from the site of the proposed mill, appeared and was admitted defendant to oppose the application.

At the hearing, Waddill objected to the grant of leave to Smith to build the mill and dam, on the ground, that the finding of the inquisition was not certainly responsive to the inquiry propounded to the jury, touching the annoyance to the health of the neighbours from the stagnation of the waters by the mill dam, if erected; and that if it was certainly responsive on that point, the finding was in substance against the applicant. And Waddill's counsel at the same time intimated, that they designed to offer testimony, at another stage of the cause, upon the question whether the health of the neighbourhood would be affected by the proposed mill pond; upon which the counsel for Smith called on Waddill's counsel to produce their testimony at

\***Mills and Milldams—Inquisition.**—The principal case is cited in *foot-note* to *Mairs v. Gallahue*, 9 Gratt. 94; *Varner v. Martin*, 21 W. Va. 546. See monographic note on "Mills and Milldams" appended to *Calhoun v. Palmer*, 8 Gratt. 88.

once; insisting that they ought not to be allowed to try the case by piecemeal, to take the chance of a favourable decision upon their objection to the inquisition, and if they should fail in that, then to offer testimony to shew that the health of the neighbourhood would be annoyed by the stagnation of the waters by the proposed dam. Waddill's counsel said they relied on the inquisition itself as conclusive against Smith's application for leave to build the proposed mill and dam; as  
534 ascertaining, \*in effect, that the stagnation of the waters in the mill pond would be injurious to the health of the neighbourhood: and they insisted, that they could not be required to offer testimony in support of the finding of the inquisition. The court, without deciding whether Waddill's testimony should be then adduced or not, proceeded to hear the objection founded on the inquisition, and overruled the same. And then Waddill's counsel proposed to introduce evidence to shew, that the health of the neighbourhood would be annoyed by the stagnation of the waters in the mill pond, if the proposed dam should be erected. But the court said it had already decided the whole case, refused to hear the evidence offered, and gave Smith leave to erect his mill and dam. Waddill filed a bill of exceptions, stating the proceedings at the hearing, and appealed from the order granting Smith leave to erect the mill and dam, to the circuit superior court.

In the circuit superior court, the testimony of witnesses was admitted and heard; but that court did not found its judgment on the testimony, which, therefore, was not inserted in the record. It held, that the inquisition was insufficient and defective, in not finding, with certainty, whether the health of the neighbourhood would or would not be injured by the erection of the proposed mill and dam; and, therefore, it reversed the judgment, directed that the writ of ad quod damnum and the inquisition should be quashed, and remanded the case to the county court for further proceedings on Smith's application. To which order, this court, upon the petition of Smith, allowed him a supersedeas.

Lyons and R. C. Stanard, for the plaintiff in error, adverting to the statute, 2 Rev. Code, ch. 235, § 1, 2, 3, 4, 5,\* in-

\*The statute provides, that upon application made to a county court, for leave to build a mill, and to make a dam across a water course for working such mill, the court shall order a writ of ad quod damnum, commanding the sheriff to summon a jury of twelve freeholders to meet at the place proposed for the mill and dam; that the jury shall be sworn and charged to examine the lands above and below, and (among other things) to say, "whether, in their opinion, the health of the neighbours will be annoyed by the stagnation of the waters;" that the inquisition of the jury shall be returned to the court; and that, "if, on such inquest, or on other evidence, it shall appear to the court, that the mansion house of any proprietor, or the offices, curtilage or garden thereto immediately belonging, or orchards, will be overflowed, or the health of the neighbours be annoyed, they shall not give leave to build the said mill, and erect the said dam; but if none of these

535 sisted, that the finding of the inquisition \*touching the effect of the mill pond on the health of the neighbourhood, was well enough. All that was required was, that the inquisition should find, substantially, that the health of the neighbourhood would not be injured. Mayo v. Turner, 1 Munf. 405. And this was substantially found by the inquisition in this case. The plain meaning of the finding was, that if it were possible that any mill pond would not injure the health of the neighbourhood, the mill pond in this case would not.

The jury seemed to have had some difficulty in affirming, that there could be any mill pond which might not cause disease in the neighbourhood; but they declared their belief, that the proposed mill pond would do as little mischief of the kind as any mill pond could; which was, in effect, to say that this mill pond would not be injurious, unless it should be held, against all experience, that every mill pond must be injurious to the health of the neighbourhood, so as to render it impossible, under the existing laws, to build any mill  
536 and \*dam upon a water course, since every dam must more or less stagnate the waters of the stream. Surely, upon the finding in this inquisition, the court might well hold (in the language of the statute) that injury to the health of the neighbourhood was not "like to ensue;" in which case, the statute authorized the court to grant the leave asked. And if it should turn out, that the jury was mistaken, the statute saved to any party who should be injured, his action for damages; which, if there should be any real grievance, would be an effectual remedy.

R. T. Daniel and Scott, for the defendant in error, contended, 1. that it ought to have appeared by the inquisition, distinctly and positively, that the health of the neighbourhood would not be annoyed by the stagnation of the waters in the mill pond. The health of others ought not to be in the least degree jeopardized for the profit of the applicant. Anciently, when mills were scarce, no inquiry was directed as to the effect of the mill pond upon the health of the neighbours. Act of 1705, ch. 41; 3 Hen. Stat. at Large, 401; 1748, ch. 26; 6 Id. 55. But afterwards, when the country came to abound with mills, the effect of the stagnation of the waters in the mill pond upon health, was made a primary object of inquiry. 1785, ch. 82, § 1; 12 Id. 188. And all our subsequent legislation manifested the same care to provide against the possibility of such mischief. They insisted, that leave ought not to be granted to erect a mill dam, if there was

injuries are like to ensue, they shall then proceed to consider, whether, all circumstances weighed, it be reasonable that such leave should be given, and shall give or not give it accordingly," &c. But that "no inquest, and no opinion or judgment of the court thereupon, shall bar any public prosecution or private action, which could have been had or maintained if this act had never been made, other than prosecutions and actions for such injuries as were actually foreseen and estimated upon such inquest."—Note in Original Edition.

the least doubt, whether the mill would produce so cruel a grievance as ill health in the neighbourhood. The inquisition in this case, they said, shewed that the jury had doubts upon the subject; and that was enough to condemn the application for leave to build the mill and dam. But, 2. they maintained, that the county court clearly erred in refusing to hear parol testimony as to the probable effect of the stagnation of the waters in the mill pond upon the health of the neighbours.

537 \*Lyons replied, as to the last point, that the county court did not refuse to hear the evidence as in itself improper, but because the party would not offer it at the proper stage of the proceedings, but designedly held it back till he could get the judgment of the court upon his objection to the inquisition; a practice, which, if indulged, would have enabled the party to divide the questions presented by the case, and to have, instead of one judgment on the whole case, as many judgments as he could raise points.

TUCKER, P. I am of opinion, that the inquisition, in this case, finds, with sufficient certainty, that the health of the neighbourhood will not be annoyed by the erection of the proposed mill dam. In the present universal conviction of the deleterious influence of the stagnation of water in mill ponds, it is probable no twelve men could concur in a verdict, declaring the entire and absolute freedom from such influence of any mill pond whatever. It is moreover scarcely probable, that such could have been the meaning and intention of the statute itself. So to interpret the statute, would be at once to repeal it; for it would establish a condition upon the leave to build a mill, that would be impossible: and thus, one of the daily blessings of life would be denied, from the idle apprehension of a remote and often only a casual injury. We should be denied bread, for fear that, in some season or other, the means which give it to us might bring ill health. This could not be a judicious interpretation of the statute, even if its own terms did not negative any such rigorous construction. That it does not, however, require the absolute impossibility of annoyance to health to be affirmed, appears from the language of the 5th section, that "if none of these injuries are like to ensue, the court shall proceed to consider whether, all circumstances weighed, it be reasonable to give leave, and shall give or not

538 give it accordingly." \*It is only necessary, that the court should be assured by the inquisition, or otherwise, that the health of the neighbours is not likely to be annoyed. This, I think, is substantially found by this inquisition, which declares that "it will be less or as little annoyed as it is possible to be in the erection of any dam."—This construction of the statute is the less objectionable, as the right of no person to abate the nuisance (if it shall be one) or to recover damages for injury to health, will be barred or impaired by the inquisition of the jury or the judgment of the court. For, no such injury having been foreseen and estimated, a prosecution or an action will lie for any

person who shall sustain detriment from the stagnant water in the mill pond. And thus, while the convenience of the public is consulted on the one hand, no injustice is done to individuals on the other.

The county court, then, rightly overruled Waddill's objection to the inquisition and refused to quash. But it erred in refusing to hear the testimony he offered. The circuit superior court ought for that error to have reversed the order of the county court; but it erred in quashing the inquisition as insufficient and defective. The orders of both courts, therefore, must be reversed, and the cause remanded to the circuit superior court, to be sent back to the county court for further proceedings.

The other judges concurred; and an order was entered to the following effect—That the circuit superior court, though right in reversing the order of the county court, yet erred in quashing the inquisition; therefore, the order of the circuit superior court was reversed with costs. And this court proceeding to make such order as the circuit superior court ought to have made, held, that the county court rightly refused to quash the inquisition, but erred in refusing to permit the introduction of the testimony which was offered by Waddill; therefore, the order of the county court was also reversed with costs.

539 \*And it was ordered, that the cause should be remanded to the circuit superior court, to be thence remanded to the county court, and there further proceeded in.

Lyons afterwards moved, that the order of this court should be so varied, that the cause should be remanded to the circuit superior court, to be there fully heard and decided, instead of directing that it should be remanded from thence to the county court, and the proceedings resumed in that court.

STANARD, J., delivered the opinion of the court upon the motion—That the former order should be set aside, and an order to the following effect entered in lieu thereof: That the inquisition was sufficient, and the circuit superior court erred in quashing it, and ought to have proceeded to hear and determine the case upon its merits: That the county court erred in refusing to hear and decide upon the testimony, offered by Waddill, to shew that the health of the neighbourhood would be affected by the erection of the mill dam; but, as the appeal from the order of the county court carried up all matters of law and of fact involved in the case, the proper mode of correcting that error of the county court by the circuit superior court, was to receive that and all other proper evidence in relation to all matters in controversy, and to give its judgment on the merits; which, it was presumed, would have been the courts of the circuit superior court, if it had decided (as this court thought it ought) that the inquisition was sufficient. That, therefore, the order of the circuit superior court should be reversed with costs, and the cause remanded to that court, for a new hearing and decision there upon the merits.

TUCKER, P. I cannot concur in the proposition to set aside the former

order, and to enter that now proposed.  
540 \*I am of opinion, that the cause must go back to the county court for further proceedings, and that we cannot direct it to be retained in the circuit superior court.

The case stands thus: Smith applied for leave to build a mill. A writ of *ad quod damnum* was issued, and an inquisition was found, and returned. Waddill, who opposed the application, moved to quash it, which the county court refused. He then offered evidence to prove, that the health of the neighbourhood would be injured. The court would not permit this evidence to be introduced; and he excepted. The court then proceeded (without, it seems, hearing any evidence) to give the leave asked for. Waddill appealed. The judge of the circuit superior court reversed the order of the county court, not for its refusal to hear the evidence, but because he considered the inquisition defective. And he remanded the cause to the county court for further proceedings, setting aside the former proceedings up to the petition. This court has decided, that he erred, and that the inquisition was sufficient. But it has also decided that the refusal of the county court to hear evidence, was also erroneous; and thus the orders of both courts must be reversed.

In this state of things, I am of opinion, that the cause should go back to the county court: 1st. because it is sufficiently manifest, that that court has not heard the case upon evidence: it excluded the evidence, and Waddill excepted to that exclusion: and therefore, the circuit superior court, in going into the facts, will not be proceeding as an appellate tribunal, but originally. 2ndly, Waddill has a right to have the judgment of the county court upon the facts, that tribunal being peculiarly fitted to judge, from all the circumstances, whether it is advisable to grant or to refuse the leave. 3rdly, The statute requires, that in reversing the judgment of the circuit superior court, we shall give such  
541 judgment as that \*court ought to have done; which is easy enough, if we have only to correct the error of law upon the face of the judgment; but if the circuit superior court is to proceed to investigate the facts, it is impossible to say, a priori, what that judgment is ultimately to be or ought to be. 4thly, Pursuing the direction of the statute, the judgment to be entered must be, that the order of the county court be reversed with costs; and either that the cause should, according to the usual course of the court, be sent back to the court which committed the error sought to be corrected; or it must be sent for further proceedings to the appellate court (for such the circuit superior court is in relation to this matter, though it is empowered to examine into the whole cause *de novo*). Now this, I think, would be not only an anomaly, but it would produce difficulty and incongruity. The order of the county court would be now reversed with costs. Suppose the circuit superior court goes into an examination of the facts, and finds, upon that enquiry, that it was right to give leave to build the mill:

then, upon the whole matter, the order of the county court is right, and it must be affirmed with costs. Here, then, the same order is first reversed and costs adjudged to Waddill; and then it is affirmed and costs adjudged to Smith. These incongruities seem to me unavoidable, and I am therefore unwilling to pursue the course which leads to them. To avoid these consequences (I presume) the order is presented in its present form. It proceeds upon the idea, that the circuit superior court pronounced judgment of reversal prematurely: that there should have been no reversal for the error in law, until the matter of fact had been enquired into. But this mode of proceeding would have done injustice to Waddill. The county court would not hear his evidence on the merits. He excepted and appealed. Had he not reason? And whether upon a future hearing of the facts

he should succeed or not, ought he to  
542 pay the costs of an appeal, \*taken for the purpose of procuring a fair hearing which had been denied by the county court? I think not. Upon a *superseas* or appeal from an error in law in a mill case, the party injured is entitled to reversal and costs, if he can shew error, although upon the merits the case may ultimately be decided against him. I think, therefore, the circuit superior court was bound to reverse the order, and send the cause back to the county court; and if so, this court should render the same judgment.

### Duncan & Wife & Others v. Wright.

February, 1841. Richmond.

**Wills—Detinue—When Statute of Limitations Begins to Run—Case at Bar.**—Testator lends three slaves to his daughter during her natural life and to her heirs lawfully begotten of her body; but should his daughter or her husband dispose of, convey out of the way, conceal, or attempt to alienate the slaves, then her title to cease, and he directs his executors to take them into possession, and after her decease they and their increase to be divided among her children; the daughter's husband sells one of the slaves; the testator's executors are apprised of the sale, but fail to take the slave sold into their possession, or to bring any action to recover the same; the daughter dies; and long after the lapse of five years from the date of the sale, but within five years after the daughter's death, her children bring detinue for the slave: and the only question being from what time the statute of limitations began to run, HELD, the right of the children accrued upon the death of their mother, and so the statute began to run against them only from the time of her death.

**Same—Validity of Condition Not to Alien—Case at Bar.**—Note, the question whether the daughter did not take an absolute estate, exempt from the condition that she should not alien as being repugnant and void, was not presented by the record, and therefore not decided by the court.

Detinue for a slave named John, brought in 1829, by Wesley Duncan and Sarah  
543 his wife, William Davidson \*and Mary his wife, and William and Henry Camden, against Wright, in the circuit court of Nelson. Pleas, non detinet and the statute of limitations.

At the trial of the issues, the plaintiffs gave in evidence the will of Charles Burrus, who died about the year 1796, whereby he bequeathed as follows: "I lend to my daughter Lucy Camden, my negro woman Sidney and her child Sarah and negro boy John" (this boy John was the slave in question) "during her natural life, and to her heirs lawfully begotten on her body; but should my said daughter or her husband dispose of, convey out of the way, conceal, or attempt to alienate the negroes aforesaid, I do hereby declare her title to cease, and direct my executors to take them into possession; and in such case, after her decease, they and their increase to be divided among her children if any living, otherwise to be divided among my children, Joseph, &c." Joseph and Charles Burrus, executors named in the will, took probat in January 1797. And the plaintiffs adduced evidence to prove, that Henry Camden, the husband of the legatee Lucy and their father, about the year 1800 or 1801, sold the slave John to one Bryant, under whom the defendant claimed; that the legatee Lucy Camden died within five years next before the commencement of this suit; that the plaintiffs, Sarah Duncan, Mary Davidson, and William and Henry Camden, were her children; and that they were infants at the time of the sale made by their father to Bryant. And then the defendant adduced evidence on his part to prove, that the testator's executors Joseph and Charles Burrus migrated from Virginia about the year 1807, and one of them, Joseph, died in Tennessee in 1823; that they were apprised of the sale of the slave John by Henry Camden, the husband of the legatee Lucy, to Bryant, before they left Virginia; and that the purchase money of the slave was not paid by Bryant, until after he

544 had had an interview with the executors, who were said to have \*made objections to the sale, interposing their claim under their testator's will. (There was no proof adduced of the assent of the executors to the legacy, in the first instance; but the plaintiffs' claim was not resisted on that ground, and the court considered that fact as admitted.) Whereupon, the defendant moved the court to instruct the jury, that the statute of limitations, which he relied on in his defence, began to run from the date of the sale by Camden the husband to Bryant, notwithstanding the infancy of the plaintiffs, provided it should be proved to them, that Camden sold, and the purchaser Bryant claimed under the sale, the absolute estate in the slave, that such sale and claim were known to the testator's executors before their migration from Virginia, and that there was no impediment to a suit by the executors before they left the state. And the court gave the instruction accordingly; to which the plaintiffs excepted.

Verdict and judgment for the defendant. The plaintiffs applied by petition to this court, for a supersedeas; which was allowed.

Garland, for the plaintiffs in error, maintained, that, upon the true construction of the will of Charles Burrus, the legal title of the slave in question, which the legatee

for life forfeited by the alienation, vested in the plaintiffs at the death of their mother, not in the testator's executors in trust for them, and that their right did not accrue until their mother's death; and this action having been brought within five years after her death, the statute of limitations could not be a bar.

Leigh, contra, said the plaintiffs had no title at all. The bequest under which they claimed was so framed, that, had the words been applied to real property, they would have given Mrs. Camden an estate tail, tantamount by our law to a fee simple, and

545 applied to personal property, they gave her the absolute estate; and \*then to

this absolute estate a condition subsequent was annexed, that neither she nor her husband should alien the property, but should keep it constantly in actual possession. The condition was repugnant and void, and the legatee took the property exempt from the restraint upon her power of alienation. Co. Litt. 223a. [Tucker, P. Whatever there may be in that point, it does not appear that it was raised in the court below, and it is not presented by the record.] Leigh agreed that it was not; but, he said, as the point must arise upon the will, it would be well that the court should intimate its opinion upon it (as under like circumstances it had often done), and so put an end to a controversy, the expense of which was probably equal to the present value of the subject. But supposing the bequest effectual according to the testator's intent, then immediately upon the alienation of the slaves, the legal estate was vested in the executors; they were empowered and required to take them into their possession; they might have maintained an action for them. The trust on which they were in that case to hold them was not expressly declared, but it resulted very plainly: they were to hold them in trust for Mrs. Camden for life, and after her death in trust for her children to be divided among them. The statute of limitations was a bar to any action the executors and trustees could have brought at this late day; and it was equally a bar to the claim of the cestuis que trust, and that notwithstanding their infancy. *Wych v. East India Co.*, 3 P. Wms. 309.

TUCKER, P. The only question is as to the date from which the statute of limitations began to run. The question of title does not arise upon the record. As the case is presented to us, we must take it that Mrs. Camden or her husband had no power to sell the slaves, and that upon the sale her title ceased, and a right accrued to the executors to take them into 546 possession \*during her life. It still remains to decide, whether during her life the legal title devolved upon her children by the bequest, or whether the executors were trustees for them. And I am of opinion, that the children were to take nothing until after the decease of Mrs. Camden, at which time the title devolved upon them, and not till then. No trust of the profits between the date of the sale and Mrs. Camden's death is declared in their favour. It is not necessary to decide, whether the profits went to her, or into the



residuum of the testator's estate: they could not, under the terms of this will, pass to her children. The children, then, had no title until their mother's death, and the statute consequently was not a bar to this action, brought within five years after her death. The judgment must, of course, be reversed, the verdict set aside, and a new trial had, upon which the instruction given by the court is not to be repeated.

The other judges concurred. Judgment reversed, and cause remanded for a new trial.

#### 547 \*Wilkins v. Gordon & Wife & Others.

February, 1841, Richmond.

##### Deeds of Trust—Debt Ascertained—Duty of Trustee.\*—

Deed of trust conveys property to a trustee, in order to secure payment of a debt "not then ascertained but supposed to be about 2000 dollars," and of another debt "not then ascertained but supposed to be about 1800 dollars;" and by a subsequent deed of trust, part of the same trust subject is conveyed to another trustee, to secure payment of the same debts, stating the one to be "about 2000 dollars," and the other "about 1800 dollars," with power to the trustee to sell the trust subject, and pay the debts out of the proceeds: **HOLD**, the trustee under the last deed cannot proceed to sell the trust subject till the amounts of the debts actually due are ascertained by proper settlements.

\***Deeds of Trust—Sale—Duty of Trustee.**—In *Spencer v. Lee*, 19 W. Va. 187, 188, it is said: "No general principles are better settled than, that a trustee is the agent of both parties and must consult impartially the interests of each. He is bound to bring the property to sale in the way, which will secure the best price, and to accomplish this he is required to exercise reasonable diligence and to observe those precautions, which would naturally be observed by a prudent business-man in an important business-transaction. It is his duty to see, that no encumbrance or cloud upon the title or any impediment to a fair sale for the best price remains unremoved. He is supposed to be the common friend and agent of both parties impartial and disinterested, whose duty it is to act justly and discreetly towards those in interest. In order that the trustee may thus act, a court of equity is always open to him, when the amount due by the deed is uncertain or is in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when for any reason a sale is likely to be accompanied by a sacrifice of the property, which at the cost of some delay may be obviated. *Rossett v. Fisher*, 11 Gratt. 492; 1 Tuck. Com. B. II. p. 107; 1 Lom. Dig. 425; *Lane v. Tidball*, Gilm. 132; *Wilkins v. Gordon*, 11 Leigh 547; *Miller v. Argyle's Ex'r*, 5 Leigh 460; *Quarles v. Lacy*, 4 Munf. 261; *Gay v. Hancock*, 1 Rand. 72; *Chowning v. Cox*, 1 Rand. 306; *S. C.* 3 Leigh 654 (*Taylor v. Chowning*); *Gibson v. Jones*, 5 Leigh 370; *Norman v. Hill*, 2 Pat. & H. 678."

See also, citing the principal case on this subject, *foot-note* to *Griffin v. Macaulay*, 7 Gratt. 476; *Bank v. Hupp*, 10 Gratt. 50; *Rossett v. Fisher*, 11 Gratt. 499 (see *note*); *foot-note* to *Shurtz v. Johnson*, 28 Gratt. 657; *foot-note* to *Hogan v. Duke*, 20 Gratt. 244; *Schultz v. Hansbrough*, 33 Gratt. 579; *Muller v. Stone*, 84 Va. 337, 6 S. E. Rep. 223; *Morris v. Virginia St. Ins. Co.*, 90 Va. 374, 18 S. E. Rep. 843; *Feamster v. Withrow*, 9 W. Va. 323; *Conrad v. Buck*, 21 W. Va. 411; *Hartman v. Evans*, 38 W. Va. 679, 18 S. E. Rep. 814.

**Same—Same—Same.**—Where a debt secured by a deed of trust appears by the deed to be of unascertained amount, either party may resort to a court of chancery to have the amount ascertained by accounts taken under its direction, and all accounts affecting the amount of the debt ought to be directed: and the trustee cannot proceed to sell the trust subject until the debts are settled and ascertained.

James Corbin died intestate and without issue in 1834, leaving a small real estate and personal of much greater value. His distributees were his widow Mary, who was entitled to half of his personal estate, and his mother Daphne West, and his natural brothers on the mother's side, Austin Peay, Benjamin Hord, and Corbin Lane, who were each entitled to a fourth of the other half. Mary, the widow of James Corbin, took administration of his estate; and James Wilkins and Gulielmus Smith were her sureties in her administration bond.

Corbin Lane also died intestate and without issue. His distributees were his widow Mary, who afterwards married Grandison Boyd, and who was entitled to one half of his personal estate, and his mother Daphne West and his natural brothers Austin Peay and Benjamin Hord, who were each entitled to a third of the other half. James

Wilkins took administration of his estate, and Gulielmus Smith was his surety in his administration bond.

Mary, the widow and administratrix of the first named decedent James Corbin, being about to remove to the state of Ohio, and having an unsettled account with James Wilkins, who, it seemed, had been her agent or assistant in the administration of her intestate's estate, she and Wilkins, in April 1836, got Mr. Barton (the well known commissioner of the court of chancery at Fredericksburg) to settle their accounts for them; and upon that settlement, she was found indebted to him, from 800 to 1100 dollars. Whatever the balance was, she paid it immediately, by a transfer to Wilkins of bank stock and some other funds. At or about the same time, she put into Wilkins's hands twenty-five other shares of bank stock which she still owned, and some other effects, authorized him to sell the bank stock and effects for her, and appointed him her agent to collect the rents of a small real estate she held in Fredericksburg. She then removed to Ohio, and shortly after married Andrew Gordon.

Wilkins sold the twenty-five shares of bank stock; but he did not remit the whole proceeds thereof to Gordon and wife: he remained their debtor for probably much the greater part thereof. In 1838, they constituted Barton their agent to settle Wilkins's accounts, and to collect the balance due to them. His effects to bring about a settlement of the accounts were ineffectual; and they were not settled. But in November 1838, Wilkins requested Barton to draw a deed of trust, mortgaging his property for the benefit of his creditors, and for the indemnification of Gulielmus Smith, his surety for the due administration of Corbin Lane's estate, and providing (among other specified debts) for the debt he owed Gordon and wife, and for the



debt which as administrator of Lane he owed to his distributees.

549 \*By this deed, dated the 7th November 1838,—reciting that James Wilkins “was justly indebted to Andrew Gordon and Mary his wife, in their individual characters and as administrators of James Corbin, in a sum not then ascertained but supposed to be about 2000 dollars, and to Mary Boyd, Daphne West, Austin Peay and Benjamin Hord, as distributees of Corbin Lane, in a sum not ascertained but supposed to be about 1800 dollars,” and to sundry other creditors therein named in certain specified sums,—Wilkins conveyed and assigned to Isaac Cary, divers lots in or near the town of Fredericksburg, some lands in Randolph county, four horses and other chattels, and certain debts stated in a schedule annexed; upon trust, that Cary should permit Wilkins to hold possession of the land and other property (except the debts assigned) and to take the profits, until default should be made by him in the payment of the debts due to the creditors, “the same being accurately ascertained, and payment thereof demanded” either of Wilkins or of Cary the trustee; and that upon such default of payment, and upon the request of the creditors, or a majority of them, the trustee should sell the trust subject, real and personal, at auction, for cash, and out of the proceeds, pay the debts in the deed mentioned, and then any other debts due from Wilkins to other creditors, and the surplus, if any, to Wilkins.

James Wilkins, the mortgagor, was afterwards taken in execution by the sergeant of Fredericksburg for debts due to other creditors; and thereupon, he took the benefit of the statute for relief of insolvent debtors; surrendering to the sergeant all his effects, and inter alia his equity of redemption in the property, real and personal, mortgaged by the deed of trust of the 7th November 1838. The sergeant made sale of all the effects mentioned in the schedule and surrendered by the insolvent; John Wilkins (the son of James) became the purchaser; and the sergeant conveyed and assigned \*the effects to him, by deed dated the 20th March 1839.

Cary, the trustee in the deed of trust of the 7th November 1838, sold to the same John Wilkins, all the real estate thereby conveyed to him in trust, the aggregate of the purchase money being 3725 dollars; and he conveyed the same to him, by deed dated the 20th August 1839. But John Wilkins, in fact, paid no part of the purchase money. All the other debts secured by that deed of trust, except the debts due to Gordon and wife and the distributees of Lane, had been paid.

Then, by deed dated the same 20th August 1839,—reciting, that John Wilkins stood indebted to Gordon and wife “in and about the sum of 2000 dollars,” and to Austin Peay in his own right and as assignee of Boyd and wife, Daphne West and Benjamin Hord, as distributees of Corbin Lane deceased, “in and about the sum of 1800 dollars,” with interest on both debts from the 7th November 1838,—John Wilkins, in order to secure payment of those debts, conveyed to Barton (the agent of Gordon

and wife) all the real estate which was comprised in the deed of trust of the 7th November 1838, and which had been sold and conveyed by the trustee Cary to John Wilkins, as before mentioned; upon trust, that Barton should permit him to remain in possession and enjoyment of the profits of the premises, until default should be made in the payment of the debts, or of either of them, or of any part thereof, and the interest upon the same; and that upon such default being made, and upon request of the creditors, or of either of them, Barton should advertise and sell the premises, or so much thereof as should be necessary for the purpose, at public auction, for cash; and out of the proceeds, should first defray the expenses attending the execution of the trust, and then pay the debts above mentioned, with interest, “or such part thereof as might be due,” and the surplus, if any, to John Wilkins or his assigns.

551 \*Barton, the trustee in the last mentioned deed of trust, advertised the trust subject for sale on the 31st July 1840, to satisfy the debts therein mentioned and secured, without specifying in the advertisement, the amounts of the respective debts then due.

Upon this, John Wilkins exhibited a bill in chancery in the circuit superior court of Spotsylvania, against Gordon and wife, and Austin Peay in his own right and as administrator of Daphne West, Boyd and wife, and Benjamin Hord, distributees of Corbin Lane, Gulielmus Smith the surety of James Wilkins for his administration of Lane's estate, Cary the trustee in the first, and Barton the trustee in the last, of the deeds of trust above mentioned; wherein, after setting forth the several conveyances, he alleged, that as to the debt therein mentioned to be due and intended to be secured to the distributees of Lane, it had been ascertained, and acknowledged by those creditors themselves, that that debt, instead of being 1800 dollars, did not exceed 750 dollars. That the accounts between Gordon and wife and James Wilkins had never been settled, and so the true amount due from the latter to the former was yet uncertain, and it was in fact much less than 2000 dollars, the sum mentioned in the deeds of trust. That since the deed of trust of the 7th November 1838 was executed, James Wilkins had paid many sums of money to or for Gordon and wife, which ought to be credited to him. That the accounts of Mrs. Gordon's administration of her first husband James Corbin's estate had never been settled and closed; balances were still due to the distributees of that intestate, and, among the rest, to the estate of Corbin Lane; and James Wilkins as Lane's administrator, was entitled to the balance due Lane's estate, for which he would be accountable to Lane's distributees. That James Wilkins being Mrs. Gordon's surety for the due administration of James

552 Corbin's estate, was entitled \*to have her accounts of administration thereof settled and closed, before his property should be sold to pay the alleged debt to her, since he might be made liable as her surety for whatever debts she might owe to her intestate's distributees. And that the

twenty-five shares of bank stock, and the other effects, which she put into his hands when she went to Ohio, was received by him as security for advances already made and afterwards to be made by him to or for her, and as an indemnification to him against loss by reason of his suretyship for the due administration of her first husband's estate. Therefore, the bill prayed, that the claims mentioned in the deeds of trust should be adjusted and ascertained by proper accounts to be settled under the direction of the court, and that, in the mean time, the trustee Barton should be enjoined from selling the trust subject; and general relief.

The injunction was awarded.

Guilielmus Smith answered, and insisted on the prompt execution of the deed of trust, upon which his indemnification depended, since his principal James Wilkins was insolvent.

The answer of Austin Peay in his own right and as administrator of Daphne West and of Benjamin Hord stated, that Hord had received all that he was entitled to as a distributee of Corbin Lane, and Mary Boyd had received more than she was entitled to, and had, moreover, by deed recorded, assigned to Peay all her claim as one of Lane's distributees. That in 1839, the accounts of James Wilkins as administrator of Lane were settled, or rather a compromise was made in respect thereto, between him and Peay; upon which all credits claimed by Wilkins for payments to the distributees were allowed him, and it was agreed that he should pay Peay 750 dollars; Wilkins promised prompt payment of that sum to him; and upon the faith of

that promise Peay agreed to accept it 553 in full satisfaction; \*but Wilkins had never paid it; Peay, therefore, insisted that the trust subject should be presently sold in order to pay him that balance. And that Mrs. Gordon's accounts of administration of James Corbin's estate had been settled; she had accounted for all the assets that had come to her hands, and had paid and distributed the whole surplus of that estate to the distributees, and among the rest to James Wilkins the administrator of Lane; except a small balance which had been left in her hands to pay a debt due from the estate; and these defendants exonerated Gordon and wife from all demands on that account.

Gordon and wife, in their answer, stated that at the time the deed of trust of the 7th November 1838 was executed by James Wilkins, it appeared by his own vouchers exhibited to their agent Barton, that he owed them something more than 2000 dollars; and as he had, on various pretexts, avoided a full settlement of his account, that sum was inserted in the deed of trust as being the least amount due to them; and he had never since paid them any thing. That the twenty-five shares of bank stock, and the other effects, which Mrs. Gordon put into the hands of James Wilkins when she removed to Ohio in 1836, were, as he well knew, her own property; she empowered him to sell the stock and the other effects, and also to collect the rents of her real estate in Fredericksburg; and he was to

account for and remit the proceeds of sale of the stock and the other effects, and the rents, to her. That the property was not put into his hands as a security or indemnification for any purpose whatever. That she had paid him all that she owed him, or that he claimed, before she left Virginia. That it was true her accounts of administration of James Corbin's estate had not been finally settled, but she had rendered an account of all the assets which had come to her hands, and distributed the surplus to and among all the distributees to their 554 satisfaction, \*except a small sum which they had agreed should be left in her hands to meet a claim against the estate for which a suit was then pending; and thus the state of her administration accounts furnished no pretext for delaying the payment of the debt which James Wilkins owed her.

It appeared, that Mrs. Gordon's accounts of administration of James Corbin's estate had been settled, and the surplus (except 500 dollars, left in her hands by agreement of the parties to meet claims asserted against the estate) had been distributed, under a decree of the hustings court of Fredericksburg; in which distribution thirty-six shares of bank stock were assigned to her for her distributive share. There remained to be distributed, so much of the 500 dollars as should not be absorbed by the outstanding debts of the estate, and James Corbin's share of the estate of James Ross, then in the hands of Ross's administrators.

The deposition of Mr. Barton, the trustee, was taken and filed. He stated, that before Mrs. Gordon went to Ohio, he in April 1836, settled the accounts between her and James Wilkins, at their request; that upon that settlement, Wilkins exhibited an account against Mrs. Gordon, consisting partly of a balance which he claimed for advances made to her, and partly of debts he had paid or assumed to pay for her, amounting in the aggregate, according to his recollection, to between 800 and 1100 dollars; that the whole of Wilkins's account (including all the claims, as they both stated, which he had against her, for advances made and debts paid or assumed by him for her) was then paid by her to him, by a transfer of seven shares of bank stock and from other resources. That Mrs. Gordon had then twenty-five shares of bank stock remaining, which she put into Wilkins's hands, as he had acknowledged; and she also authorized him to collect her rents in Fredericksburg; that in 1838, Gordon 555 and wife (not being able, as they alleged, to get any \*account from

Wilkins of the bank stock, its dividends or proceeds, and of the other property she left in his hands, and of the rents) sent an agent to Virginia to procure a settlement of the accounts; this the agent could not affect, but Wilkins paid him 500 dollars; and then the agent employed Barton to settle the account, and collect the balance: that after various ineffectual efforts to bring about a settlement, Wilkins called upon him in November 1838, and requested him to draw a deed of trust for the benefit of his creditors, and, at his instance, the debts

due from him to Gordon and wife, and to the distributees of Corbin Lane, were provided for in the deed: that, in estimating the debt due to Gordon and wife, Barton charged Wilkins with the twenty shares of bank stock at 112 dollars per share (the actual value) with the dividends thereof for July 1836 which he had received, and interest on the value of the stock sold, and with 72 dollars which he admitted he had received for rents; and he credited him for the 500 dollars paid to the agent of Gordon and wife, and with the whole of his charges against them not included in the previous settlement with Mrs. Gordon in 1836, that were sustained by any evidence, and some that were not, but that Wilkins said he could prove: that the result was, that Wilkins was found to owe Gordon and wife a balance of above 2100 dollars; but Wilkins stating that he had other accounts and vouchers to produce, which (according to Barton's recollection) he supposed would leave only 2000 dollars, the balance was stated at about that sum; and though Barton at the time believed that more was due to Gordon and wife, he agreed that the debt should be stated as of that amount in the deed: that after Barton had resolved to execute the deed of trust, Wilkins for the first time began to talk of setoffs against the claim of Gordon and wife; Barton urged him to exhibit them, and go into a settlement; offered to go over the whole 556 account with Wilkins's counsel; and promised to allow him every credit that he could prove, or that was even plausible; but all was rejected; Wilkins admitting, that he could not prove his account, and that all must rest on the admissions of Gordon and wife, who he insisted should come from Ohio, where they resided, to hear his explanations: and that under these circumstances Barton proceeded to advertise the property for sale under the deed of trust of August 1839.

There was an ex parte affidavit filed, to prove that Wilkins, in June 1840, sent an account to Gordon and wife, wherein there were numerous charges for moneys sent them, or paid for them, subsequently to April 1836.

Upon this state of the pleadings and proofs, the circuit superior court dissolved the injunction that had been awarded to stay proceedings under the deed of trust of August 1839; as to the defendants Gordon and wife, for 2000 dollars with interest from the 7th November 1838; and as to the defendants Peay and Hord, for 750 dollars with interest from the 15th October 1839, upon the last named defendants giving the usual refunding bond to James Wilkins administrator of Corbin Lane, to indemnify him against debts of his intestate outstanding and unforeseen.

From this decree, the plaintiff applied by petition to this court, for an appeal; which was allowed.

Patton, for appellants.

R. C. Stanard and Lyons, for appellees.

TUCKER, P. It was said by this court in the case of Lane v. Tidball, Gilm. 130, that a trustee, in the exercise of his duty as an impartial agent of both parties, may apply to a court of equity to adjust the

actual sum which is to be raised by the sale, and that if he should fail to do so, the party injured by his default has an unquestionable right to do it. This, 557 indeed, would seem to be an axiom in the law. Until the amount of the creditor's demand is adjusted, he cannot resort to compulsory means to enforce the payment. Even the judgments of a court of justice have no validity, and can be enforced by no execution, where they leave the amount of the demand uncertain, and depending for ascertainment upon subsequent adjustment. A fortiori, these judgment bonds, as they have been not unaptly called, to which, when the debt is certain, we have given, perhaps unwisely, the force of judgments, ought not to be regarded in that light, where they do not fix, distinctly and definitely, the amount of the demand. In all such cases, the deed of trust has but the effect of a mortgage. It secures the debt indeed, but it vests no power in the creditor, or in his trustee, to enforce payment, except through the agency of the courts, unless the amount be voluntarily adjusted by the agreement of the parties. However unreasonable the debtor may be in refusing to settle, his vexations and litigious spirit can yet give no right to the creditor to take the law into his own hands, by proceeding to execute the trust. It is his duty to seek from the tribunals of justice, the settlement of his accounts; and when that has been effected the enforcement of the trust will become lawful, but not till then.

The present case comes fully, I think, within the influence of these principles. It is very clear, that the deed of trust of November 1838 was given without definitively fixing the amount of the demand. It does not appear, that there was any adjustment of it between the dates of the first and the second deed of trust of August 1839. And the latter deed, though not in terms so strong as the former, speaks of the debt to Mrs. Gordon as "in and about 2000 dollars;" and that to Lane's distributees as "in and about 1800 dollars;" still leaving uncertain the actual amounts due. The last has been confessedly reduced to 558 750 dollars. And thus we have an

evidence how little confidence is to be placed in the expressions "in and about," as fixing the true amount of the demand. Moreover, long since the deed of August 1839 the parties say they were willing to go into a full account, and to allow any offsets which could be proved; thus sufficiently admitting that there was nothing definite as to the amount of debt, in the deed of trust. They allege, indeed, that Wilkins prevaricated, and very probably he did; but this, though good cause for suing him, was no justification of an attempt to sell the trust subject, without an appeal to the tribunals of justice to compel a settlement. There was, then, ample ground for the injunction; and as the state of the case is not changed materially since filing the bill, and as the accounts are still in the same state of uncertainty as before, I think the injunction was improperly dissolved. Accounts ought to have been directed embracing not only the accounts

between Wilkins and Gordon & wife, but the account of administration of the estate of James Corbin, of whom Wilkins's intestate Corbin Lane was a distributee. The account of Wilkins with Peay in his own right, and as representing Lane's other distributees, should also be settled, and proper refunding bonds decreed, before action on the deed of trust is permitted.

The other judges concurred. Decree, that the circuit superior court ought not to have dissolved the injunction, without having first directed a settlement of the proper accounts, namely, not only the accounts of Wilkins with Gordon and wife, but the accounts of the administration of the estate of James Corbin, of whom Wilkins's intestate Corbin Lane was a distributee, and the account of Wilkins with Peay in his own right and as representing Lane's other distributees; and then directing proper refunding bonds to be given; therefore, decree reversed with costs, the injunction reinstated, and the cause remanded for further proceedings.

### 559 \*Clarke & Another v. Curtis.

February, 1841, Richmond.

#### **Vendor and Vendee—Conveyance—Condition Precedent to Payment of Purchase Money\*—Case at Bar.**

Upon an agreement to sell to three joint purchasers land and certain personal chattels then upon it, for a sum in gross, to be paid when the vendor shall have made a deed of the land and a bill of sale of the personal effects, and that the purchase money shall be paid in equal instalments at future days appointed, vendor, without making such conveyances, delivers possession of both the real and personal subject to the vendees: **HOLD**, the making the conveyances by vendor is not a condition precedent to his right to demand the purchase money.

**Same—Vendee in Possession—Case at Bar.**—About the time when first instalment falls due, two of the joint purchasers, by agreement of the other and of vendor, are discharged from the contract; and by new agreement between vendor and the third purchaser, he becomes sole purchaser of same subject, for same price, with no other variance but that vendor gives further indulgence for the first instalment: and then vendor agrees to make conveyances of the property to the now sole purchaser, whenever he shall make such payments as they shall agree upon; two months further indulgence is given for the payment of first instalment; purchaser continues in possession of the real and personal property: but vendor makes no conveyance: **HOLD**.

#### **1. Same—Same—Right of Vendor to Specific Execu-**

**\*Vendor and Vendee—Conveyance of Land and Personality—Gross Sum—Lien.**—Where a lease is sold with certain personal property thereon for a gross sum for both and in the writing transferring the lease and the personal property, a lien is reserved for the payment of the purchase money, as between the parties to the contract of sale and those having actual notice of it. The lien will in a court of equity be declared to be valid and will be enforced by a sale of both real and personal property for the purchase money of both. *Cole v. Smith*, 24 W. Va. 298, citing *Clarke v. Curtis*, 11 Leigh 559. The principal case is also cited in *Bank v. Hupp*, 10 Gratt. 41; *McComas v. Easley*, 31 Gratt. 28, and *note*; *McKay v. Ripley*, 42 W. Va. 27, 24 S. E. Rep. 687.

**tion.**—A bill in equity lies for vendor against vendee for specific execution of the whole contract, in respect as well of the personal as of the real part of the subject sold.

**2. Same—Same—Vendor's Lien.**—As between vendor and vendee, the agreement in respect to the sale of the personal subject was not executed by delivery of possession thereof to vendee, but yet remained executory; and vendor retains a lien on the personal as well as real property, for the purchase money of the whole; dissentiente *STANARD, J.*, as to the lien on the personality.

**3. Same—Same—Same—Injunction against Waste.**—To preserve the security of that lien unimpaired to vendor, the court may properly enjoin the purchaser, and his agent, from committing waste on the land and from selling or removing the personal property.

**4. Same—Purchase Price—Sale of Property.**—And court may properly decree sale of the whole property, real and personal, for payment of the purchase money, unless purchaser shall pay it within a reasonable time given him by the decree.

### 560 \*5. Same—Sale of Personality before Hearing.

But it is erroneous to order sale of the personality on motion of plaintiff, before the hearing; and if it be in fact sold under such irregular order, vendor shall give credit for the proceeds, whether collected or not, in part of the purchase money.

#### **6. Same—Purchase Price—Sale of Property—Deeds.**

And it is erroneous to decree payment of purchase money against the purchaser, or a sale of the land by commissioners, without providing that vendor shall make a proper deed of the land ready to be delivered to purchaser, in case he pays the purchase money, or to purchasers under the decree, if the land be sold under it.

**7. Same—Same—Instalments—Interest.**—In executing the second contract, the first agreement is to be resorted to for ascertaining the date from which the first instalment is to bear interest.

This was an appeal from a decree of the circuit superior court of Gloucester, upon a bill in equity filed by Curtis against Clarke, for specific execution of a contract of sale. The state of the case, collected from the pleadings and proofs, was thus—

Charles Curtis first contracted to sell the property to Robert Curtis, Patrick Fitzhugh and William Clarke joint purchasers and equally interested, and he gave them the following note in writing of that agreement—“August 5, 1837. I have this day sold to R. Curtis, P. Fitzhugh and W. Clarke, my farm in Gloucester county known by the name of Perton, with all its appurtenances, crops, stocks, farming utensils, tools &c. for getting timber, wood &c. and every thing with the exception of the household and kitchen furniture, for the sum of 1300 dollars, and have received in part five dollars; the residue to be paid when I shall have made unto the aforesaid parties a deed of said estate, and a bill of sale of the personal effects, which instruments shall be executed by me. (Signed) Charles Curtis.” The time for the delivery of possession to the vendees, and for the payment of the purchase money, not being appointed in the written note of the agreement, was arranged by verbal and (it appeared) subsequent agreements—that one half of the purchase money should be paid on the 1st January \*1838, and the other half on the 1st June 1839; and

the vendor agreeing to deliver possession presently, the purchasers agreed in consideration thereof to pay him, in addition to the first instalment, three per cent. per annum on the amount thereof, from the date of the contract till the 1st January 1838. This part of the agreement appeared not only by parol evidence of it, but by the fact that possession was promptly delivered to the purchasers, and by two bonds executed by them to the vendor, dated the 10th August 1837, one for 6581 dollars payable the 1st January 1838, and the other for 6500 payable the 1st June 1839; the 81 dollars, in the first bond, over and above one half of the purchase money originally agreed to be paid, being the three per cent. thereon, from the time possession was delivered to the time appointed for the first payment (according to computation made by the purchaser Clarke), which was to be paid in consideration of the prompt delivery of possession.

The first payment of 6581 dollars was not made on the 1st January 1838. By that time Robert Curtis repented him of the bargain; and he solicited Charles Curtis, the vendor, and his copurchaser Clarke, to discharge him from his share of the purchase. The other joint purchaser Fitzhugh was a minor; and he too was willing to abandon the purchase. Curtis on his part was willing to discharge them all from the contract; but Clarke insisted on it. Upon this, Clarke agreed to become the sole purchaser, and Charles Curtis agreed to sell the property to him alone, upon the terms on which it had before been sold to the three joint purchasers, with this variance, that Curtis agreed to give Clarke time until the 1st March 1838, to pay 4000 dollars in part of the first instalment of the purchase money, and further indulgence for the residue of that instalment, but what further indulgence was never expressly agreed; yet the purchase money to be paid by

562 \*Clarke, was to be exactly equivalent to that which the three joint purchasers under the first contract were to pay. The three bonds, executed by the three joint purchasers under the first agreement, were then cancelled: and a note of Curtis's second agreement with Clarke was subjoined to the note of the first, in these words—"Robert Curtis and Patrick Fitzhugh having withdrawn from the purchase of the above estate &c. I hereby oblige myself to execute a deed to the said William Clarke individually for said property, whenever he shall make such payments as we shall agree upon. January 22, 1838. (Signed) Charles Curtis." On the same day, Clarke paid Curtis 1000 dollars, to be credited against the first instalment of the purchase money, and he continued in sole possession of the whole property he had thus bought, which had been delivered to the joint purchasers under the first contract. But he did not, on the first March following, pay the residue of the sum which he had contracted to pay on that day: on the contrary, he refused to pay the same, unless Curtis would first make a conveyance of the property in which his wife should join so as to relinquish her possibility of dower in the land; and he insisted upon setting off against that instalment certain claims

he had or had procured an assignment of (it did not clearly appear which) against Curtis, amounting to 1124 dollars. Curtis refused to allow the set-off, or to make the conveyance as a condition precedent to the payment of the purchase money; insisting, that the claim of set-off was unjust, and that he had a right to retain the title as a security for the purchase money, until the whole should be paid.

It appeared, that of the whole property, real and personal, which was the subject of the contract, the value of the personal bore quite a large proportion to that of the real. And it also appeared, that the timber and fire wood upon the land, for which there was a ready market, constituted a large, probably the chief, ingredient of its value; that Clarke had, at the time this 563 suit was \*commenced, cut about 700 cords of fire wood, which, for the most part, was still on the land; that he had as many as ten labourers employed in cutting firewood, capable, if they continued at work, to fell far the greater part of the wood on the land.

In April 1838, the vendor Curtis exhibited his bill, setting forth his first agreement for the sale of the property to Robert Curtis, Fitzhugh and Clarke; the withdrawal of R. Curtis and Fitzhugh from the purchase with the consent of himself and of Clarke; the agreement for the sale of the whole subject to Clarke, on the same terms as to the amount of the purchase money, with the variation as to the time of payment of the first instalment; Clarke's actual possession of the whole property; and the points of difference that had arisen between them as to the execution of the agreement. And then alleging, that the land called Perton was chiefly valuable for the fire wood and timber upon it, and would become comparatively valueless, and almost unsaleable, when these should be cut and removed; that Clarke had already cut, and had many labourers then employed in cutting, the fire wood and timber, who might make such destruction thereof as would render the land worthless; and that he had no security for the purchase money but his lien on the property itself, which the cutting of the fire wood and timber was daily impairing; therefore, he prayed an injunction to restrain Clarke and Fitzhugh (who was Clarke's agent upon the land) from cutting more of the fire wood and timber, or removing that which he had already cut, or committing other waste on the land, till Clarke should comply with his contract for the purchase of the whole property, real and personal. And the bill moreover prayed a specific execution of the contract in all respects, and a decree for the sale of the whole property, real and personal, for the payment of the purchase money, unless Clarke should, within a reasonable time, 564 pay the 4000 dollars he had contracted to \*pay on the first of March 1838 with interest, and give adequate security for the payment of the residue of the purchase money.

The injunction was awarded.

Clarke, in his answer, insisted on a different construction of the written notes of the contract from that which Curtis in

his bill put upon them. And he gave a different account of those parts of the agreement which were not in writing, chiefly as to the credit which was to be allowed him, under the second contract, for the instalments of the purchase money, and the time from which the same were to bear interest, and the duty of Curtis to make the conveyance before any of the deferred payments were to be made; and a different account, too, of the points of dispute that had arisen between them when Curtis called on him for the first payment which was to be made in March 1838. He insisted, that he was entitled to a credit against the first instalment, for money paid to Curtis, and just claims against him which he had a right to set off, to the amount of 2124 dollars. And he denied, that he had cut, or intended to cut, more fire wood and timber, than a prudent owner would, or that he had thereby impaired or would impair the value of the land, or that he had committed any other waste upon it.

There was a great deal of evidence, and conflicting evidence, touching the questions of fact put in controversy by the pleadings; but this need not be particularly stated, since, in the opinion of this court as well as of the court below, the truth of the case was as above stated.

In October 1838, Curtis, with leave of the court, filed an amended bill, in which he said, that in his original bill, through an oversight of his counsel, he had omitted to pray an injunction to restrain Clarke, and Fitzhugh his agent, from selling or disposing of the personal chattels, which were on the land called Perton, and which  
565 constituted \*part, and a large part, of the subject he had contracted to sell. And then alleging, that he apprehended that Clarke and Fitzhugh intended speedily to sell the personal chattels, pocket the purchase money, and then abandon the land and the agreement, and leave him without the means of getting the purchase money, he prayed an injunction to restrain Clarke and Fitzhugh from selling, conveying away or otherwise disposing of the personal property.

An injunction was awarded accordingly.

Clarke, in his answer to the amended bill, said, that he had sold to messrs. Colton & Clarke (partners) all the stock of horses, mules, horned cattle (except two cows), sheep and hogs, at Perton, which had been sold and delivered him along with the land by Curtis, for the price of 2000 dollars, of which he had received full payment from Colton & Clarke; that the two cows had been before sold by Fitzhugh on his account, and the price thereof received; and that, as these personal chattels had been sold and delivered to him by Curtis, and as he had paid Curtis above 2000 dollars, which was the full value of this part of the property, he had a right to sell and dispose of the same at his pleasure.

Fitzhugh answered, that he had no interest whatever in the subject in controversy: that he had held the personal property at Perton as the agent of Clarke, from the time of the sale and delivery thereof by Curtis to Clarke, until Clarke's sale of the stock of horses &c. to Colton & Clarke, and

since the last mentioned sale, he had held, and yet held, the stock &c. as the agent of Colton & Clarke, subject to their control. He had, as agent for Clarke, before his sale to Colton & Clarke, sold two cows.

There was some evidence to shew, that Fitzhugh had an interest in Clarke's purchase; namely, that there was an agreement between Clarke and him, that he should be let in as joint purchaser with Clarke for one third of the subject, when he should attain to full age: but Fitzhugh's  
566 \*deposition was taken, and he said there was no such agreement: and, upon the whole, the fact of Fitzhugh's interest was left uncertain.

It appeared, by documents exhibited with Clarke's answer, that his sale of the stock of horses &c. to Colton & Clarke, was made on the 7th August 1838, that is, subsequent to the filing of Curtis's original bill. The stock of horses &c. yet remained at Perton, in the care of Fitzhugh, as the agent of Colton & Clarke; and Fitzhugh had under his care, as agent of Clarke, all the other personal property at Perton, as well as that farm itself.

At October term 1838, the defendants moved the court to dissolve the injunctions; which motion was overruled; and leave was given to Curtis to amend and make new parties.

Curtis filed a supplemental bill making Colton & Clarke parties, with a view to charge the stock of horses &c. which they had bought of Clarke, with the purchase money due to him. Colton & Clarke never answered this bill, nor did it appear that any process was sued out to convert them before the court.

In the sequel, evidence was adduced by Clarke to prove that he was in good credit, and held property sufficient, besides that which he had bought of Curtis, to pay him the whole purchase money; and that this was made known to Curtis, upon inquiry made by a friend at his instance, in September 1837.

Of the items of set off to the amount of 1124 dollars, which he claimed against the first instalment, there was no distinct proof; only enough appeared to shew that some of them might be just.

At April term 1839, the court, on motion of the plaintiff, ordered that all the personal property which had been sold by him to Clarke and was in his possession, and all the wood, which had been cut down at Perton since Clarke had possession, and which had not been removed, should be sold,  
567 by a commissioner appointed \*for the purpose, at auction, on a credit till the 1st October following; with directions to the commissioner, to take bonds and good security, for the proceeds, from the purchasers, and hold the same subject to the future order of the court.

At October term 1839, the cause came on for hearing by consent of parties (as the record imported) both upon the bills against Clarke and Fitzhugh, and the supplemental bill against Colton & Clarke, the answers to the former bills, replications thereto, exhibits, depositions, and the report of the commissioner under the order of April 1839—Whereupon the court declared, that ac-

cording to the agreement between Curtis and Clarke, the vendor retained a lien upon all the property sold, for the purchase money thereof, and Colton & Clarke, if purchasers at all of any part of the subject, were purchasers pendente lite, and therefore their purchase could not deprive Curtis of his lien: and that of the credits claimed by Clarke, he had only shewn himself entitled to his payment of 1000 dollars on the 22nd January 1838, which Curtis admitted; and therefore it was unnecessary to refer the case to a commissioner to ascertain the amount of the purchase money remaining due; the court adopting a statement made at the bar,\* shewing that the true amount thereof was 5604 dollars 83 cents due the 22nd January 1838, and 6500 dollars due the 1st June 1839. Therefore, the court decreed, that the defendant Clarke should pay Curtis the sum of 12104 dollars 83 cents with interest on 5604 dollars 83 cents part thereof from the 22nd January 1838, and on 6500 dollars the residue thereof from the 1st June 1839—And that, unless Clarke should pay the same to Curtis, on or before the 1st January ensuing, two commissioners, appointed for the purpose, should sell the farm called Perton, at public auction, on the premises, for cash, having given eight weeks previous notice by public advertisement, of the time, place and term of sale: that the commissioners, upon payment of the purchase money to them, should convey Perton to the purchaser or purchasers; and pay Curtis the money before decreed to him, or so much thereof as they should receive upon their sale; and if any balance of the proceeds should then remain in their hands, they should pay it to Clarke: and that the commissioners should make report of their proceedings to the court. And there being no exception to the report of the commissioner of the sales of the personal property under the former order of the court, that report was confirmed; and the commissioner was ordered to collect the moneys due on the bonds taken for the proceeds of sales of the personal property, in his report mentioned, and make further report of his proceedings.

Upon the petition of the defendants, Clarke and Fitzhugh, this court allowed them an appeal from the decree.

Daniel, for the appellants. 1. The bill

\*The following was the statement to which the decree referred—

"Amount debt due 1st January 1838....."	\$ 6,581.00
"Interest on \$6581 to 22nd January 1838....."	23.83
	\$ 6,604.83
"Received 22nd January 1838 ....."	1,000.00
	\$ 5,604.83
"Amount due 1st June 1839....."	6,500.00
	\$12,104.83."

It will be observed, that the court considered Clarke chargeable with interest on the first instalment, from the 1st January 1838, because under the first contract that instalment was to be paid on that day, and because under the second contract, Clarke was to pay the same price which he and his associates were to pay under the first agreement.—Note in Original Edition.

should have been dismissed as to Fitzhugh: he declared, both in his answer and in his deposition, that he had no interest in the subject in controversy, and there was no proof which ascertained that he had.

569 2. The decree \*was premature as to Colton & Clarke. They had not appeared; nor does the record shew, that any process had been served upon them, or even sued out, to convent them before the court. Even supposing that they are to be regarded as pendente lite purchasers, and that therefore it was unnecessary to make them parties, yet, as they were in fact made parties, they ought at least to have been served with process, in order to give them an opportunity of defending their interests: and they had a right to be heard on the main question in the cause; namely, whether Curtis, the vendor, had any lien on the personal chattels which he had sold and actually delivered to Clarke; much more, whether he had any such lien as overreached their rights as purchasers from Clarke for valuable consideration. 3. As there was no reason to doubt that Clarke's means were adequate to pay the whole purchase money, the injunctions to restrain him from taking the full benefit of the property he had bought were unnecessary and oppressive: they ought then to have been dissolved: indeed, they ought never to have been awarded. It was clearly proved, that Clarke had sufficient and ample means to pay the purchase money, and that this was made known to Curtis as early as September 1837; which rendered his application for the injunctions the more unreasonable and vexatious. 4. The bill, so far as it sought specific execution of the contract in respect to the personal chattels, ought not to have been entertained at all. In general, a bill will not lie for specific performance of a contract for chattels; nor are such bills ever entertained, unless the chattels have some peculiar value, or unless it appear, that the party cannot be compensated in damages for the breach of the contract, and nothing can answer the justice of the case but a performance in specie. 2 Tuck. Comm. 455; Pusey v. Pusey, 1 Vern. 273; Buxton v. Lister, 3 Atk. 383; Adderley v. Dixon, 1 Sim. & Stu. 607; 1 Cond.

570 \*Eng. Ch. Rep. 311. Here, the vendor might, in an action of assumpsit, have recovered the full value of the chattels he had sold; and, certainly, they could not have had any peculiar value in the estimation of either party, especially of the vendor, who had sold them, and who asked that they should be sold again, and procured an order for the sale of them. Indeed, the personal chattels having been actually delivered to the vendee, the agreement as to them was no longer executory; it was an executed contract. 5. The decree supposes that the vendor had a lien on the personal chattels for the purchase money. But he had no lien on that part of the subject: none, certainly, by express contract: none impliable from his retention of the title; for, though he had not executed a bill of sale of the chattels, he had delivered possession of them to the purchaser, and thereby parted with the title, and vested the absolute property in the purchaser, as



effectually as if he had conveyed it by deed. To allow such a lien may be of mischievous consequence; for possession is the great indicium of title in personals; and the world deals, and has a right to deal, with the holder of it, upon the faith that he owns the absolute property, unaffected by any secret, much more an implied, trust. Thus, Colton & Clarke purchased of Clarke a large part of the personal property which Curtis had sold him and put into his possession; and purchased, obviously, without any doubt of his clear title; for they actually paid him the price. 6. If the vendor had an equitable lien on the chattels, and the court might on the hearing have justly ordered a sale of them, it was wrong to make such an order on motion. Opportunity should have been given to the vendee to anticipate and prevent the sale, by paying the value of them, and so to have retained the power of fulfilling his contract of sale with Colton & Clarke. 7. The decree is erroneous in ordering Clarke to pay the whole purchase money remaining due, without providing that Curtis should first make him a conveyance of the title, or at least tender a perfect conveyance. The conveyance by the vendor was a condition precedent to the payment of the purchase money: for it clearly appears, that the only variation, intended by the parties, of the terms of the sale to Clarke from those of the previous sale to him and his two associates, was in the time given for paying the first instalment, which had been appointed not by the written but by a verbal agreement; and the first contract expressly provided, that the purchase money should be paid when the vendor should have made to the purchasers a deed of the land, and a bill of sale of the personal effects, which instruments should be executed by him. And if the conveyance by the vendor was not a condition precedent to his right to demand payment of the purchase money, yet the decree should have provided, that the conveyance should be made and delivered contemporarily with the payment, instead of positively decreeing that the purchaser should pay the whole money without any assurance of the title. But the decree does not even provide that Curtis shall convey the title of the land to the purchasers at the commissioners' sale, but only that the commissioners shall convey the title: now, the title is in him, not in them, and it can only pass by his deed, in which his wife ought to join upon regular privy examination. The want of such a conveyance may materially affect the price of the property in the market. 8. The decree is erroneous in charging Clarke with interest on the first instalment from the 1st January 1838. He ought to have been charged with interest only from the day appointed for the payment of that instalment by the second agreement, which is the agreement to be enforced against him. The decree is, in effect, a specific execution of the first agreement, which had been canceled. Lastly, the decree is erroneous in excluding 571. \*the set offs, claimed by Clarke against the purchase money, to the amount of 1124 dollars, without a regular inquiry into the justice of them; and yet

more clearly erroneous in not giving Clarke credit for the proceeds of sales of the personal property, which had been sold at Curtis's instance, and he was therefore bound to take the proceeds as part payment. An account should have been directed to ascertain those credits.

Robinson, for the appellee. 1. The evidence renders it probable, that Fitzhugh, notwithstanding his disclaimer of interest in the controversy, was to have an interest in Clarke's purchase; but if he had no such interest, yet he was Clarke's agent, having under his care both the land and the personal property; the active agent in cutting the fire wood on the land, and disposing of the personal chattels. If Curtis had a right to ask the interference of the court to prevent the waste of the real property, and the dispersion of the personal, Fitzhugh was properly made a party: he was peculiarly the party on whom the preventive justice of the court was to act. 2. As to Colton & Clarke, it is doubtful whether Clarke's sale to them was a real transaction, or only a colourable sale to disappoint Curtis of his claim to subject that part of the property to the debts due to him: for there was no visible change of the possession: the stock remained on Clarke's land, under the care and control of the same person who was Clarke's agent. But suppose the sale to Colton & Clarke a real sale, they were pendente lite purchasers; therefore, there was no necessity to make them parties; and if the plaintiff need not have made them parties, there was no necessity to convent them before the court to hear the decree, which bound them whether they were before the court or not. Besides, the cause was heard by consent of parties, not only upon the bills against Clarke and Fitzhugh, but on the bill against Colton & Clarke. Neither 573 \*have they appealed from the decree.

3. The propriety of the injunctions depends on the other questions, whether Curtis was entitled to specific execution? and whether he had a lien on the real and on the personal subject sold, for the purchase money? If he had, he surely had a right to ask the interference of the court to prevent the purchaser, and his agent, from denuding the land of the wood which constituted the chief ingredient of its value, and so impairing the security which the lien on the land afforded him, and from selling and dispersing the personal property, and thereby destroying the security which it afforded. This lien was the only security the vendor had. In this view, it is immaterial whether Clarke had, or had not, ample means, independently of the property he had bought of Curtis, to pay the purchase money: suppose he had, that did not give him a right to impair, much less to destroy, the security which equity gave to the vendor. 4. The vendor had a right to specific execution of the whole contract. That he had a right to specific execution, so far as the agreement was for the sale and purchase of the land, has not been, and cannot be, questioned. But the agreement was for the sale and purchase of the land and the personal chattels upon it, for a gross sum of 1300 dollars, without dis-



criminating what proportion of that sum was the price to be paid for the real, and what for the personal part of the subject. Neither the party, nor the court, could make such discrimination. The vendor was obliged to ask specific execution of the whole contract, or to forego specific execution altogether; and the court must decree specific execution of the whole contract, or deny it as to the land. Upon authority as well as on principle, the bill, and the decree, for specific execution of the whole contract, was proper and just. *Hook v. Ross*, 1 Hen. & Munf. 310; *Dakin v. Cope*, 2 Russ. 170; 3 Cond. Eng. Ch. Rep. 66. But

if this were an agreement for the sale of personal chattels \*only, the authorities are clear, that a bill for specific execution of such an agreement may be maintained by either vendor or purchaser, provided the agreement is to be completed by subsequent acts of the parties. *Buxton v. Lister*, cited by Mr. Daniel, is itself an authority in point to this purpose. *Wright v. Bell*, Daniel's Exch. Ca. 95; *Doloret v. Rothschild*, 1 Sim. & Stu. 590; 1 Cond. Eng. Chan. Rep. 302. Here, the plain intent was, that the contract was to be completed by subsequent acts of the parties; the purchaser was to pay the purchase money, and the vendor was to convey the subject by deed. In *Adderley v. Dixon*, cited by Mr. Daniel, the court after shewing, that in contracts for chattel interests which are not to be immediately executed, a bill for specific execution will lie for the purchaser, entertained a bill for the execution of such an agreement, on behalf of the vendor; saying, it had been settled by repeated decision, that the remedy in equity must be mutual, and that where a bill will lie for the purchaser, it will also lie for the vendor. In the present case, the delivery of possession of the personal property, was not, because it plainly was not intended by the parties to be, an execution of the contract as to that part of the subject. 5. Then, as to the lien of the vendor on the personal part of the property: this is not a question between the vendor and the creditors of the vendee or fair purchasers from him, but between the vendor and the vendee himself; for the pendente lite purchasers from him can have no better right than he himself, to hold the property exempt from the lien, if it exists. As between the vendor and vendee, the lien did exist. The plain intent of Curtis's contract of sale to Clarke was, that Curtis should retain the title of the whole property, personal as well as real, till the purchase money should be paid; in other words, that the title should be held as security for the payment. There was nothing to prevent the parties

from making \*such an agreement; and if such a lien was expressly reserved, or plainly results from the contract, there is nothing which should prevent a court of equity from giving it full effect, in regard to the personal as well as the real subject. *Williams v. Price*, 5 Munf. 507; *Ld. Seaforth's case*, 19 Ves. 507. Curtis's delivery of possession of the personal property was not absolute: it had reference to the agreement, and its effect is to be measured by the terms and intent of the

agreement. A vendor of goods, who has actually delivered them to the vendee, yet upon condition that he pay the price, retains, as against the vendee, a lien on the goods for the price, which both courts of law and courts of equity will enforce; each, however, in its own way. At law, the vendor may maintain trover, detinue, or replevin; *Ervine v. Dotton*, 6 Munf. 231; *D'Wolf v. Babbett*, 4 Mason 289; *Palmer v. Hand*, 13 Johns. Rep. 434; *Ward v. Shaw*, 7 Wend. 404; *Hussey v. Thornton*, 4 Mass. Rep. 405; *Marston v. Baldwin*, 17 Id. 606; *Barrett v. Pritchard*, 2 Pick. 512; *Whitwell v. Vincent*, 4 Id. 449; *Reeves v. Harris*, 1 Bailey 563; *Copland v. Bosquet*, 4 Wash. C. C. R. 588; *Barrow v. Coles*, 3 Camp. 92; *Townley v. Wright*, 4 Adolp. & Ell. 58; 31 Eng. C. L. Rep. 23. Equity lays hold of the goods themselves, or the proceeds thereof, wherever it finds them, and restores or applies them to the payment of the price; varying the mode of relief, according to the circumstances of the case. *Haggerty v. Palmer*, 6 Johns. Ch. Rep. 437; *Keeler v. Field*, 1 Paige 312. In our case, the court has properly adapted the relief to the case. 6. Whether it was regular or not, to order the sale of the personal property on motion, is immaterial now; the sale was in fact made; it was not objected to at the hearing; and the decree holds the proceeds subject to future disposition. 7. Curtis's first contract to sell the property to Clarke and his two associates, fairly construed with reference to the other part of the transaction,

did not import that the conveyance should \*first be made by the vendor, and that the purchase money should thereupon be paid by the vendees: such a construction would be incompatible with the arrangement by which a certain time was appointed for the payment of the purchase money by instalments, whereas no time was appointed for making the conveyance. But the second agreement, for the sale to Clarke, is explicit, that Curtis should execute a deed to Clarke for the property, whenever he should make such payments as they agree upon. As to the objection, that the decree does not require that Curtis shall make the conveyance to Clarke upon his payment of the purchase money, or, in case of sale by the commissioners, to the purchasers at such sale, the decree is interlocutory, and may be corrected in that particular. 8. The decree is clearly right in charging Clarke with interest on the first instalment from the 1st January 1838, when that instalment was to be paid under the first agreement. Clarke was, by the second agreement, to pay exactly the same price which by the first agreement he and his associate purchasers were to pay; and there was no other way to give the vendor such equal amount of purchase money, but by charging Clarke with interest on the first instalment from the time when the original joint purchasers were to pay it. Then, lastly, as to the credits to which Clarke was entitled; his claim to set off for 1124 dollars, was a mere question of evidence; and the court rightly held that there was no proof of the set off. His claim to a credit for the proceeds of sales of the personal subject under the previous order, seems not to

have been asserted at the hearing; and the court did not dispose of the money. The claim is asserted here for the first time; and this court may, if it think proper, dispose of it. According to Clarke's pretensions, a great part of that money belongs to Colton & Clarke.

577 \*TUCKER, P. Various objections have been made to this decree, of which I shall proceed to dispose as succinctly as may be.

1. On the part of Fitzhugh, it is contended that he was originally improperly made a party, and that the bill as to him ought to have been dismissed. This objection is premature, as there is not yet a final decree in the cause. Until such decree be rendered, the plaintiff may go on with his proofs, and peradventure establish some ground of charge against him. In the present state of the record, I am by no means satisfied that he was improperly made a party; for he seems to have been an active agent in cutting timber and wasting the premises; and he may, perhaps, be made chargeable for the eloining of the personal property between the execution of the first and second contracts. The uncertainty as to his age does not permit us to say how far he may or may not be bound.

2. It is objected, "that no specific execution of a sale of personal property can be enforced; and that no lien on the personal property for the purchase money exists, especially when money has been paid by the purchaser, the possession delivered to him, and he is solvent." As to the first: the contract being for the sale of real and personal estate together for a lumping price, the specific execution cannot be decreed as to the real estate alone; and as there is clearly jurisdiction as to that, it must carry with it jurisdiction as to the personalty also. As to the second point: it is unimportant whether or not an implied lien exists, for in this case there is ample evidence that Clarke was not to have a title until the purchase money was paid. This is obvious, both under the first and second contract. By the first contract, indeed, which is very loosely worded, it is said, that the price was to be paid "when a deed should be made." But the parties certainly did not

design this as fixing the time of payment: For the \*vendees would not have been willing to pay up the cash the day after the contract, if a deed had then been tendered. Both parties contemplated a credit, and bonds were accordingly given for two instalments, payable in January 1838, and June 1839. Here then was a definite time appointed for payment, and no fixed time for making the deed; and where that is the case, the latter is not a precedent condition to the former. *Bailey v. Clay*, 4 Rand. 346. Besides it is clear, that by this contract, the delivery of the possession of the personal property, was not designed to operate to convey the title, as it is provided expressly, that it was to be conveyed by bill of sale. Under the second contract the retention of title is plain. Curtis agreed to execute a deed for the property to Clarke "whenever he should make the payments they should agree on."

He was not then to have the property till he paid the money. A lien, therefore, clearly existed, and as to Clarke the sale was properly directed.

3. It is objected, that Colton & Clarke have purchased the property, and the plaintiff has not proceeded regularly as to them. That is nothing to Clarke; it does no injury to him. He violated good faith by attempting to sell to Colton & Clarke, when no bill of sale had been made to him as the contract provided for: I say attempting; for it may admit of question, whether, as the goods were still left at Perton, a constructive change of possession should be implied, against the rights of Curtis, from the mere order to deliver them.

4. It is objected, that the court has refused Clarke credit beyond his payment of 1000 dollars. I think it properly did so, upon the evidence in the case: yet there was enough in the evidence to justify sending the account to a commissioner. The failure to direct an account was therefore an error. So also was the omission to apply the proceeds of sale of the personalty to the discharge of the purchase money pro tanto.

579 \*There is a further error in directing a sale of the lands without having required a proper deed to be previously executed by Curtis and wife, since a sale under such circumstances might have led to a sacrifice.

I think too, the sale should have been for only one half cash and the other half on a credit of twelve months. And the commissioners should have been directed to report their proceedings to the court for its confirmation, instead of paying over the purchase money without the previous ratification of the sale.

For these errors, the decree must be reversed and the cause sent back for further proceedings, according to the principles here declared.

I have omitted to observe, that the decree in this case, though apparently founded upon the original, instead of the substituted contract, is substantially correct; since the price was identical in both, and though the time of paying the first instalment was varied, no change was made as to the time from which it was to bear interest. The amount due therefore would be the same under both.

BROOKE, CABELL and ALLEN, J., concurred.

STANARD, J. This case is, in my opinion, a fit one for relief in equity. The circumstance that the contract sought to be carried into specific execution, embraced personal as well as real estate, does not preclude the court of equity from giving such relief. The principle on which that jurisdiction is exercised, does not depend on the subject of the contract being real or personal, but on the adequacy of the remedy at law to give full and effectual relief. When the subject of the contract is real estate, generally if not universally, such full and effectual relief can be obtained in a court of equity only: whereas, when the subject is personalty, damages at law, in general, will afford the party injured adequate \*redress; but when this is

not so, equity has jurisdiction to enforce specific execution of a contract for personalty, on the same principle on which the exercise of such jurisdiction when the subject of the contract is realty, is vindicated. Where (as in the present case) the subject of the contract of sale is mixed of real and personal estate, and a gross price to be paid, the jurisdiction is free from all reasonable doubt. Had the purchaser brought his suit for specific performance, there could not have been a doubt of the jurisdiction: for he, certainly, had not an adequate remedy at law. It is true he had possession of the personalty; but on that no separate value had been fixed by the parties. They, probably, made very different estimates of the value of it; and the consequence would be, if he were driven to a suit at law for damages for the failure of the vendor to convey, that he would be exposed to a claim for the estimated profits of the land which he had received and held as his own, and, in effect, made chargeable with an estimated value of the personal property, which might be equally at variance with the estimates of both contracting parties. Now, no principle is better settled than that the right to call for specific execution of a contract is reciprocal; when one of the contracting parties may call for specific execution, the other may too. In this case, the vendor's right to the aid of the court for specific execution, is vindicated by the further consideration that the circumstances of the case made it peculiarly fit for that jurisdiction. It is the case of a contract for land, of which there had been part performance, by surrender of possession, and payment of a portion of the purchase money; and where, in respect to the separate contract of Clarke, the purchaser in possession, there was no note in writing signed by him; and, in respect to the first contract, the obligation of the first three purchasers had been cancelled, and no remedy remained for the

581 vendor against those parties \*as obligors. In such a case, the remedy at law was not only inadequate, but at best precarious and doubtful.

The vendor having properly resorted to equity for relief, what is the extent of his claim? The measure of Clarke's responsibility as to amount, is the purchase money which was to be paid under the first contract; namely, 6581 dollars with interest from the 1st January 1838, and 6500 dollars with interest from the 1st June 1839. That Curtis was to receive from Clarke, under the second contract, as much as he was entitled to claim under the first contract, and that the only variation from the first contract was a change, not in the amount of purchase money but in the time of making the first payment, is satisfactorily established by the parol evidence, by the written engagement which Clarke took from Curtis to convey the property to him when the payments should be made, and the fact distinctly stated in Clarke's answer, that Curtis was willing to cancel the first contract altogether, and Clarke insisted on it. It is not to be credited, that Curtis would be willing to cancel a contract on which Clarke and two others were bound to him, in order

that he might make a sale to Clarke alone for a smaller price, while Clarke was insisting on the contract by which he and two others were bound for a larger price. The decree is clearly right in this particular.

The opinion I have expressed places the right of the vendor to relief in equity on a foundation, of which his retention of a lien on the personal property for the purchase money, forms no part. I am strongly inclined to think, that no such lien remained: that the delivery of the personal property, and the execution of the bonds by the purchasers under the first contract, passed the full property in that part of the subject to them, without any further act, and no lien upon it for the purchase money existed after the title in and possession of it

582 had \*passed to the purchasers. The new contract made no change in this respect. It only converted the joint title in and possession of the personalty, before held by Clarke in common with the other original joint purchasers, into the sole title and possession of Clarke, and the joint responsibility of the original joint purchasers into a sole responsibility of him alone. But upon this point, my brethren hold a different opinion, and I readily acquiesce. As to all the other points, I concur with them.

The decree of this court declared, that the appellee Curtis properly sought and was entitled to relief in a court of equity, and that the measure of his claim, under the contract by which the appellant Clarke was substituted as sole purchaser, in place of him and his associates in the original contract, was the amount stipulated to be paid by the original contract, viz: the sum of 6581 dollars, with interest from the 1st January 1838, and 6500 dollars, payable on the 1st June 1839. That the whole subject purchased, real and personal, remained in the hands of the appellant Clarke, chargeable with the purchase money; and though the precise date at which a part of the first mentioned sum of 6581 dollars was payable, is not ascertained, yet that part with interest thereon from the 1st January 1838, together with the rest of the purchase money, was due and payable at least as early as 1st June 1839. That the court below erred in decreeing the sale of the personal property, on the mere motion of the appellee, before the case was heard and his title to relief adjudicated, and before the amount of the lien thereon had been ascertained by a liquidation of the appellee's claim; and if that decree had not been executed, and the property sold under it, and in all probability dispersed, it would be proper to reverse

that order, annul the sale under it,

583 and order \*the restitution of the property; but as such a measure would afford the appellant Clarke, or those entitled to the property, no adequate redress, the appellee should be held accountable for the amount of the sales, he taking the benefit thereof, and his accountability therefor credited, whether the proceeds of the sales be collected or not, against the purchase money due from the appellant Clarke on the contract, unless in the further progress of the case, the title of Colton & Clarke to the property sold under the said order should

be asserted and sustained. That before the court should have decreed the payment of the purchase money, the just balance thereof should have been liquidated, by an account in which the appellant Clarke should have credit (on the condition above expressed) for the amount of the sales of the personal property under the said order, and such other discounts, payments or set offs, as he might shew himself entitled to. And that when the balance due of the purchase money should have been so ascertained, the court should have decreed, that the appellee should prepare and tender a conveyance with general warranty from himself and wife to the appellant Clarke; and if he, on such tender, should pay the balance of the purchase money, then the conveyance should be delivered; and if he should not pay it, then the conveyance should be deposited with the clerk of the court, to be delivered to Clarke, should he pay the said balance of purchase money before the sale of the land embraced by the contract, or to be held for the use of the purchaser under the decree of the court; and on such default of payment by the appellant Clarke on the tender of the deed, it should be further decreed, that the said appellant pay to the appellee the balance ascertained as aforesaid, and that the land embraced by the contract should be sold on reasonable notice, on the terms that the purchaser pay one half of the purchase money in cash, 584 and the other in \*twelve months, the title to be retained as a security therefor, and the land subject to re-sale under the further decree of the court, to raise the amount of the credit instalment in default of the payment thereof. Therefore, the decree, so far as it conflicted with the principles here declared, was reversed, and in all things else affirmed; and the cause was remanded to the circuit superior court to be further proceeded in according to the principles here declared.

### Wynn v. Wyatt's Adm'x.

February, 1841. Richmond.

(Absent BROOKE and ALLEN, J.)

**Appellate Practice—Rehearing—Service of Process\*—Case at Bar.**—After this court had reversed a judgment and remanded case to the court below for further proceedings there, and certificate of that judgment had been sent by the clerk to the court below, a rehearing was, on motion of defendant in error, directed here; whereupon this court revoked the certificate of its former judgment, and directed court below to surcease proceedings till further order: and plaintiff in error being now a non-resident, ordered, that service of this order on the counsel who appeared for him on the former argument, should be sufficient service.

\***Court of Appeals—Decree—Finality of.**—In *Reid v. Strider*, 7 Gratt. 88 (see also, *foot-note*), the case of *Bank of Va. v. Craig*, 6 Leigh 399, where the court overruled a motion for a rehearing, on the ground, that it could not set aside its decree entered at a former term, whether it was prematurely decided, or whether it was objectionable on the merits or not, was approved. The court further said the decision is not in conflict with *Wynn v. Wyatt*, 11 Leigh 584. It is true in this case a judgment of this

### Pleading and Practice—Defective Process—Waiver,†—

Plaintiff having sued out a summons against defendant to answer her action, and judgment being entered by default; it does not expressly appear of record, that defendant was a person against whom the summons was the proper process under the statute 1 Rev. Code, ch. 128, § 68, but defendant appeared in term to have proceedings at rules corrected, and did not object to the summons as improper process: HELD, the court will presume it was the proper process. But

**Same—Same—Failure to Appear—Quere.**—Whether, if defendant had never appeared for any purpose, the summons could be presumed proper process?

**Same—Summons—Failure to Make Proper Return—Right to Sue Out Attachment.**—Upon a summons sued out against defendant to answer plaintiff's action, the officer returns "not found, and copy left &c." without shewing when the copy was left: HELD, upon that return it did not appear that the summons was duly served; and that

585 \*plaintiff should then have sued out alias summons, and not an attachment against defendant's goods to compel appearance, upon the construction of the statute, *Ibid.* § 61, 68.

### Same—Same—Irregular—Special Appearance—Effect,‡

—Plaintiff sues out a summons to defendant to answer her action; the return on the process shews it was not duly served; then an attachment is sued against defendant's goods to compel appearance, which being returned executed, an office judgment is entered at rules; defendant in term appears and moves that the attachment be quashed as irregular process; the court accordingly quashed the attachment, and sends case back to the rules for further proceedings there: HELD, the defendant's appearance in term to have the irregular process quashed, was not an ap-

court of one term was set aside at its next and a rehearing directed; but as is suggested by the reporter the motion was made at the previous term and held under advisement. See also, citing the principal case on this question, *Hall v. Bank*, 15 W. Va. 380. See *Glass v. Baker*, 6 Munf. 212.

### †Pleading and Practice—Defective Process—Waiver.

—For the proposition that, where the defendant appears and pleads to the action he waives defects in the summons and return, the principal case is cited and approved in *Mahany v. Kephart*, 15 W. Va. 618; *foot-note* to *Hickam v. Larkey*, 6 Gratt. 210. See also, *Lockridge v. Lockridge*, 1 Va. Dec. 61; *Pulliam v. Aler*, 15 Gratt. 54, and *note*.

‡**Same—Same—Special Appearance.**—It is well settled that an appearance on a motion to quash an attachment, because of irregular execution of process is not an appearance to the action whereby its alleged defects are waived. *Petty v. Frick Co.*, 86 Va. 508, 10 S. E. Rep. 886, citing *Daniel on Attachments*, sec. 183; *Wynn v. Wyatt*, 11 Leigh 584; *Harkness v. Hyde*, 98 U. S. 476. See also, citing the principal case for this proposition, *Pulliam v. Aler*, 15 Gratt. 62; *Hickam v. Larkey*, 6 Gratt. 212; *foot-note* to *Harvey v. Skipwith*, 16 Gratt. 410; *Chapman v. Maitland*, 22 W. Va. 346.

**Same—Same—Effect.**—In *Capehart v. Cunningham*, 12 W. Va. 758, it is said: "Under the principles laid down in *Wynn v. Wyatt*, 11 Leigh 584, the defendant was under no obligation to appear to the action, since process was not served according to law; and the entering of office judgment at rules, and directing the writ enquiry against him by the clerk, upon the supposed default of appearance, were without warrant, and were therefore clerical errors."

See also, citing the principal case, *Fowler v. Lewis*, 36 W. Va. 126, 14 S. E. Rep. 451.

pearance to the action which dispensed with further and proper process.

In assumpsit by Wyatt's administratrix against Wynn, in the circuit superior court of Dinwiddie, a summons\* was issued, directed to the coroner of the county, commanding him to summon the defendant to appear on the return day and answer the plea, dated the 11th May 1835, and returnable the next rule day, namely, the first Monday in June.† The coroner's return was, "Not \*found, and a copy delivered at the defendant's house to his son of lawful age," without stating when the copy was so delivered, or that the son was informed of the purport of the process. At June rules, an attachment‡ was sued out, directed to the coroner, to attach the defendant's goods to satisfy the plaintiff's demand, returnable to the July rules; which was returned, "executed on a silver candlestick." At July rules, the plaintiff filed her declaration; and the defendant not appearing to replevy the attached effects, a conditional judgment for the plaintiff was entered in the office, unless the defendant should appear and plead at the August rules. The defendant still failing to appear at the August rules, the conditional judgment was then confirmed, and a writ of inquiry of damages awarded to be executed at the next term. But at the next term in September 1835, on the defendant's motion, the attachment was quashed, the proceedings consequent upon

it set aside, and the case sent back to the rules for further proceedings there.

The plaintiff, at October rules, sued out an alias summons, returnable the next rule day; on which the coroner returned, "not found, and a copy left on the side board in the defendant's dwelling house on Friday the 30th October;" so that the copy of the process was not left ten days before the return day, as the statute in such cases requires. Yet at November rules, the defendant not appearing, a conditional judgment was entered for the plaintiff against him, unless he should appear and plead at the next rules; and at December rules, the defendant still failing to appear, the conditional judgment was confirmed, and a writ of inquiry of damages awarded. The writ of inquiry was executed at April term 1836; the jury assessed the plaintiff's damages to 277 dollars with interest &c. and the court gave her judgment accordingly. The defendant Wynn applied to this court for a supersedeas to the judgment; which was allowed.

The cause was first argued in December 1839, by Spooner for the plaintiff in error, and Allison for the defendant; and the court then reversed the judgment, and remanded the case to the circuit superior court to be there further proceeded in; but in March 1840, on the motion of C. and G. N. Johnson for the defendant in error, the court set aside the judgment of reversal, and directed another argument. In the mean time, however, the certificate of the judgment of reversal had been sent by the clerk of this court to the circuit superior court, and thus the case was now in that court. Whereupon this court made the following order—"On the motion of the defendant in error by her counsel, and it appearing to the court, that the judgment of reversal rendered in this court in December 1839, was, by a subsequent order made in March last, set aside, for the purpose of having a rehearing of the whole matter in the cause, and it further appearing that before the last recited order was made, the transcript of the judgment aforesaid was improvidently\* certified to the said circuit superior court, and the cause remitted to the said court, it is ordered, that the same be recalled and revoked, and it is further ordered, that the said circuit superior court from all further proceedings in the said cause under the judgment aforesaid do altogether surcease, \*until the further order of this court. And it further appearing to the court, that the plaintiff in error is not an inhabitant of this state, and that at the former hearing he was represented by counsel, it is further ordered, that a service of this order upon his said counsel shall be deemed and taken to be a sufficient service."

Upon the second argument, Spooner, for the plaintiff in error, objected, 1. That it nowise appeared by the record, that the summons was the proper process in the

\*It did not appear by the record, why the plaintiff proceeded by summons instead of suing out a capias ad respondendum, or why the process was directed to the coroner instead of the sheriff. But the reason no doubt was, that the defendant was the sheriff. The coroner was, therefore, the proper officer to serve the process, by the statute 1 Rev. Code, ch. 81, p. 292-3. And by another statute. Id. ch. 128, § 68, p. 506, it is provided, that "In all actions or suits which may be commenced against the governor of the commonwealth, any member of the privy council, any of the judges of the superior courts, or the sheriff of any county during his continuance in office, instead of the ordinary process, a summons shall be directed to the sheriff, or other proper officer, recting the cause of action, and commanding him to summon such defendant to appear and answer the same on the proper return day; and if such defendant, being summoned, or after a copy shall be left at his usual place of abode, ten days before the return day, shall not appear to answer the same, the court shall proceed against such defendant in the same manner as if he had been taken upon a capias ad respondendum.—Note in Original Edition.

†The rules are held in the clerk's office on the first Monday in every month: 1 Rev. Code, ch. 128, § 69.—Note in Original Edition.

‡The plaintiff, apparently, considered the coroner's return assimply a return of non est inventus, and therefore sued out the attachment against the defendant's goods to compel an appearance, instead of an alias summons, supposing she had the option to do so under the statute 1 Rev. Code, ch. 128, § 61. But a return of non est inventus is not a due return of a summons of this kind; for if the defendant cannot be found, the proper service of such process is to leave a copy at the defendant's dwelling ten days before the return day. Id. § 68, which see in the preceding note.—Note in Original Edition.

\*The reporter supposes, that though the rehearing was not allowed till March 1840, the motion for it had been made at the previous term, and held under advisement.—Note in Original Edition.

action; in other words, that Wynn, the defendant below, was a person against whom the statute authorized the proceeding by summons; and if the summons was illegal, the defendant was not bound to appear upon it; and the proceedings should, therefore, be reversed from the beginning. 2. That the proceedings at June rules 1835, upon the return of the first summons, were altogether irregular; for the coroner's return thereupon did not shew, that the summons was served ten days before the return day, or indeed that it was duly served at all according to the provisions of the statute; and instead of an attachment against the defendant for failing to appear, an alias summons should have been sued out.\* The attachment was therefore properly quashed. 3. That the subsequent proceedings at the rules were also irregular; because upon the alias summons then issued, the coroner's return shewed distinctly that the process was not served ten days before the return day: the copy of it was left at the defendant's dwelling house on the 30th October 1835, and the return day was the next rule day, namely, the first monday in November. Therefore, instead of entering a conditional judgment; for the defendant's failure to appear at November rules, a pluries summons should have been issued.

C. and G. N. Johnson, for defendant in error, said, 1. That the court must, in this case, presume, that Wynn was a person against whom Wyatt's administratrix might commence her action by summons; for as he appeared in court to have the proceedings at the rules corrected, and could then have objected to the summons, and had that process quashed if it was irregular, but only objected to the attachment and the proceedings thereupon, it was plain enough that the propriety of the summons could not have been contested. Besides, if the summons was not the proper process, the error was in the defendant's favour; it allowed him a privilege to which he was not entitled. He had no reason, and therefore no right, to complain. 2. They admitted that the proceedings at the rules on the return of the first summons were irregular; and whether they were so or not, they were set aside by an interlocutory order of the

\*These two points had occurred in another case, *Jeter v. Hyde*, which was heard before four judges of this court, who were equally divided in opinion, and so the judgment there was affirmed. In that case, *TUCKER, P.*, said:—"If the defendant was a private individual, it was not competent to sue him by summons, and he could not be in default for failing to appear upon illegal process. The judgment being by default, the process is part of the record; and as it does not appear, that the defendant was an officer who must be sued by summons, we cannot presume him to have been so: and if not, then he was not bound to appear. But suppose we may presume him to have been a privileged person within the statute, then the service of the process ten days before the return day ought to have appeared: else, he was in no default. But this does not appear. Therefore, the judgment is erroneous." But it did not appear in that case (as it did in this) that the defendant had appeared in the cause, in any way or for any purpose.—Note in Original Edition.

court, from which no appeal lay, and which the defendant in error could not now question here. But, 3. they contended, that Wynn in fact appeared to the action. He appeared in court to have the proceedings at the rules corrected: he had, therefore, full notice of the action. The only purpose of the summons was to give him such notice. After he had appeared in court, and had the case sent back to the rules, there was no necessity to issue a new summons to give him notice of 590 \*the action which he already had; and the plaintiff might have proceeded against him at the rules, as against a defendant who had appeared but failed to plead, and so might have taken judgment against him by nil dicit. The conditional judgment was, indeed, entered by the clerk for the failure of the defendant to appear and plead; but the failure to plead after appearance equally warranted the conditional judgment; and the mistaken entry of the failure to appear could not vitiate the proceeding. This was, in effect, a judgment by nil dicit, and all errors were cured by the statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 512.

Spooner, in reply, maintained that Wynn's appearance in term, to have the proceedings at the rules corrected, upon the ground of the irregularity of the process, could not be tantamount to regular process, nor could an appearance in term be an appearance to the action at the rules. But if the appearance in term could be so regarded, it might have authorized a rule upon him to plead, but not this office judgment against him for default of appearance and plea.

STANARD, J. I think the objection, that it does not expressly appear by the record that Wynn was a person against whom it was proper to commence the action by summons, is of no avail. The substitution of the summons instead of the ordinary process of *capias*, is a privilege given by statute to certain officers, when they are sued. If a defendant be not strictly entitled to the privilege, no wrong can be done him by conceding it to him, but rather a favour. A defendant not entitled to the privilege might probably object to the extension of it to him, and by declining it, have the process set aside for irregularity: but if he suffers the case to proceed upon the summons, he must be considered as admitting that he is a person liable to be sued by such process, or if not, as acquiescing in the privilege it con- 591 cedes \*to him. In either view, the objection to the process ought not to be regarded as just cause to impeach the judgment rendered upon it. Besides, in this case, Wynn, the defendant below, having expressly objected to the regularity of the process of attachment, without making any objection to the summons, the implication is inevitable, either that he was a person against whom the summons was the proper process, or if he was not, that he waived objection on that head.

The award of the attachment on the return made upon the first summons, and the proceedings at the rules upon the return of the attachment, were confessedly irreg-

ular; nor is it to be doubted, that the court was right in quashing the attachment, setting aside the proceedings consequent upon it, and sending the cause back to the rules for further proceedings.

In the subsequent proceedings at the rules, an alias summons was issued, the return upon which shewed, clearly, that the process was not duly executed, and yet an office judgment was entered against the defendant for failing to appear and plead, and a writ of inquiry of damages was awarded. The writ of inquiry was executed at the ensuing term. There could be no default of appearance, unless the summons was returned duly served. The clerk, I presume, through mistake, supposed that the return upon the summons shewed that it was duly served, and entered the office judgment, and the award of the writ of inquiry, in consequence of that mistake. But as the summons was not duly served, there was no warrant for entering the office judgment and awarding the writ of inquiry; and those proceedings are erroneous, if there be no other foundation for them than the supposed default of appearance at the rules.

It has, however, been earnestly insisted, that Wynn's appearance in term, to have the attachment quashed and the proceedings consequent upon it set aside, was  
592 \*an unqualified appearance to the action, which superseded the necessity of other process; and that when the case returned to the rules, the plaintiff below, without further process, was entitled to judgment for the defendant's failure to plead. It might be a sufficient answer to say, 1. that, if the defendant's appearance in term to have the previous proceedings at the rules corrected, dispensed with the necessity of further process, the plaintiff, by suing out the new process, waived the benefit of that dispensation; and 2. that the judgment entered at the rules was not a judgment for the defendant's failure to plead after his appearance, but for his failure to appear after process served. But, apart from these considerations, was the defendant's appearance in term for such a purpose, and appearance to the action, which dispensed with further process, and subjected him to a judgment by nil dicit, and to the consequences of such a judgment? It was not so understood by the plaintiff, by the clerk, by the defendant, or by the court: not by the plaintiff, for upon the return of her case to the rules, she sued out new process: not by the clerk, for he founded the subsequent proceedings at rules upon the return of the alias summons, under an erroneous opinion that the return shewed due service of that process: not by the defendant, else he would hardly have let judgment pass by nil dicit, and a writ of inquiry be executed, whereby any claim which the plaintiff might have set up, however inconsistent with that mentioned in the process, might have been conclusively charged upon him: not by the court, for it set aside the previous proceedings, because the attachment was irregular process, and when, after quashing the attachment, it sent the case back to the rules for further proceed-

ings, the further proceedings plainly indicated, were such as the plaintiff ought to have taken instead of suing out the attachment; that is, as the first summons was not duly served, the issuing of an  
593 alias. \*The argument then is, that the defendant's appearance in term, and motion to quash the attachment, though not so intended by him, nor so understood by the plaintiff, or by the clerk, or by the court, was, proprio vigore and necessarily, an unconditional appearance to the action which dispensed with further process. The proposition is not sustained by any principle or analogy. It is of common occurrence, that a motion for award of execution on a forthcoming bond, is resisted on the ground that due notice of the motion has not been given; yet, in my experience, it has never even been pretended, that such an appearance dispenses with due notice of the motion, to be made at a subsequent term: but if the argument for the defendant in error here were well founded, then in every such case, the court would treat the appearance to resist award of execution for want of due notice of the motion, as dispensing with further notice, at least in respect to a motion to be afterwards made; and when the actual notice was found defective, though execution might not be presently awarded upon it, the motion would yet be docketed as one to be afterwards made, as upon notice dispensed with by the party's appearance. The argument presents the singular dilemma, that a party cannot free himself from the present or past effect of erroneous process, without forfeiting his right to exemption from judgment until proper process shall be sued and duly served upon him. It would subject him to judgment without any future regular process, as the consequence of his objecting the nullity and irregularity of past process.

My opinion is, that the appearance of the defendant in term, and his motion to quash the attachment irregularly issued, and to set aside the proceedings at rules founded upon it, was not an appearance to the action, dispensing with further and proper process; that the award of the alias  
594 summons was proper \*and necessary; and that the proceedings on that subsequent process cannot be sustained, since, confessedly, it was not duly served.

CABELL, J., concurred.

TUCKER, P. It is conceded, that the first proceedings were irregular, and that the office judgment which had been entered at September term 1835, was properly set aside. The plaintiff then sued out a new summons, but that never was duly served; and yet she proceeded against the defendant for not appearing, and took a common order against him by default for want of an appearance. This was wrong, because the defendant was under no obligation to appear, since the process was not served in due time according to law. The common order then being wrong, the office judgment founded upon it was also erroneous, as were also the subsequent proceedings. But it is now contended, that the motion to quash the attachment and send the cause to the rules, was an appearance. I think



not, for the reasons given by judge Standard. But if it was, the plaintiff waived her first process and the proceedings under it, when she took out the second process; and moreover, if there was an appearance, there could have been no common order for want of one, but a rule should have been given to plea. In every aspect of the case, then, the proceedings are erroneous and the judgment must be reversed.

The proceedings up to the return of the alias summons must be set aside; and the cause remanded to the circuit superior court, to be sent back to the rules, where the plaintiff may sue out a pluries summons, if she shall think proper so to do.

Judgment reversed.

595 \*Ware and Wife v. M'Candlish.

February, 1841. Richmond.

**Wills—Construction and Effect—Case at Bar.**—Testator bequeaths to a trustee one slave by name, and one fourth of residuum of his estate, in trust for his daughter M. and at her death in trust for her children, if any then living, if none then for his surviving daughters, and makes similar bequests for the use of other daughters; and then declares his wish, that the husbands of his daughters shall have no control over the property devised to them; the daughter M. marries during her infancy: HELD, 1. though she is entitled to only a life interest in the subject, she is entitled, not merely to enough of the profits for her support, but to the absolute property and enjoyment of the whole profits of the subject accruing during her life, and no part of the profits ought to be converted into capital wherein she should have only a life interest; 2. that the surplus profits beyond her support should be paid to her or her order, if she be of full age; but if she be yet an infant, then the same should be paid to her when she comes of age, and if she die under age, to her representatives.

John Slaughter late of York county, died in 1827, leaving four children, Harriet then the wife of Samuel Badkins, and Lucy, Margaret and Martha Slaughter; and by his last will and testament, after bequeathing three female slaves, named Sally, Mary and Lucy, and their future increase, to Robert M'Candlish, in trust as to the slave Sally for his daughter Harriet Badkins, as to the slave Mary for his daughter Margaret, and as to the slave Lucy for his daughter Martha, to be held by the trustee for the sole, separate and exclusive use of the several daughters, and at the death of each, the slave and her increase bequeathed for her use to be equally divided among her children then living,—devised and bequeathed as follows —“I devise all the residue of my estate to Robert M'Candlish, in trust for my four daughters, Harriet, Margaret, Martha and Lucy, to be equally divided between them;

the profits for their sole, separate and exclusive use, and at their death \*for their children then living, equally to be divided between them; that is to say, one fourth to each of my daughters, and one fourth to be divided between the children of such daughter at the death of such daughter; and if one of my daughters should die without having a child living

at the time of her death, then I wish such daughter's share to go to the surviving daughters and grandchildren, the said children to take the share of the mother if living: to be held by the said trustee under the limitations before stated, as I do not wish the husbands of my daughters to have any control over the property devised to my daughters.” And he appointed M'Candlish to be his sole trustee and executor; who took upon himself the trust and the executorship.

After the testator's death, his daughter Harriet Badkins died, leaving two infant children, John and Elizabeth Badkins; his daughter Margaret married William Bacon, and then died leaving one infant child, Mary Bacon; his daughter Lucy married William Delk; and his daughter Martha married William Ware.

M'Candlish took possession of the three slaves bequeathed to him for the use of Harriet, Margaret, and Martha respectively, and all the residuary slaves about sixteen in number; hired them out, and received the profits, to be appropriated according to the trust declared by his testator.

In May 1837, William Ware and Martha his wife exhibited a bill in chancery, in the circuit superior court of James City, against M'Candlish the trustee, Delk and wife, the infant children of Harriet Badkins and the infant child of Margaret Bacon; setting forth the will of the testator Slaughter, the agency of M'Candlish in the execution of the trust, the number and names of the residuary slaves that had come to his hands, and the death of some of them; insisting, that they were entitled to have the profits of the slave Lucy bequeathed to

the trustee for the use of Mrs. Ware, and one fourth of \*the net profits of the residuary slaves, accounted for and paid to them; complaining that the trustee denied the right of the plaintiffs to more of those profits than was necessary for Mrs. Ware's own support, and contended, that the surplus ought to be retained by him as part of his testator's estate, and that the interest thereof ought to be divided among all the testator's daughters and the children of those who were dead; and praying an account of the profits of that portion of the testator's estate which was bequeathed to M'Candlish for the use of Mrs. Ware, and a decree for the payment of the whole amount thereof to the plaintiffs.

M'Candlish answered, that he had acted as trustee under his testator's will, hired out the trust slaves from year to year, and annually credited the female plaintiff with the hire of the slave Lucy, and one fourth of the profits of the residuary slaves; that, out of this fund, he had educated, boarded and clothed her, and that there was a balance thereof in his hands, of 274 dollars with interest on 193 dollars from the 1st January 1837, which he was always ready to pay when he could safely do so; that he had refused to pay this money to Ware, the husband of the legatee, because he was expressly excluded from benefit by the testator's will, and the female plaintiff was an infant and could not give an acquittance; and that he conceived, that he ought



to invest the surplus of the profits in question, over and above the support of the female plaintiff, in some fund for the benefit of her and her sisters; since if it should be paid to her husband he might use it at pleasure; and if she should die without leaving a child, the surviving sister and the children of the deceased sisters might be entitled to the very money now claimed by the bill. And he submitted the construction and effect of the testator's will to the court.

The defendants Delk and wife, in their answer, insisted, that the surplus of the profits of the female plaintiff's 598 \*portion, ought to be invested in order that the same might accumulate for the benefit of all the legatees, as M'Candlish in his answer proposed; and they suggested that it should be invested in a young female slave, to be held as part of the trust subject for the benefit of all, especially as some of the residuary slaves had died, and this would be the means of replacing them.

The court appointed a guardian ad litem for the infant defendants. And the cause coming on for hearing upon the bill, the answers, and the exhibits, the court declared, that the surplus of the profits set apart by the testator's will for his daughter Martha, over and above what was necessary for her support, now in the hands of M'Candlish the executor and trustee, namely, the sum of 274 dollars with interest on 193 dollars from the 1st January 1837, ought to be invested in the purchase of a young female slave, or some other profitable stock; and decreed, that the trustee M'Candlish should invest that sum in the purchase of a young female slave, to be by him held as part of the daughter Martha's portion, in all respects, according to the provisions of the testator's will.

On the application of Ware and wife, this court allowed them an appeal from the decree.

Harrison, for the appellants, said, that under the will of the testator Slaughter, his daughter Martha was plainly entitled to have, during her life, the absolute use of and dominion over the whole profits of the property given to the trustee for her use. To decree that any portion of those profits should be converted into and made part of the capital subject bequeathed to her, in which she should then enjoy only a life estate, was irreconcilable with any just or sensible construction of the will. The restriction of the use and enjoyment of the profits of the estate vested in the 599 trustee, to the sole, separate \*and exclusive use of the legatees, free from the control of their husbands, was intended to avoid the marital rights of the husbands in the subject, so far only as to exempt the same from alienation or incumbrance by them, and from their debts, but not to restrict the common use and enjoyment of the profits by the husbands and their respective wives. And he submitted, that the court ought to have directed an account of the trustee's transactions, and of the profits by him received.

There was no counsel for the appellees.

TUCKER, P., delivered the opinion of the court—That under the will of the testator Slaughter, though the appellant Martha was entitled to but a life estate in the slave Lucy, and in her portion of the testator's residuary estate, she was nevertheless entitled to the absolute property, use and enjoyment of the profits of the estate bequeathed to her; and therefore, the decree was erroneous in directing any portion of those profits to be converted into capital, whereof she should enjoy only a life estate: That, instead of reinvesting the profits, as directed by the decree, the surplus thereof in the hands of the trustee M'Candlish, after having been duly ascertained by any proper proceeding, should be decreed to be presently paid to the female appellant, or her order, if she be of full age; and if she be yet an infant, to be paid to her so soon as she shall attain to full age, or, in case of her death during infancy, to her representatives.

Decree reversed, and cause remanded for further proceedings.

600 \*Gibson v. The Governor, at the Relation of Stewart's Adm'r.

February, 1841, Richmond.

**Sheriff's Bond\*—Action on for False Return—Measure of Damages.**—In debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of nulla bona on a *fi. fa.* sued out by the relator. the measure of recovery is the amount which was due on the execution at the return day: which ought to be found in damages, and no continuing interest ought to be allowed on such damages.

**Same—Same—Same—Verdict and Judgment for More Than Declaration Claims—Jeofails.**—And where the relator in his declaration shews and claims the precise amount he is entitled to recover by reason of the wrong complained of, a verdict and judgment for more than the claim in the declaration warrants, are erroneous; and the error is not cured by the verdict, under the statute of Jeofails.

**Same—Same—Same—Release—Effect.**—But the court reversing the judgment for such error, will not direct a new trial, if the relator will release the excess of damages recovered beyond the just amount, but upon such release of the excess, will direct judgment to be entered for the just amount of damages.

Debt, in the circuit superior court of Fauquier, brought in the name of governor Floyd, successor &c. at the relation of Stewart's administrator, against Gibson late sheriff of Fauquier, upon his official bond. The action was founded on the statute, 1 Rev. Code, ch. 78, § 12, 13, p. 278-9.

The declaration demanded 30000 dollars, the penalty of the bond; and then setting out and making profert of the bond, and reciting the condition in *hæc verba* (which was in the form prescribed by the statute, and provided, among other things, that the sheriff should well and truly execute and due return make of all process and precepts to him directed, and in all other things

\*See monographic note on "Official Bonds" appended to Sangster v. Com., 17 Gratt 124.

truly and faithfully execute and perform his said office, during his continuance therein) assigned the following breach—That Stewart's administrator, having recovered judgment in the county court 601 of Fauquier, at the June \*term thereof 1821, against one Chilton, for 400 dollars with interest from the 7th November 1812 till paid, and 13 dollars 86 cents costs, subject to a credit for 163 dollars 79 cents paid on the 1st January 1816, sued out a writ of fieri facias thereon for the debt, interest and costs, returnable to the fourth monday in August 1821, which was delivered to one of the sheriff's deputies to execute and return according to law, who made return upon it "no property found;" and that the return was false. The defendant pleaded, conditions performed; upon which an issue was made up. The jury found a verdict for the relator, and assessed his damages by reason of the breach alleged, to 349 dollars 80 cents, with interest on 335 dollars 54 cents part thereof from the 1st January 1816 till paid. Judgment for the penalty of the bond, to be discharged by the damages assessed by the verdict and the costs of this suit, and such other damages as should be afterwards assessed upon scire facias sued out, and new breaches of the condition assigned, by any other party injured.

Upon the application of the defendant, this court allowed him a supersedeas to the judgment.

Morson, for plaintiff in error. The action was, substantially, an action for a tort; an action to recover damages for an official malfeasance of the sheriff; for a false return made by his deputy upon a fieri facias sued out by the relator. The statute gives this action of debt on the sheriff's bond, in order to secure redress to the relator for the officer's default, but it does not convert the relator's claim to damages for the tort, which is its real nature, into a claim for breach of contract: the measure of damages should be the same as in an action on the case brought for the tort. The rule is stated by lord Mansfield in Robinson v. Bland, 2 Burr. 1087, that in trespass or tort, the damages should be estimated only up to the time of the 602 wrong complained of; and this \*court approved the rule in Brugh v. Shanks, 5 Leigh 598. Here, the verdict and the judgment first give the relator excessive damages for the tort, and then give him interest thereon, retrospective and prospective; but it is the continuing interest that constitutes the sheriff's chief grievance. The declaration shews the data by which the amount of damages may be exactly ascertained; and, by the relator's own shewing, the utmost he could have had a right to recover, was 326 dollars 7 cents, with interest on 312 dollars 21 cents, part thereof, from the 1st January 1816 to the fourth monday in August 1821; that being the utmost of his loss by reason of the sheriff's default, at the time it was committed, since that was the utmost amount of his execution on which the false return was made.\*

\*To shew this, the counsel submitted the follow-

I say this was the utmost extent of his claim to damages against the sheriff; for the recovery against the sheriff does not vest the property in the execution in him; the relator may still pursue the original debtor, and so, perhaps, recover double satisfaction. It would be most unreasonable to give him running interest during the whole time of his long delay to bring his action; a delay which may have jeopardized, perhaps rendered wholly 603 \*unavailing, the defendant's remedy over for indemnity. Besides, neither the sheriff nor his deputy enjoyed the use of the money; the relator's claim supposes that it was not in fact collected, though with proper official diligence it might have been. Supposing the debt wholly lost to the relator, the sheriff is no more bound to pay him running interest upon it in damages, than an executor, who by negligence has lost a debt due to his testator's estate, which by due diligence he might have recovered, is chargeable with interest on the debt he has so lost. Now, an executor in such case, is only chargeable with the principal lost; as was held by this court in Colaton v. Webb, (which has not been reported). So, an attorney by whose neglect debts placed in his hands for collection are lost, is only chargeable with the principal; Rootes v. Stone, 2 Leigh 650. Interest on unliquidated damages for a tort never can be proper.

G. N. and C. Johnson, for defendant in error. A sheriff covenants by his official bond to execute and make due return of all process to him directed, and when he makes a false return he breaks that covenant, and is responsible in damages for a breach of contract: the statute gives the party injured an action for the breach of contract. He ought to make compensation for the whole loss sustained by the party injured thereby. The loss to the relator, in this instance, was the loss of the money due upon his execution, and of the use of that money for years, in other words, of the interest of the money. And the statute expressly provides, that "in all actions founded on contracts, and tried before a jury, the jury shall ascertain the principal sum due, and fix the period from which interest shall commence, if interest be allowed by them; and judgment shall be given accordingly, carrying on the interest

ing statement, which the court afterwards adopted:

"Original debt due Nov. 7, 1812.....	\$400. 00
"Interest to Jan. 1, 1816, say 3 years 2 months.....	76. 00
	476. 00
"Credit payment made Jan. 1, 1816.....	163. 79
"Balance due that day.....	312. 21
"Add the costs.....	13. 86
	\$326. 07

"Add interest on \$312. 21 from Jan. 1, 1816 to the 4th monday in August 1821, the return day of the execution: this shews the utmost amount of the execution, and therefore the utmost amount of damages which the creditor sustained by the false return."

—Note in Original Edition.

till the judgment be satisfied;" 1 Rev. Code, ch. 128, § 80, p. 508. No bill of exceptions having been filed to shew the state of facts proved at the trial, the judgment should be \*sustained, if in any possible state of facts the verdict might have been right; as if it appeared that the sheriff had in fact received the whole amount due on the relator's execution at the very time he made the false return of nulla bona, then surely he ought to have been charged with interest till he should make payment. If it be said, that the declaration does not allege that the sheriff collected the money, yet, by the statute of jeofails, the verdict cures the omission of such averment; it cures the omission of the averment of matter without proving which the jury ought not to have given such verdict. Id. § 103, p. 511, 512. At any rate, the verdict and judgment, if the court shall think them excessive, may be corrected, by requiring the relator to release the excess and the continuing interest, or giving judgment for the just amount, including the interest, as was done in *Brugh v. Shanks*.

Morson, in reply. The statute which authorizes juries to give continuing interest, applies only to actions founded on contracts, where a principal sum is due, and cannot be tortured into a warrant for giving interest on unliquidated damages for an official malfeasance of a sheriff, or for any other tort. As to the statute of jeofails; this is an action not for vindictive damages, but for compensation for the loss sustained by reason of the sheriff's default complained of; and a greater recovery than the wrong complained of in the declaration warrants, is just as erroneous, as the recovery, in an action for a liquidated demand, of more than the plaintiff claims in his declaration; and in both cases the error is equally apparent on the record. The case of *Brugh v. Shanks* is a clear authority to this point.

PER CURIAM. The amount which the relator was entitled to recover, according to the claim alleged in his declaration, was the amount due upon his execution at the return day thereof; and the jury should have found \*that amount for him in damages, and no interest on such damages should have been allowed by the verdict, or given by the judgment of the court. Therefore, the judgment must be reversed with costs. But the error may be corrected without a new trial, if the relator will release the excess he has recovered beyond what he was entitled to; and the court will give him an opportunity to make the proper correction. Therefore, the court will remand the cause to the circuit superior court for a new trial to be had therein, unless the relator shall release the damages found for him by the verdict, except as to the sum of 326 dollars 7 cents with interest on 312 dollars 21 cents part thereof from the 1st January 1816 till the 4th monday in August 1821, in which case judgment shall be entered for him accordingly with costs.

Judgment reversed, and cause remanded with the directions indicated in the opinion.

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\*Baber v. Cook &amp; Others.

March, 1841. Richmond.

(Absent ALLEN, J.)

**Bonds—Joint as to Some Obligors, Several as to Another—Judgment\*—Case at Bar.**—In debt on bond for money payable twelve months after date against obligors, declaration counts against them as joint obligors; but it appears, by defendants' pleas and plaintiff's replications, as well as by evidence at the trial, that in fact the bond was first sealed and delivered by three of the obligors, of whom one was principal and the other two sureties; and that the fourth obligor sealed and delivered it some time after the debt fell due, with a view in so doing to substitute himself as surety in place of one of the original sureties; and this was done with the assent of the obligee of the principal obligor, and of the surety for whom the fourth obligor was to be substituted, but without the consent or knowledge of the other original surety: **Held**, the original obligation was the joint contract of the three obligors, but the obligation of the fourth obligor was his several contract, and therefore plaintiff cannot recover joint judgment against the four obligors.

**Same—Same—Remedy—Quere.**—Whether plaintiff has any, and if any, what remedy against the three original obligors on the original obligation? and any, and what, remedy on the several obligation of the last obligor?

**Pleading and Practice—Joint Contract—Judgment.\***—

In an action against several defendants on a joint contract, plaintiff must be entitled to joint judgment against all, else he cannot have judgment against any.

Debt, in the circuit superior court of Pittsylvania, by Baber against Cook, Treadway, Edwards and Hoofman, upon a bond dated the 17th December 1832, for 500 dollars payable twelve months after date; on which the declaration counted as the joint obligation of the defendants.

The defendant Cook, having been arrested and enlarged on special bail, was surrendered in court by the bail, and thereupon confessed judgment, and then took the benefit of the statute for relief of insolvent debtors.

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\*Edwards took over of the bond, and then pleaded in bar, that he was bound in the bond as surety for Cook who was the principal obligor, and that after the debt secured by the bond had become due and payable and Baber's right of action had accrued on the bond, to wit, on the

**\*Bonds—Obligor Added—Effect.**—See principal case cited and approved in *Nash v. Fugate*, 24 Gratt. 216, and *foot-note*. See monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

**\*Pleading and Practice—Joint Contract—Judgment.**—For the proposition that, in an action against several defendants on a joint contract, the plaintiff must be entitled to a joint judgment against all, else he cannot have judgment against any, the principal case is cited in *Septeoe v. Read*, 19 Gratt. 9 (see note); *Bush v. Campbell*, 26 Gratt. 426; *Hoffman v. Bircher*, 22 W. Va. 542, 550; *foot-note* to *Rohr v. Davis*, 9 Leigh 30. See also, *Peasley v. Boatwright*, 2 Leigh 196; *Jenkins v. Hurt*, 2 Rand. 446; *Code of 1887*, sec. 3212.

See monographic note on "Contracts" appended to *Enders v. The Board of Public Works*, 1 Gratt. 364, also, monographic note on "Judgments" appended to *Smith v. Charlton*, 7 Gratt. 425.

10th March 1834, he required Baber by notice in writing forthwith to put the bond in suit; and that Baber did not commence his action within a reasonable time after such notice to him delivered, according to the statute\* in such case made and provided, but delayed to bring suit for seven months &c. concluding with a verification.

Baber replied, by way of confession and avoidance, that Edwards delivered him the written notice in the plea mentioned, requiring him forthwith to put the bond in suit, as he in his plea alleged, before Hoofman had sealed and delivered the bond; and after the said notice was delivered, and before any unreasonable delay on Baber's part had occurred which could exonerate Edwards from the obligation, Edwards, at the special instance and request of Cook, in order to prevent Baber from bringing his action forthwith, procured Hoofman to seal and deliver the bond, Hoofman undertaking to stand bound in Edwards's place and to save him harmless from all responsibility on the bond; and Hoofman accordingly sealed and delivered the bond; and Edwards thereupon and thereby waived his said notice and requisition therein contained; and so Baber, with the knowledge, consent and approbation of Edwards, delayed to bring suit, as well and justly he might without exonerating Edwards; concluding with a verification.

Edwards, in his rejoinder, traversed the matters of avoidance alleged in the replication, and tendered an issue, which was joined.

608 \*Treadway pleaded, that he also was bound in the bond as co-surety jointly with Edwards for Cook; and then setting forth the same matters alleged in Edwards's plea, by reason whereof, and by force of the statute in such case made and provided, Edwards was released from the obligation, he said, he also was released.† Baber's replication alleged the same matters of avoidance which he had replied to Edwards's plea. Treadway's rejoinder traversed the replication, and an issue was made up.

Hoofman put in two pleas. The first was exactly like Treadway's; Baber replied the same matters in avoidance; which Hoofman's rejoinder traversed, and an issue was made up. The second plea alleged, that Hoofman, on the — day of — 1834, became joint surety with Edwards and Treadway for Cook for the debt in the bond set forth in the declaration mentioned, and he being so then and there bound, and the debt remaining due and unpaid, Edwards, before that time, gave written notice to Baber to put the bond in suit forthwith, and Baber did not within a reasonable time after such notice to him delivered commence his action on the bond, but delayed to do so for an unreasonable

time, to wit, for seven months; whereby Edwards, and therefore Hoofman also his joint surety, were wholly released from the obligation; concluding with a verification. To this plea Baber replied, that Edwards did not, after the sealing and delivery of the bond by Hoofman and after the debt therein mentioned became due and owing from Hoofman to Baber, and before the commencement of this suit, deliver to Baber any such notice and requisition in writing as in the plea set forth; concluding to the country. On which Hoofman joined issue.

609 \*When Baber offered his replications to the pleas put in by Edwards and Treadway, and his second replication to Hoofman's plea, the defendants respectively objected, that the replications were faulty, and ought not to be received; but the court overruled the objection, and admitted the replications, whereupon the defendants rejoined, and made up the issues as before stated.

Upon the trial of the issues, the jury found a verdict for the defendants Edwards, Treadway and Hoofman; Baber moved the court to set aside the verdict and direct a new trial; the court overruled the motion, and Baber filed a bill of exceptions setting forth all the facts proved at the trial.

From this it appeared, that Baber produced the bond on which his action was founded, and which was in these words— "Twelve months after date, we promise and oblige ourselves, our heirs &c. to pay Alex. Baber the just and full sum of 550 dollars for value received—witness our hands and seals this 17th December 1832"—and it was in fact signed and sealed by Cook, Treadway, Edwards and Hoofman. But it was proved, that the bond was first sealed and delivered by Cook, Treadway and Edwards; Treadway and Edwards executing it as sureties for Cook, who was the principal obligor. And it was further proved, that while the bond was in that state, Edwards, on the 10th March 1834, gave a written notice to Baber requiring him to put the bond in suit forthwith, otherwise he would not stand bound as Cook's surety for the debt; and Baber promised Edwards that he would bring suit as required; but some five or six days after Edwards's notice and requisition were delivered to Baber, Cook, in order to prevent an immediate action on the bond, by and with the consent and agreement of Edwards, but without the knowledge of Treadway, procured Hoofman to seal and deliver the bond, which Hoofman did with Baber's privity and consent. That the ob-

610 ject of Cook, Edwards \*and Hoofman in so doing, was the release of Edwards from all liability as one of the obligors in the bond; and after Hoofman had so executed it, Cook and Hoofman, in Baber's presence and hearing, told Edwards that he was released, and that Hoofman stood bound to Baber in his place, and Edwards also said that he was released. There was no proof that Edwards's notice and requisition to Baber to bring suit, were given with the knowledge of Treadway at the time, or that the fact of such notice and requisition being given was made

\*The plea was founded on the statute, 1 Rev. Code, ch. 116, § 6, p. 461.—Note in Original Edition.

†The plea of this defendant was founded on the principle laid down by this court in Wright's adm'r v. Stockton, 5 Leigh 158, that wherever some of several sureties are discharged by any act or omission of the obligee, the other sureties are also discharged.—Note in Original Edition.

known to him till after Hoofman had executed the bond; and of Hoofman's execution of it he was equally ignorant, and no-wise consenting to the transaction. It was proved, that some six months after Cook had become insolvent, Edwards applied to Baber for a written release from the obligation of the bond; which Baber said he was willing to give him, but he was advised that it should discharge the other obligors; declaring at the time, and afterwards, that he did not wish that Edwards should be sued on the bond, if he could be left out without destroying his action against the others. That Edwards then asked Baber to deliver up to him the written notice he had given to him on the 10th March 1834, which Baber accordingly did; and the notice was produced and proved at the trial. And that Hoofman paid Baber half of the debt; but being afterwards advised that he had been too hasty in making the payment, Baber promised to refund the money to him, in case he should fail in his action to recover the debt of Hoofman. And these being all the facts proved at the trial, Baber's counsel moved the court for a new trial, on the ground that the verdict was contrary to the evidence; but the court overruled the motion, and gave judgment upon the verdict for the defendants.

Baber applied to this court for a superseas to the judgment; which was allowed.

611 \*Grattan, for plaintiff in error.

R. C. Stanard, for defendants.

TUCKER, P. It is with great regret that I feel myself compelled to pronounce the opinion that this judgment must be affirmed. The process by which I arrive at this conclusion, is simple, and avoids much of the argument, and some of the points made in the course of the discussion.

I proceed, first, upon the well established principle, that, except in a few cases, the rule is general, that he who sues upon a joint contract, cannot recover a separate judgment against one of the defendants. So firmly is this principle fixed, that even where one of two joint defendants confesses the action, no judgment can be entered against him till the issue made up by his codefendant is tried, and it is wholly set aside if the issue be found for the codefendant. *Jenkins v. Hurt's com'rs*, 2 Rand. 446; *Taylor v. Beck*, 3 Rand. 316. The recent statute of 1839 makes no other change in this principle, than to provide that, in a joint action, if the process be executed as to some and not as to all, the plaintiff may proceed to judgment against those who have been arrested, and discontinue as to the others, or proceed against them successively.

The question then presents itself, whether a joint judgment can be entered in this case, against all the defendants? And I think it cannot; for if the contract be not joint, a joint judgment cannot be rendered; and admitting that the bond was not avoided by Hoofman's execution of it (which seems very clear, since his name and seal are only added, and the writing itself is wholly unaltered) and admitting also, that Hoofman is bound by his signing

and sealing (which seems also clear) yet to my mind it seems not less clear, that, as between Hoofman and the three other obligors the contract is not joint. All indeed are bound; but Hoofman is only severally \*bound, while the obligation as to the three others is joint as between themselves, and several as it relates to Hoofman. I speak not of the contract as it appears upon its face, but of the contract or transaction as disclosed by the pleadings and the evidence. There can be no doubt, indeed, that the action upon the contract as it stands, was properly a joint action, and I do not perceive how any other action could have been brought on it, for it contains no words of severalty. Nor could the defendant Hoofman have pleaded the special matter, so as to shew that the contract was not joint: he is estopped by his seal to deny it. The others might doubtless have so pleaded, though they have not done so. But the plaintiff has been driven by the exigencies of his case to allege the matter himself. To avoid the effect of Edwards's plea, he sets forth, in his replication, the fact that Hoofman was no original party to the bond, but that he executed it some time after the day of payment was past. Could he then have been jointly bound with the others? I apprehend not. A joint obligation implies unity of time, of act, and extent of obligation. Not, indeed, that all must sign and seal at the same time; but the obligation on all must take effect at the same time to make it joint. The execution by others afterwards may make it good as to them, and not avoid it as to the others; but it does not therefore make it joint as to them all. When, therefore, a bond has been executed by three and perfected by delivery, though the sealing and delivery by another afterwards, will bind him and not avoid the bond as to the others, yet the obligation is not joint but several, though he may by his deed be estopped to deny it. This will be more clear, when we consider, that if they are not jointly bound with him, he cannot be jointly bound with them. Now, they are clearly not jointly bound with him. For when they signed and sealed, he was not known in the transaction. They did not jointly with him oblige themselves \*to pay. Treadway and Edwards bound themselves jointly with Cook to pay. If Cook failed, Treadway would have Edwards to bear one half the debt. If Hoofman is to be intruded into the transaction without Treadway's consent, he may be obliged to look to him for his contribution, before he can resort to Edwards for more than a third. By what right could Baber, Cook, Edwards and Hoofman change Treadway's rights and responsibilities under this contract? They had no right to judge for him, that the arrangement would be for his benefit. Every contracting party has the exclusive right of judging quoad hoc for himself. I hold, then, that the first three named obligors in this bond, are not jointly bound with the fourth, upon the transaction as it really occurred, the bond not having the unity of time and act essential to making it joint. Nor had it the same extent of obligation.

When Hoofman signed and sealed, the debt was already due and payable by Cook, Edwards and Treadway. Did the bond bind him to pay at a day which was past? The plaintiff's own replication shews, that he executed the bond after the date of it. It is then to be construed according to the true time of execution. Whether that would give him twelve months after that time for payment, may perhaps be questionable. If not, then he was bound either to pay presently, or at a time past. The latter is impossible; and the former is a different obligation from that of the others. It cannot therefore be a joint contract.

It is true, as already said, the effect of the estoppel might perhaps have prevented Hoofman from alleging the fact that the date of the bond was not the true date. But be this as it may, the plaintiff himself has alleged the true date. And this brings me to observe, that upon the pleadings in this case the plaintiff never could have had judgment. Had the jury found the issues in his favour, the judgment must have been arrested. For, in the first place, there

is a fatal departure in pleading:  
614 \*the declaration alleges a joint contract; the replication shews a separate one; the declaration alleges that the defendants on the 17th December 1832, sealed and delivered; the replication admits that Hoofman sealed and delivered sometime in March 1834: the declaration sets up one contract, the replication another; the declaration sets forth a contract to which Treadway was a party, the replication one to which he was not privy. In the second place, the various matters in the replication shew, that the contract was not joint, and so there could not be a joint judgment. In the third place, the declaration alleges a breach by Hoofman in not paying in 1833, when according to the replication, he was at that time no party to the bond, and not bound to pay the debt. With all these fatal objections, a verdict for the plaintiff would have done him no good. Judgment must have been arrested, and entered for the defendant.

I think the judgment should be affirmed.

BROOKE, J. I do not think it necessary to give any opinion as to the irregularity of the pleadings. That would be proper if there had been a demurrer; but the general verdict for the defendants cures all the errors in the pleadings, according to the uniform decisions of this court on the statute of jeofails. I think the only question before us is that which arises on the bill of exceptions to the opinion of the court refusing a new trial; and upon the facts therein as stated, I cannot doubt the correctness of that opinion. On this ground, I think the judgment ought to be affirmed.

CABELL, J., concurred in the opinion delivered by the president.

STANARD, J. I am of opinion, that upon the case made either by the pleadings or by the evidence, this action, to sustain which it is necessary to shew a joint

615 \*responsibility of Cook, Treadway, Edwards and Hoofman, cannot be sustained; because the existence of such joint responsibility is negatived as well by the

pleadings as by the evidence. If this be so, judgment must eventually have been rendered for the defendants, whatever had been the fate of the trial of the issues before the jury. In this aspect of the case, whatever might be the opinion of the court as to the conformity of the verdict of the jury upon the issues with the evidence, it would be supererogatory to have a new trial of the issues so far as the fate of this action is concerned. But looking to the plaintiff's ulterior remedies, either against the original obligors, or against Hoofman, my apprehension has been (though without coming to any definite opinion as to what those remedies, if any, are, or may be) that judgment in this case, after the verdict on the issues, and the refusal of the court to set aside that verdict, might be a bar to any such remedy; and if such be the necessary consequence, thinking as I do that the finding of the jury for the defendants on the issues of fact, is not warranted by the evidence, I should be of opinion to set aside the verdict. But two of my brethren think, that a judgment of this court that this action, being on a joint responsibility, is for that cause not sustainable, and that our affirmance of the judgment on that ground will oppose no bar to the remedies, if any, which the plaintiff may have against the original obligors on their original obligation, or against Hoofman, I acquiesce in that opinion, and concur in affirming the judgment.

Judgment affirmed.

616 \*Anderson's Ex'ors v. Anderson.

March, 1841, Richmond.

**Wills—Slaves—Emancipation in Futuro—Increase\*—**

**Case at Bar.**—Testator bequeaths the raising of infant negroes to his son N. but not to be moved out of the state or so far as to deprive them of their freedom, and to other sons the labour and raising of other infant negroes, with a like restriction: and then mentioning that four other negroes are in hands of other sons, bequeaths, that they and all the others shall, after his own and his wife's death, be free at their ages of twenty-one; and there is no other bequest of slaves in the will, though there was a general bequest of the residuum of his estate: the testator's wife dies: among the negroes of whom the raising was bequeathed to the son N. was a female infant at testator's death, who had two children born before she was twenty-one: **Held**, these two children are entitled to freedom at their ages of twenty-one.

**Equity Jurisdiction—Right of a Mother to Sue for Freedom of Children—Case at Bar.**—Two infant negroes being entitled to freedom on their attainment to age of twenty-one, under a bequest in a will to which the executors have not assented:

\***Wills—Slaves—Emancipation in Futuro—Increase.**—

On this question see the principal case cited in *foot-note* to *Erskine v. Henry*, 9 Leigh 188; *foot-note* to *Lucy v. Cheminant*, 2 Gratt. 36; *Osborne v. Taylor*, 12 Gratt. 120, and *note*; *Wood v. Humphreys*, 12 Gratt. 336, 339; *Hunter v. Humphreys*, 14 Gratt. 297.

†**Equity Jurisdiction—Suit for Freedom.**—See the principal case cited in *foot-note* to *Peter v. Hargrave*, 5 Gratt. 12; *Reid v. Blackstone*, 14 Gratt. 365, 366, and *note*.

upon a bill in chancery filed by their mother, a free negro, showing their prospective rights to freedom, and that the holders of them claim and intend to sell them as absolute slaves, whereby their freedom may be jeopardized, and praying an injunction to restrain the holders from selling or disposing of them so as to impair their prospective rights, and security for their enjoyment of their freedom when it shall accrue: HELD, 1. the court of chancery has jurisdiction to give such relief; and 2. the mother may maintain such suit in her own name, for the protection of her infant children.

Jordan Anderson the elder, late of Chesterfield, died in 1805, and by his last will and testament, after sundry devises and bequests to his sons, Jordan, Charles, James, Thomas and Nathan Anderson, bequeathed as follows—"I also give my son Nathan the raising of my young negroes, namely Anaca's increase, and Tom and Patt and Peter, Phillis's children, and her future increase, not to be moved out of the state, or so far as to deprive them of their freedom. It is further my will, that my son Thomas shall have all the labour and the raising of my young negroes, namely Amy's and Milly's increase

617 \*and Sall, till they come to the age of twenty-one years, but not to move them out of this state, or so far as to prevent their freedom; but Matt is excepted, now with Charles. It is further my will, that my son Jordan shall have the labor and the raising of all Rachel's increase, but not to move them out of the state, or so far as to prevent their freedom. As there are two young negroes now with Charles, and two with James, they and all the others to be free at twenty-one years of age."—"It is my will and desire, that all my negroes that shall be twenty-one years old, now living with me and my sons Thomas, Jordan and Nathan, shall be free on the first day of January after my and my wife's death, and they shall be well clothed, both male and female, and shall have their working tools, and bread corn for one year, and liberty to settle on thirty-three acres of land, where my son Thomas shall choose for them; and I earnestly request that no advantage may be taken of them, or suffer any to be taken of them, that can be conveniently prevented, but let them have wood land as well as cleared." And the testator gave all the rest of his estate (charged with a legacy to charitable uses) to be equally divided among all his sons. There was no other bequest of or concerning slaves in the will, except the bequests above recited; nor did it appear that the testator owned any other slaves besides those named in the will and their increase. The testator's wife died shortly after him, in 1805.

The negroes Tom, Patt and Peter were the children of Phillis, born before the testator's death. The woman Patt was then very young, and the testator's son Nathan held her till she was twenty-one years of age, and afterwards, in October 1821, she was registered, in the clerk's office of the county court of Chesterfield, by the name of Patty Anderson, as a free negro emancipated by the will of Jordan Anderson deceased.

618 \*Patty Anderson, after the testator's death but before she attained the age of twenty-one, and while therefore she was still held by Nathan Anderson, had two children, Green and Henry, who were one sixteen and the other seventeen years old at the time this suit was commenced. Nathan Anderson continued to hold these two children of Patty till his death, which happened in the year 1834; and his executors William and Beverley Anderson took possession of them, claiming them as slaves for their lives of their testator's estate.

In November 1834, Patty Anderson, the mother of these two boys Green and Henry, exhibited a bill in chancery in the circuit court of Chesterfield, against Nathan Anderson's executors, setting forth the facts above stated; insisting, that her children, Green and Henry, were presently entitled to their freedom, or if not presently, would be at their age of twenty-one respectively; representing, that the defendants claimed them as absolute slaves for their whole lives of their testator's estate, that they designed to sell and dispose of them as such, and that the children might probably be purchased by negro traders, who would remove them out of Virginia; and praying an injunction to restrain the defendants from selling, removing or otherwise disposing of the boys Green and Henry, unless they should give bond and security to have them forthcoming to abide the final decree of the court; and general relief.

The injunction was awarded.

The defendants demurred to the bill; thus controverting the jurisdiction of the court to relieve in such a case, and the right of the plaintiff to sue, in her own name, to recover or to vindicate the right of her children to freedom. And then, by their answer, they admitted the facts alleged in the bill, but insisted, that the boys Green and Henry, having been born while their mother was actually held in slavery by their testator, were born his slaves, and so 619 belonged absolutely and \*for their whole lives to their testator's estate, and the defendants claimed the right to dispose of them as such.

Upon the hearing at October term 1836,\* the circuit superior court, declaring that the boys Green and Henry, though born before their mother attained the age of twenty-one years, were free from their birth, perpetuated the injunction, and decreed, that the defendants should forthwith enlarge and discharge them from their custody, and pay the plaintiff her costs expended in this suit.

The defendants, by petition to this court, prayed an appeal from the decree; which was allowed.

May, for the appellants. 1. The demurrer should have been sustained, and the bill dismissed, for want of jurisdiction. For, if the fact, that a master intends to sell persons whom he holds as slaves, and the probability that traders may buy them, to be sufficient to give jurisdiction to courts of equity, it is obvious, that all pauper

\*Neither Green nor Henry (the boys whose freedom was in question) were twenty-one years old at the time of the decree.—Note in Original Edition.



suits for freedom may be brought in those courts. And certainly, the mother had no right to sue, in her own name, to recover or to protect the freedom of her children. 2. The negroes, Green and Henry, were not emancipated by the will of the testator Jordan Anderson, unless the bequest that their mother should be free at her age of twenty-one, had the effect of emancipating her children born before her attainment to that age and while she herself was actually a slave. But the children followed the actual condition of their mother at the time of their birth, not the status she was to acquire at a future time. The mother was, at the birth of these children, Nathan Anderson's slave; and, therefore, they were born his slaves. *Maria v. Surbaugh*, 2 Rand. 428; *Fulton v. Shaw*, 4 Rand. 597; *M'Cutchen v. Marshall*, 8 Peters 220, 241.

620 \*Taylor, for the appellee. 1. As to the objection to the jurisdiction: though these boys were emancipated by the will of Jordan Anderson, their legal right to freedom could never be perfected till the executors assented to the bequest, which they have never done: their right was equitable, and the court of chancery was the proper and indeed the only forum to which they could resort. But they were infants; infants held in bondage, for whom the law provided no guardian: surely, then, equity ought to entertain the bill of their mother to protect their rights, which, but for her interference, might have been lost or jeopardized. 2. The effect of the will of Jordan Anderson was to give the woman Patty a present right to freedom, or a right to freedom to commence at his wife's death; and, at the most, to give the legatee Nathan Anderson a right to her personal services until she should attain to the age of twenty-one, by way of compensation for raising her, which was imposed on him as a duty. The case is like that of *Isaac v. West's ex'ors*, 6 Rand. 652. But, if Patty was a slave at all, she was certainly not Nathan Anderson's slave: the testator did not bequeath any slave property to him, or to any of his other children. If she was a slave, she belonged to the estate of the testator, and her sons, Green and Henry, were born the slaves of his estate; and were emancipated by the bequest, that the two young negroes then with his son Charles and the two then with his son James, and "all the others," should be free at twenty-one years of age. The plain intent of the testator was to emancipate all his slaves and all their posterity. *Elder v. Elder's ex'or*, 4 Leigh 252; *Erskine v. Henry*, 9 Leigh 188.

May, in reply. Let it be conceded, that the slaves were not bequeathed to Nathan Anderson; that is no question in this case. None of the slaves were to be free till they attained the age of twenty-one years; but before Patty was of that age, her 621 sons Green and Henry were born; therefore they were born slaves. Whether they belong to the appellants, or whether they passed under the residuary clause of the will, or whether the testator died intestate as to them, are questions that do not arise here. The only question is,

whether Patty was a free woman or a slave when they were born. It is remarkable, that while the testator indicates his intent, that the future increase of Patty's mother Phillis, and the increase of Amy, of Milly, and of Rachel, shall be free, there is no such provision as to the increase of Patty.

ALLEN, J., delivered the opinion of the court. The cases of *Elder v. Elder's ex'or* and *Erskine v. Henry* are decisive in favour of the negroes. Judge Carr remarked, in the first of those cases, that "in the construction of wills, we are to find out the meaning, the intention, the will of the testator, and unless it violates some provision of law, it must be carried into effect." This is the polar star to guide us in the construction of all wills. The law permits emancipation by will, and where the intention is clear, it must be observed. In the present case, upon the whole will, there would seem to be no doubt of the intention of the testator to emancipate the whole of his slaves. The will intends a disposition of his whole estate. But his slaves are not specifically bequeathed as slaves to any person. A limited interest, coupled with a charge, is given to the legatees, "the labour and raising"; with a further restriction as to the slaves in question, that they were not to be removed out of the state, or so far as to deprive them of their freedom. And after making similar provisions as to other slaves, and the two young negroes with his sons Charles and James, he directs, that they and "all the others" shall be free at twenty-one years of age. Many of the slaves no doubt exceeded that age at the execution of the will: others 622 might probably attain it before his and his wife's death; and for those in that condition, he provides that they shall be free on the first of January succeeding the death of himself and wife. Such as were then under that age were left to the operation of the preceding clauses, which gave their "labour and raising" to his sons, and conferred freedom on their attainment of twenty-one. No disposition being made of the slaves or their increase, they continued to be the slaves of his estate, and as such were embraced by the comprehensive grant of freedom to all the other slaves of his estate. In the case of *Elder v. Elder's ex'or*, the testator directed that all the rest of his slaves should be given to a trustee to take to Liberia. It was contended there, in reference to the increase, that the mothers were slaves at the birth of the children: to which it was replied by judges Carr and Tucker—"If the children were born slaves, they were the slaves of the testator, and come within the bequest as well as their mothers." In *Erskine v. Henry*, the testator bequeathed all his estate, real and personal, to R. C. during her life, and at her death all his negroes to be free: the court held, that not only the slaves living at his death, but the children born during the life estate, were his slaves, belonged to his estate, and as such were emancipated. The words in the present will are equally comprehensive; and the intention not to dispose of any of



the slaves as slaves, but to emancipate all, is equally manifest.

We do not think there is any thing in the objection to the jurisdiction or form of proceedings. Though a testator may emancipate by will, the right to do so is subject to the claim of creditors. The assent of the executors is necessary, and until given, the slaves have no legal title to freedom which could be asserted in an action at law; hence the necessity of an application to a court of equity. The slaves here were infants, bound to service until they attained the age of twenty-one; 623 the legatee \*and his representatives had a right to the custody of them. The bill avers an intention to sell; and this allegation is not denied. The executors insist upon their right to hold and dispose of them as absolute slaves; and if the condition of the estate required it, they would, if their view was correct, be bound, in the proper discharge of their duty, to sell them. If redress could not be afforded by a court of chancery, the slaves would be without remedy. On both grounds, it seems to me, the jurisdiction could be maintained.

The decree is to be affirmed.\*

BROOKE, J., dissented: he said—this case is, I think, an important one, since it involves the point decided in the case of *Maria v. Surbaugh*. There, a testator bequeathed a female slave to his son, with a provision that she should be free at the age of thirty-one years; she had children born after the testator's death and before she was thirty-one; and the question was, whether these children were born slaves? or born free? or persons bound to service for limited time? The point had never before been decided; and the court after great consideration held, that they must follow the actual condition of their mother at the time of their birth, and that as she was then a slave, though she was afterwards to be free, therefore they were born slaves. In the case before us, I think the boys, Green and Henry, born while their mother Patty was a slave though she was to be free at the age of twenty-one, must be held 624 \*to be slaves until they attain to the age of twenty-one, according to the particular provisions of his will. In *Maria v. Surbaugh*, the claim was, that the children of Maria born before she attained to the age of thirty-one, were free born; and that case was decided on its merits. Here, it is admitted, that Green and Henry were slaves; and the object of the bill was to protect them from the treatment of their masters till they shall attain to the age of twenty-one, when they are to be free. Their

case is a hard one; every case of slavery is a hard one: but there are considerations connected with it of a very delicate nature. The rights of the master must be controlled, the moral influence that subjects the slave to the master disregarded, and a spirit of hostility engendered while they continue to be slaves, calculated to diminish their value while slaves: the property of the master is to be invaded in a manner subversive of the institution of slavery, and likely to have an influence on those who are slaves for life; and the next step may be to interfere with the master in their case also, if the humanity of the court is to be appealed to. I admit the right of a testator to emancipate his slaves prospectively, because I submit to the decisions of this court, though I think there is nothing in the law, which authorizes it: but while I do this, I insist that, in such case, the testator must make complete provision for the object, and not rely on the court of chancery to become the guardian of his infant slaves, and thereby to enfeeble the master's rights while they continue slaves.

The case of *Ersine v. Henry* is entirely unlike this. That case was decided by a bare court; I did not sit in it, or I should have dissented. There the question was presented upon the will of one M<sup>c</sup>Coy, by parties who claimed the negroes as their property; and the court, instead of deciding that question, which was a pure question of property, decided that the negroes were free under the will; and that 625 too, notwithstanding \*that in a former suit brought by the negroes against *Ersine* for their freedom, they had been adjudged to be slaves, and this court had refused to allow a supersedeas to the judgment; for it was said, *Ersine* had no title to them, though he had a verdict and judgment against them as slaves, in their pauper suit for freedom. This was confounding the question of property with the question of freedom; which, unfortunately, has been too often done. *Elder v. Elder's ex'or* has as little application to the present case. In that case, the testator's will provided amply for the emancipation of all his slaves, the young and the old, if they would consent to go to Liberia; they were free at the testator's death upon condition that they should consent to go to Liberia; and it was only necessary to apply to the court of chancery to carry the provision into effect.—Though I reluctantly differ from my brothers, I am of opinion that this decree ought to be reversed, the injunction dissolved, and the bill dismissed.

Decree affirmed.

626

\**Parrish v. Parrish.*

March, 1841, Richmond.

Witnesses—Competency—Interest—Release—Effect.—

In trespass for taking and carrying away a slave, defendant claiming the slave as part of his father's estate, of which he is administrator, to prove that title, offers his brother as a witness; and to obviate objection to his competency, on the ground he was interested as a distributee, shews a deed of the witness, whereby he conveyed to defendant, for valuable consideration, all his the witness's right, title and interest in

\*The court held, that the boys Green and Henry were bound to service till they attained to twenty-one years of age: that the representatives of the legatee Nathan Anderson had a right to the custody of them till then. Yet it affirmed the decree of the circuit superior court, which held that they were free from their birth, and ordered that they should be forthwith discharged from custody, though neither was then twenty-one years of age. The reason of the general affirmance probably was, that, at the time of the decree of this court, they had both attained to that age.—Note in Original Edition.

the father's estate, and warranted the same free from the claims of all persons: HELD, that as the witness had parted with all his interest in his father's estate whatever that was, and had not warranted that the particular slave in question was part of that estate, he had no interest in the controversy, and was competent.

Trespass, in the circuit superior court of Goochland, by David Parrish against Humphrey Parrish, for taking and carrying away a slave the property of the plaintiff. Pleas, not guilty, and the statute of limitations. At the trial of the issues, the defendant offered to introduce his brother, Nelson Parrish, as a witness to prove that the slave in question belonged to the estate of the defendant's and the witness's father, of whom the defendant was the administrator, and in that character claimed and had taken possession of the slave. And the witness being a distributee of the father's estate, the defendant to shew that he had now no interest in the slave, exhibited a deed from the witness to him, duly recorded in the county court of Louisa, whereby Nelson Parrish, the witness, in consideration of 475 dollars, bargained and sold to Humphrey Parrish, the defendant, "all his Nelson's right, title and interest, of every kind real and personal, in and to the estate of their deceased father," and warranted "the same free from the claims of all persons whatever." The plaintiff objected to the competency of the witness, because he had conveyed to the defendant his interest in the slave in question if he was parcel of his father's estate, and had warranted his title by the conveyance. And the objection was sustained by the court, and the testimony excluded: to which opinion the defendant excepted. Verdict and judgment for the plaintiff for 800 dollars. The defendant applied to this court for a supersedeas; which was allowed.

Rhodes, for plaintiff in error.

Lyons, for defendant.

TUCKER, P. I am of opinion, that the judgment should be reversed, and a new trial directed. The action was trespass de bonis asportatis to recover the value of a slave. The defendant, Humphrey Parrish, insisted that the slave belonged to his

father's estate, of which he was the administrator, and he called his brother Nelson to prove it. The objection to the competency of the witness was, that he was interested as a distributee; to obviate which a deed from him to Humphrey was produced, conveying all his interest in his father's estate to him; so that he had parted with all interest as distributee. But in the deed, he gives a general warranty of all the right conveyed: and it is contended, that he is liable to make good the loss to Humphrey, if the plaintiff recovers, and so is interested in protecting the defendant by his testimony. I do not think so. If the defendant loses the slave, it will be because the witness's father had no title to him; and if he had not, then the witness had none, and so the conveyance and the warranty had no reference to that slave. For he sold no specific property nominatim or by description; but only his right, title and interest in the estate. What he had no right, title or interest in, or what was in fact no part of the estate, he did not sell, and of course did not warrant; for the warranty cannot be larger than the 628 \*grant. Though the language of this warranty seems general, yet it is, in effect, but a warranty against the vendor and all claiming under him, of such right and title as he had in his father's estate. He did not warrant this slave or any other property to be part of his father's estate. On the contrary, the very terms of the deed, that he sold "all his right, title and interest," exclude the idea of his selling any thing more than he had a right to, and of course exclude the idea of his warranting any thing. Then not having warranted the title of his father to this slave, he would not be responsible for his loss, and so is disinterested. The warranty was designed, not to insure the goodness of the father's title, but to secure the vendee against any prior conveyance or incumbrance of his own right and title.

The witness was therefore improperly excluded, and there must of course be a new trial.

The other judges concurred. Judgment reversed, and cause sent back for new trial.

# CASES

## ARGUED AND DETERMINED IN THE General Court of Virginia.

631

\*JUNE TERM 1841.

JUDGES PRESENT.

*Saunders,  
Upshur,  
Field,  
Lomax,  
Scott,  
Leigh,  
Thompson,  
Estill,*

*Brown,  
Fry,  
CLOPTON,  
Christian,  
Nicholas,  
Wilson,  
Johnson,  
Gholson.*

### The Commonwealth v. Howard.

June, 1841.

**Indictment—Assault upon Slave—Statute.**—Indictment lies upon the statute of 1822-3, ch. 34, against a free person for wilfully and without lawful authority injuring, by assaulting and beating, the slave of another.

Case adjourned from the circuit superior court for the county of Henrico and city of Richmond. Howard was indicted upon the statute of 1822-3, ch. 34, Supp. to Rev. Code, ch. 226, p. 280, knowingly and wil-

632 fully \*and without lawful authority injuring a female negro slave the property of John Hill, by violently and inhumanly assaulting and beating her to the great injury of the slave, and to the great damage of Hill, against the form of the statute in such case made and provided, and against the peace &c. The defendant before pleading moved the court to quash the indictment. Whereupon the court adjourned he following questions to this court, for novelty and difficulty: 1. Whether an indictment will lie against a white man for an assault upon a slave the property of another? and 2. Whether the indictment in the present case can be sustained, or ought to be quashed?

UPSHUR, J., delivered the resolution of the court. In answer to the second question, this court is of opinion that the indictment can be sustained, and ought not to be quashed. Whether such an indictment would lie at common law or not, we do not decide, since that question does not necessarily arise on the record, and is not submitted to us by the circuit superior court. This indictment is founded on the statute of 1822-3, ch. 34, to provide for the more effectual punishment of certain offences, and is a good indictment under that statute, upon the principle decided by this court in *The Commonwealth v. Percavil*, 4 Leigh 686. This being the opinion of the court on the second question, it is unnecessary to decide the first question adjourned.

The principal case is cited in *Dye v. Com.*, 7 Gratt. 666.

\*See monographic note on "Indictments, Informations and Presentments" appended to *Boyle v. Com.*, 14 Gratt. 674.

633 \*M'Carter v. The Commonwealth.

June, 1841.

**Criminal Law—Jury—Separation—What Is Not Sufficient to Vitate Verdict**—Case at Bar.—Upon trial of indictment for murder, the jury, not agreeing on a verdict, are, after dark, adjourned over till next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the courthouse to their room, one juror separates from his fellows, gets 25 yards from them and the sheriffs having them in charge, tells a servant whom he meets with to take care of his horse, says nothing else to any one, and no one speaks to him; he is immediately pursued by one of the sheriffs, and brought back to the rest of the jury; his separation from his fellows does not exceed a minute, and he was a yet shorter time out of sight of the sheriffs; next morning, jury finds prisoner guilty of murder in the first degree, and court passes sentence of death: HELD, such separation of the juror from his fellows is no cause for setting aside the verdict.

Upon a petition for a writ of error to a judgment of the circuit superior court of Mecklenburg. M'Carter was indicted in that court for the murder of one Fitts, and pleaded not guilty. He was put upon his trial at May term 1841. The jury having heard all the evidence on the first day of the trial, and retired in the evening to consider of their verdict, returned into court, and declaring they could not agree on their verdict, were adjourned over till the next morning; and the court committed then to two of the deputy sheriffs, to be enclosed and kept together in a room to be prepared for them; and the sheriffs were instructed and sworn so to keep them together, and not themselves to speak with them touching this prosecution, and also not to permit any person not of the jury to speak to them on any subject whatever. The jury returned into court next morning, and rendered a verdict finding the prisoner guilty of murder in the first degree. Whereupon, he moved the court to set aside the verdict, and grant him a new trial, upon the ground that one of the jurymen had improperly separated from his fellows. And upon this motion he proved by the testimony of

\***Juries—Separation—Effect.**—As to what separation of the jury is sufficient to vitiate the verdict, the principal case is cited in *foot-note* to *Com. v. M'Caul*, 1 Va. Cas. 271; *Thompson v. Com.*, 8 Gratt. 647, and *foot-note*; *Phillips v. Com.*, 19 Gratt. 540 (see *foot-note*); *State v. Harrison*, 36 W. Va. 733, 15 S. E. Rep. 963. And in *State v. Cartwright*, 20 W. Va. 43. the principal case is cited on the question of receiving jurors' affidavits to set aside their own verdicts for misconduct.

See generally, monographic note on "Juries" appended to *Chahoon v. Com.*, 20 Gratt. 733.

634 one of \*the jurymen, named Jones, that on the evening of the trial, when the sheriffs were conducting the jury to the room prepared for them for the night, upon getting out of the courthouse, he (Jones) stepped a little way from the other jurors to give orders for the safe keeping of his horse, and by the time he got round the courthouse, he was overtaken by one of the sheriffs in whose charge the jury was, who said he had done wrong, and must immediately return; which he accordingly did; having spoken to no person but a negro servant, and to him he said nothing but to give directions about his horse, and that no person spoke to him, the jurymen. Another of the jurymen testified, that when the jury left the courthouse on their way to the room prepared for them for the night, in charge of the sheriffs, and had got about thirty-six yards from the door of the courthouse, something was said about the jurymen Jones being missing and separated from the others; upon which the jury immediately stopped; and one of the sheriffs, Thomas, directed the other, Blanch, to go instantly after Jones, which Blanch did, Thomas remaining with the rest of the jury; it was then quite dark. It appeared by the testimony of the sheriffs, that in conducting the jury out of the courthouse to the room in which they were to be enclosed for the night, Thomas went before, and Blanch with a candle followed, the jury; that in going down stairs from the court room, the jurymen Jones told Blanch, that he did not know what to do about his horse, upon which Blanch desired the tavernkeeper who was close behind, to have the horse taken care of; that after getting out of the courthouse door, and a few yards from it, one of the jury told Blanch that Jones was gone, upon which Blanch called to the other sheriff Thomas to stop, handed him the candle, and went immediately after Jones; that Blanch did not at first see Jones, but after getting two or three steps from the candle, he saw Jones about twenty or twenty-

635 five yards before him, no person being near him, and then ran after and came up with him; that Jones had just stopped when Blanch got to him; Blanch told Jones he must not speak to any one, and instantly conducted him back to the jury; and then all proceeded together to the room prepared for them. In the opinion of both sheriffs, Jones could not have been separated from the rest of the jury more than a minute; and he was out of sight of the sheriff Blanch for a yet shorter time. And one of the jurymen who was also examined, said he thought that Jones was not separated from the rest of the jury more than five seconds. Upon this state of the fact as to the alleged separation of the jurymen Jones from his fellows, the court overruled the prisoner's motion for a new trial; he excepted to the opinion; and the court passed sentence of death upon him.

And now he presented a petition to this court for a writ of error, on the ground that the court ought to have set aside the verdict, and granted him a new trial, upon the evidence of the separation of the jury, and that after dark.

PER CURIAM, unanimously, writ of error denied.

636 \*The Commonwealth v. Nix.

June, 1841.

**General Court—Adjournment of Question to—When Proper.**—Upon the trial of an indictment for felony, prisoner's counsel moves an instruction to the jury, in effect, that the evidence adduced for the prosecution does not prove that the crime charged in the indictment was consummated, and therefore they ought to find for the prisoner; the court, with assent of the prisoner and of the attorney for the commonwealth, adjourns the questions arising on the motion to this court, discharges the jury, and continues the cause till the next term: HELD, upon construction of statute 1 Rev. Code, ch. 69, § 14, it was regular to adjourn the questions to this court, and the court ought to decide them.

**Criminal Law—Free Negro—Conditional Sale—Effect—Statute—Case at Bar.**—Upon an indictment on statute 1 Rev. Code, ch. 111, § 28, for selling a free negro for a slave, the evidence of the sale is a written agreement, importing that prisoner sold the negro to vendee, for which he was to deliver and pay goods and money to vendor, but vendee was to take the negro on trial for a month, and if at end thereof vendee likes him, vendee is to pay the price, and vendor to give a bill of sale: vendee pays a small part of purchase money; within the month negro runs away; and upon suspicion that he was a free negro, or had been stolen by the prisoner, the prisoner is apprehended within the month: HELD, 1. that the sale of a free negro, to constitute the felony within the statute, must be an absolute sale; 2. that the contract in this case was in its terms a conditional sale, to be affirmed or annulled, at vendee's option, within a month, but if affirmed by him, the sale then became absolute, and the felony was complete; and 3. that such affirmation of the sale by the vendee may be proved, either by positive act of vendee, or by mere lapse of time without any act of vendee affirming or annulling the sale.

Case adjourned from the circuit superior court of Lee. Nix was indicted upon the statute 1 Rev. Code, ch. 111, § 28,\* for feloniously selling and delivering to one Jones a negro man as and for a slave, who was at the time of the sale and delivery free, 637 knowing the negro man \*so sold to be free. He pleaded not guilty, and was put upon his trial at April term 1841.

Upon the trial, it was proved on the part of the prosecution, that the prisoner made a contract in writing with Jones, in the following words: "Article of an agreement made this 11th January 1841, Daniel Nix of one part and Stephen Jones of the other, that said Nix do sell to said Jones a certain negro called Live; witness, that said Jones gives said Nix a roan stud horse, a certain brown horse called Jack, and one saddle, and 20 dollars in store goods, and 200 dollars in lawful money of Virginia, and a carry-

The principal case is cited in *Briggs v. Com.*, 28 Va. 561.

\*The words of the statute are—"If any person shall hereafter be guilty of stealing or selling any free person for a slave, knowing the person so sold to be free, and shall be thereof lawfully convicted, the person so convicted shall undergo a confinement in the public jail and penitentiary house for a term not less than one nor more than ten years."—Note in Original Edition.

all wagon, for said boy; which said Jones takes the said boy on trial for one month, and if said Jones likes the said boy at the end of the month, said Jones delivers the above named property to said Nix; also said Nix binds himself to give a good bill of sale to said boy; also said Nix insures said boy to be sound and clear of any impediment whatever. We witness our hands and seals the day and year above written" (signed and sealed by both parties). That in pursuance thereof, the prisoner forthwith delivered the negro to Jones, who shortly afterwards, at the prisoner's instance, advanced him about seven dollars on account of the price of the negro. That the negro remained with Jones about twenty days, and then ran away; which, with other circumstances which Jones learned, led him to suspect that the negro was either free, or had been stolen by the prisoner previous to the sale to him; and under this belief, Jones pursued the prisoner, who was then passing through the county of Lee, and apprehended him before the expiration of the month. And that the prisoner voluntarily and frequently made the fullest confessions, saying among other things, that at the time of the sale to Jones, he knew the negro to be free. Whereupon, the prisoner's counsel moved the court to instruct the jury, that if they should believe from the evidence, that the

638 \*contract of sale of the negro as a slave, was a conditional contract, to be made binding or not at the option of the vendee Jones at the expiration of one month from the date of the conditional contract, during which time Jones was to keep the negro on trial, and that before the month expired the negro ran away, and this prosecution was instituted; then, although the prisoner at the time of sale well knew the negro to be free, the sale was not an absolute sale, such as the statute required it should be to constitute the offence for which the prisoner was indicted; and that the jury should find for the prisoner. And the court doubting as to the propriety of giving such instructions, with the prisoner's assent adjourned to this court for novelty and difficulty, the following questions—1. Is the contract of the 11th January 1841 such an act as amounts to a sale within the meaning of the statute? And 2. what instruction ought the court to give to the jury? And then, with the consent as well of the prisoner as of the commonwealth's attorney, the jury from rendering a verdict were discharged, and the case continued till the next term.

UPSHUR, J., delivered the resolution of the majority of the court. A preliminary point, not submitted by the circuit superior court, was examined by the judges in conference. The questions adjourned arose in the progress of the trial, and thereupon the jury were discharged, and the trial postponed till the next term. A majority of the judges are of opinion, that the statute\* author-

izes this course of proceeding, although they disapprove it as both inconvenient and hazardous.

In answer to the first question adjourned, this court is of opinion, that the contract between the prisoner \*Nix and Jones, set out in the record, is not, by the mere force of its terms, such an act as amounts to a sale within the meaning of the statute. That contract is not a sale, but an agreement to sell, which the vendee had a right to affirm, or annul, as he might think proper, at any time within the month allowed by its terms; and until it was so affirmed, the sale was incomplete, and no change of property was effected thereby. Whether it was so affirmed or not, is a question for the jury to determine upon the evidence which may be laid before them. Its affirmance may be proved, either by some positive act on the part of the vendee Jones shewing his election to affirm it, or by the mere lapse of the time allowed in the contract, without any act on his part affirming or annulling it. If affirmed in either of those modes, it ceased to be conditional, and became absolute; the sale was thus rendered complete and perfect, and came within the provisions of the statute. This opinion affords a full answer to the second question adjourned.

SAUNDERS, BROWN, CHRISTIAN, GHOLSON and JOHNSTON, J., dissented. They regarded the contract, not as a mere agreement for a sale, but an absolute sale, subject to be disaffirmed by the vendee within the time specified by the agreement, and so coming within the provisions of the statute.

LOMAX, J. I differ from the majority of the court upon the preliminary point, whether a question arising on a motion made in the progress of a criminal trial for instructions to the jury, be such a question of law as may be adjourned by a circuit superior court to this court, and, if adjourned, decided here? It must, I suppose, be conceded, that it would not fall within the provision of the statute, or be within the power of the circuit superior court to adjourn, or of this court to decide,

640 any question of law, propounded, by anticipation, before \*the occasion that might raise the question, or require the application of the principle involved in it. Now, it does seem to me, that the questions here adjourned, and any answer which this court may by its decision give to them, can, as this case is circumstanced, only avail upon some future trial, when the questions now propounded may or may not arise, according to the course which the trial may take. The prisoner's counsel, in the course of the trial then going on, moved instructions to the jury then sitting upon the case, in order that that jury might be informed as to a matter of law, which the counsel distrusted its competency properly to decide without instruction from the court. But the discharge of that jury, in order that the questions raised by the motion for the instruction might be adjourned to this court and decided here, has put an end to the trial then going on; and, in regard to that stage of the proceedings, the case stands as if there had been no attempt at such trial. The functions of the jury to whose intelligence and conscience the instructions prayed were to be addressed, were wholly dispensed with, nor can the same jury be ever again

\*The statute 1 Rev. Code, ch. 69, § 14, p. 232, whereby it is provided, that the circuit superior courts, "in any criminal case, may, with the consent of the person accused, adjourn a question of law to the general court, which may be there argued and decided though such accused person be not present."—Note in Original Edition.

impaneled in the cause. The defence upon which the prisoner then relied, has been, for the time, wholly withdrawn; the evidence of the parties has been retracted; the occasion that required the instructions has passed away. Whatever is the defence, whatever the evidence, they are now reserved for a future trial, the conduct of which must be entirely irrespective of the proceedings upon the former trial, which has been stopped, without any possibility of restoring the same precise state of things that induced the motion to the court for the instructions. Any decision of this court must be wholly nugatory as to proceedings which have passed away and are now as if they never had been. The decision of this court can only affect the future trial which is expected to take place. But at that future trial,

the whole ground of prosecution, or of  
641 defence, may be varied; \*the contract for the sale referred to may not be offered in evidence at all; its construction and effect may not be a question in the case; even the execution of the instrument may be denied: and while it has become useless and impossible to instruct the jury, for whose information especially the instruction of the court was asked on the former occasion, it may be unnecessary to prepare instructions for the future jury that may be impaneled, who may need no such instructions, since the case may be presented to them in a shape involving no such points. Is it not then obvious, that any decision which can now be pronounced, must be altogether hypothetical, applying to a case which indeed may arise, but which may never arise? If such a practice as this precedent may open, shall be established, the most perplexing difficulties may embarrass the proceedings in every criminal case, and the administration of criminal justice may be indefinitely delayed, perhaps defeated. It seems to me, that the statute which gave the power to adjourn questions of law in criminal cases to this court must have contemplated questions relative to proceedings permanent on the record, and abiding in their influence upon the final results of the case; not in regard to matters transient and temporary in their nature, having no influence whatever in the case after the occasion that provoked the questions has passed away. If a motion were made to quash an indictment, such motion might properly be adjourned to this court, and decided: but if a motion were made for a continuance, could that motion be properly adjourned? The power to adjourn a point of law arising in the course of a trial after the jury is impaneled, which must necessarily require that jury to be discharged, is a power too large to be supposed to have been in the contemplation of the legislature. It is the right (if insisted on) of the commonwealth as well as of the accused,

that the jury which has been charged  
642 with the \*case should render a verdict, and should not, unless from great necessity, be discharged: and it could never have been the design of the statute, that the jury trial should be placed entirely in the power of the judge with the consent of the accused; for no consent on the part of the commonwealth is required for the adjournment of questions in criminal

cases. There are numerous questions constantly arising in criminal cases; questions as to the competency of witnesses, or of evidence, as to the legal effect of testimony, as to points of law in regard to crimes and punishments: these, and a variety of other matters, may be perpetually offering themselves at every stage of the trial, and the court with the consent of the prisoner (which he will generally be very ready to give) may, under this precedent, adjourn them or any of them, and thus supersede the functions of the jury, which must be discharged. It was unnecessary to confide such a power to the judges; because the accused may, in a more regular mode, have the benefit of reserving every point of law he may think proper to insist upon. The power of adjourning questions arising while the jury is in the box (as has been done here) must always occasion great and unnecessary inconvenience and delay; and such a power in the hands of a wicked judge, might be exercised to the entire subversion of the commonwealth's interest in the due administration of criminal justice.

CHRISTIAN, J., said, he concurred in the opinion of judge Lomax on the preliminary point.

FIELD, J. I also concur in the opinion, that the questions in this case are not regularly adjourned to this court, and that we ought not to decide them; but the majority of the judges present holding the contrary opinion upon this point, and determining to respond to the questions adjourned, I concur in the opinion of the majority of the court upon them.

#### 643 \*Mowbray v. The Commonwealth.

June, 1841.

**Forgery—Commitment for Forging and Uttering—Effect.\***—A person examined in county court on a charge of forging an order, and committed by that court for trial in circuit superior court for the forgery only, cannot be tried there for uttering and publishing the order.

**Indictments—Counts for Distinct Offences—Effect.**—Therefore, if the indictment against the prisoner contains counts for the forgery, and counts for uttering and publishing, the circuit superior court ought to quash these latter counts.

**Same—Defective Counts—Effect upon the Good Counts in Cases of Penitentiary Crimes.†**—The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty,

\***Indictments—Counts—Forgery.**—The principal case is cited in Scott v. Com., 14 Gratt. 689; *foot-note* to Linkous v. Com., 9 Leigh 608; *foot-note* to Page v. Com., 9 Leigh 683; *foot-note* to Com. v. Cohen, 2 Va. Cas. 158; *foot-note* to Com. v. Ervin, 2 Va. Cas. 337; Dowdy v. Com., 9 Gratt. 731, 732; Hausenfluck v. Com., 85 Va. 710, 8 S. E. Rep. 683; Jones v. Com., 86 Va. 962, 12 S. E. Rep. 950; State v. Smith, 24 W. Va. 817.

†**Same—Defective Counts—Effect.**—For a discussion of this question, see the principal case cited in *foot-note* to Kirk v. Com., 9 Leigh 627; Clere v. Com., 3 Gratt. 618, and *note*; Rand v. Com., 9 Gratt. 749; Shiffet v. Com., 14 Gratt. 673; Richards v. Com., 81 Va. 115.

See monographic *note* on "Indictments, Informations and Presentments" appended to Boyle v. Com., 14 Gratt. 674.

and a general verdict of guilty be found, the bad counts will not effect the validity of the good, and judgment will be given on those which are good,—is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict.

Error to a judgment of the circuit superior court of Kanawha, whereby Mowbray was sentenced to three years imprisonment in the penitentiary.

The indictment against him contained seven counts. The first four of them were alike, only varying from each other in minute particulars, which it is unnecessary to mention, and charged him with having feloniously forged, procured to be forged, and assisted in forging, the following order in writing, directed to Lewis Ruffner and company, to wit, "Kan: Salines, Dec. 22nd 1840. Messrs. Lewis Ruffner & Co. Please let the bearer have twelve dollars in the store, and ch'd A. Donally by V. B. D." The last three counts varied likewise from each other in some immaterial particulars, and charged the prisoner with having feloniously uttered and published as true, and attempted to use as true, for his own benefit, a certain other forged and counterfeited order in writing (setting out the same order recited in the first four counts).

Upon the arraignment of the prisoner, and before he pleaded, his counsel "moved the court to quash the whole  
644 \*indictment, and each count thereof, because the offences charged therein were variant and different from the offences for which the prisoner was tried by the examining court, and sent on to be tried in the circuit superior court." And in support of this motion he produced a copy of the record of the examination of the prisoner in the county court of Kanawha, whereby it appeared, that the prisoner was examined there, and remanded for trial in the circuit superior court, upon the charge of forging the order only, and not at all on the charge of uttering the forged order. The court overruled the motion, and the prisoner's counsel excepted.

The prisoner then pleaded not guilty, and was put upon his trial. The jury found him "guilty of the charges as in the indictment against him alleged, and ascertained the term of his confinement in the public jail and penitentiary house to be three years." And the court passed sentence on him accordingly.

Upon the petition of the prisoner, this court allowed him a writ of error to the judgment.\*

\*In order to understand the points adjudged in this case, it is necessary to advert to the following provisions of the statutes of Virginia—

1. The statute regulating criminal proceedings against free persons, 1 Rev. Code, ch. 160, after providing for the examination of free persons charged with crimes by the county and corporation courts, and for the commitment of them for trial in the circuit superior courts, in case the county or corporation courts shall think they ought to be there tried; and providing that if the accused shall be acquitted or discharged by the county or corporation court on such examination, such acquittal or

Greenhow for the prisoner.

The attorney general for the commonwealth.

645 \*GHOLSON, J., delivered the opinion of the court. The motion of the prisoner which the court overruled, was a motion "to quash the whole indictment, and each count thereof." Construing the motion in such manner as to give to all its parts their full and fair meaning, we deem it, not as a motion or as only equivalent to a motion to quash generally, but that it embraced a motion to quash each of the counts of the said indictment, singly and separately. And so viewing it, this court is of opinion, that the circuit superior court erred in wholly overruling it. The prisoner had been examined by the county court, and sent on to be tried of and concerning the offence of having feloniously forged the order in writing set out in the indictment, and for that offence only. But he was arraigned in the circuit superior court on an indictment, which not only contained four counts for forging the order, but also three other counts charging him with having uttered and published it as true &c. The last three counts were improperly inserted in the indictment: they charged, not degrees of the same offence charged in the preceding counts, but (according to the

decision of this court in Page's case, 646 \*9 Leigh 683), a distinct substantive crime. Being a distinct crime, the circuit superior court had no jurisdiction to try the prisoner therefor, until he had been regularly examined by the county court, and sent on to the circuit superior court to be tried for it according to law, M'Caul's case, 1 Virg. Ca. 271, 300; Mabry's case, 2 Id. 396; Huffman's case, 6 Rand. 685, but the three counts being improperly contained in the indictment, the motion of the prisoner's counsel to quash each one of them was legal and in order, Com'th v. Cohen, 2 Va. Ca. 231, and ought to have been sustained.

discharge shall be a bar to further prosecution for the same offence;—enacts (§ 8, p. 661.) that "before any person charged with treason or felony shall be tried before any circuit superior court, he or she shall be examined, in the manner prescribed by law, by the court of the county or corporation wherein such offence was committed, unless such examination be dispensed with by the assent of the prisoner entered of record in such circuit superior court."

2. The statute against thefts and forgeries &c. Id. ch. 154, § 4, p. 579, enacts, that if any free person shall falsely make, forge or counterfeit &c.—any letter of credit or other writing, to the prejudice of another's right—or shall, with like intent, utter or publish as true, any false, forged or counterfeited paper or writing, knowing the same to be false, forged &c.—such person shall be deemed guilty of felony; and being lawfully convicted thereof, shall be punished by confinement in the public jail and penitentiary for not less than one nor more than ten years. Which was so altered by an act of March 1826, Supp. to Rev. Code, ch. 287, § 1, p. 290, that the imprisonment shall not be less than two years.

And 3. by the statute concerning the penitentiary, 1 Rev. Code, ch. 171, § 12, p. 619, in all cases where the punishment is imprisonment in the penitentiary, the jury which convicts, ascertains by its verdict the term of imprisonment.—Note in Original Edition.

It is then proper that we should reverse the judgment of the court below, which overruled the prisoner's motion. But what more? Shall we arrest the judgment and direct a new trial?—or shall we sustain the verdict of the jury, because it was general, and the indictment contained some good counts? This is a question not entirely free from difficulty. The english rule is broad and general, that one good count in an indictment is sufficient to sustain a general verdict of guilty, however defective the others may be. The soundness of this rule we do not question,—and we deem it to be the law of Virginia as well as England: but we do not think it applicable to the case now under consideration, nor indeed to many cases of general verdicts which may arise under our criminal laws. In England, it is always true and always applicable, because there juries in criminal cases never do more than find the guilt or innocence of the accused, and the nature and quantum of the punishment are fixed by law or confided to the courts. In Virginia, it is always applicable and always true, except in certain cases where the functions of juries in criminal cases have been extended and enlarged by statute; or, in other words, whenever the province of a jury in Virginia

is the same as it would be in a like case in England, the same rule is applicable here as there. But owing to several causes, especially the introduction of the penitentiary system, we have, in relation to a large class of crimes, considerably enlarged the powers and duties of juries in criminal cases, and clothed them with functions entirely unknown to the english law. Thus, in the trial of nearly all offences punishable with imprisonment, we have required our juries not only to say whether the accused be guilty or not guilty, but, if guilty, to say also what shall be the quantum of punishment. Such verdicts as these are clearly not those general verdicts of guilty merely, contemplated by the english law, and to which the rule now under consideration was intended to apply. The rule is sound and philosophical when applied to verdicts limited to the simple issue of guilty or not guilty; because it cannot by possibility operate in such case to the injury of the accused. A general verdict of guilty declares the accused guilty of each and every count in the indictment, and if all were quashed but one, the verdict would still be the same, guilty, and no more. A discovery of defective counts, or a misjoinder of counts, might change the judgment of the court, but it could not affect the verdict of the jury. Far different, however, would be the operation of the rule on those general verdicts under our law, which not only declare the guilt but ascertain the punishment of the accused. They find the prisoner guilty on all the counts of the indictment, and declare generally that he shall suffer imprisonment for so many years. Who shall say how they proportioned the punishment to the various offences? We cannot charge them with the folly or injustice of having punished some of the offences and pardoned others, after having found the prisoner equally guilty of all. How shall this court measure or estimate the verdict of the

jury in the case of Mowbray? It fixed his term of imprisonment at three years: did the jury intend to confine him two years for the uttering the forged order, or vice versa? or did they intend to punish one offence and pardon the other? if so, which? But if the english rule, which we are now considering, be applicable to this case and others like it, we are bound to apply the entire finding of the jury to four out of the seven charges contained in the indictment, and to visit upon four offences a quantum of punishment which the jury themselves declared they intended to inflict on seven. Nay, had the jury doubled or trebled the amount of punishment, and we should decide to quash every count of the indictment but one, the whole punishment would have to be visited on the isolated offence left, though it was the least, and though we might know from the declaration of every jurymen, that but a trivial portion of the punishment was intended for it. But to place this question beyond doubt, let us suppose the jury in this case to have transcended the maximum punishment prescribed by law for the crime of forgery: can it be conceived that we would sustain the verdict after having stricken from the indictment the charge of every other offence whatever? And yet, if the distinction we have taken above be not correct, the english doctrine would apply in all its force, for there would stand the general verdict of guilty, and the one good count in the indictment.

For these reasons, we are satisfied that the rule does not apply to cases in which the jury is required not only to pass on the guilt of the accused, but also to ascertain the amount of the punishment; and where, from the finding, it cannot be known in what manner the jury intended to apportion the punishment.

It is therefore the opinion of this court, that the circuit superior court erred in refusing to quash the last three counts of the indictment, and that as that error probably affected the verdict of the jury, the judgment on the verdict ought to be arrested.

649 \*FRY, J. I must dissent from the judgment of the court in this case. Admitting that the circuit court on the authority of Page's case, ought to have quashed the counts which charged offences for which the prisoner had not been examined in the county court (which one of the judges thinks the circuit court was not bound to do, because the prisoner did not point his exception to those counts), I am yet of opinion, that there is no error in the judgment of which the prisoner can complain. He is indicted in four counts for forging a paper, and in three others for uttering the same paper. Before pleading, he moved to quash the indictment, and each count thereof, because they were variant and different from the offence for which he had been examined. And it appeared, by the production of the record, that he had been committed and examined for forging the paper, but not for uttering it. His motion was overruled, and he pleaded not guilty. Whereupon he was tried, and the jury find him "guilty of the charges as in the indictment against him is alleged, &c."



Each count is regarded as a separate indictment, and is supposed to present a distinct offence. 1 Chitt. Cr. Law 249, Linkous's case, 9 Leigh 612. It is a rule of the common law, that if any count be good, and the prisoner be convicted generally, or upon the whole, judgment shall be entered upon the count that is good, notwithstanding the other counts are bad. 1 Chitt. Cr. Law 249. If two or more distinct offences are charged in an indictment by separate counts, the prisoner can neither demur nor move in arrest of judgment: his only mode of objecting to them is "by an application to the court to quash the indictment before plea, or to compel the prosecutor to elect which charge he will try in a subsequent stage of the proceedings. But the court will only listen to such request, when they see that the charges are actually distinct, and may confound the prisoner, or distract the attention of the jury." Ibid. \*In Harman v. The Commonwealth, 12 Serg. & Rawle 72, Tilghman, C. J., said—"It may be proper to remark, that where two offences are charged in separate counts, if the defendant can make it appear, that this mode of proceeding will subject him to unreasonable difficulty or embarrassment on the trial, the court have it in their power to protect him, by quashing the indictment, or compelling the prosecutor to elect on which count he will proceed, and discharge the defendant from the other." In *The People v. Rynders*, 12 Wend. 429, we have the case of a prosecution for forgery, with some counts for uttering the forged paper, and others for the forging it. A motion was made to compel the prosecutor to elect for which offence, and upon which class of counts, he would proceed to try the prisoner. The motion was denied; and the court said: "That there would be an incongruity in incorporating in the same indictment, offences of a different character, such for instance as forgery and perjury, cannot be denied, and that in such case, a court would refuse to hear a trial upon both, there can be no doubt; but when offences of the same character, differing only in degree, are united in the same indictment, the prisoner may and ought to be tried on both charges at the same time. Such is this case. The prisoner was indicted for forging the check, and also for publishing it as true, knowing it to be false. These are different offences, and punished with different degrees of severity, but were properly united, both in the indictment and trial. The prisoner might be convicted of one, and not of the other." See also *The People v. Gates*, 13 Wend. 311.

Let us apply these principles and authorities to the case before us. Admit the court ought to have quashed three counts of the indictment, and to have sustained four, and that the prisoner has been tried upon the whole seven; what is the legal effect of the verdict of the jury? Simply this, and no more: We find the

651 \*prisoner guilty of the felonies charged upon him, in the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th counts of the indictment, in manner and form as therein alleged against him &c. Nay, this is, substantially, the very words of the finding: he is guilty of the charges alleged against him in the indictment: and the indictment consists of all

its counts; the whole comprehends every part. Here is a verdict, then, upon the seven counts of the indictment, expressly finding the prisoner guilty upon each count, of the crime in each count alleged, in manner and form as laid. Say, that on three counts the finding should be set aside, and the counts quashed; why should the finding on the other four be disturbed? They are complete; the prisoner was triable upon them; there is a verdict on each, and judgment. If the verdict on three counts be in vain, why should this make it void as to the other four? Let us consider that as done, which ought to have been done, and the three counts quashed, and the prisoner as to them acquitted or discharged; yet there are the other four counts, and verdict upon each. Do they not support the finding and judgment? And wherein does the case differ from any other case, in which there has been a finding on all the counts, yet there are some which the court ought to have quashed, or on which they ought to arrest the judgment? For myself, I do not perceive the difference.

It is said the verdict is general, and the jury may have found only on the faulty counts. The answer is, that this is against the record; against the legal effect of the finding, as before mentioned, which applies to all the counts; against the very words of the finding.

But it is said, if the finding was for the forgery as well as for the uttering, the jury have punished but one only. This is true. Yet it is no error of which the prisoner can complain. It is for his benefit. He might as well allege, that he has not been punished seven \*times, once on each count,

—as that he is not twice punished, once for the forgery, and once for the uttering. If prisoners may obtain new trials, where there are several counts, and general verdicts, or verdicts upon all, and but one offence punished, I apprehend half the prisoners in the penitentiary might obtain them.

If it be said, there being but one crime punished, it is proof that the jury did not find on all the counts, I answer, as before, that this is against the finding itself; and is, besides, no necessary consequence. The jury may find a prisoner guilty on all the counts, yet find imprisonment on but one: and this is every day's practice where there are more counts than one, and general verdicts. Looking at the record only (apart from any thing extrinsic), there were seven several offences (for each count, we have seen, presents a distinct offence) and though the verdict and judgment inflict imprisonment for one only, this is for the benefit of the prisoner; if error, it is error only against the commonwealth.

Then, as to the argument, that the prisoner may have been prejudiced on his trial upon the four property counts, by evidence being offered under the three which ought to have been quashed, and that this prejudice may have been twofold, first embarrassment in his defence from evidence of two crimes instead of one, and next, increase of the term of his imprisonment for the one for which he is punished. As to the first, I think it sufficient to say, that the prisoner did not address his motion to the court on any such ground. He moved to quash be-

cause the indictment varied from the offence for which he had been examined in the county court. And we have seen that he must call the attention of the court to the subject, and satisfy it that he will be prejudiced on his trial; and that the court will exercise a sound discretion, and quash only where such prejudice will arise. But the case of *The People v. Rynders* shews that if the attention of the court had been called to the subject of prejudice on the trial, it would not have granted the motion on that ground. And in support of this case, and to shew that the prisoner could not be surprised or prejudiced by evidence of his uttering the paper with knowledge of its being counterfeit, I may here remark, that evidence of such uttering would be proper on the trial for forgery. It would prove the intent with which the paper was forged. For if he had forged and never uttered, or offered to use it, it might be difficult to establish that he had made the false paper *malò animo*. At all events, such evidence would be proper to shew the mind or intent in the forgery.

To pursue the subject of prejudice on the trial, further: Such prejudice would arise in every case, where the prisoner was indicted, in the same indictment, for more than one offence, and for all of which he had been properly examined. As, for example, where he is indicted for passing two bank notes to the same person at different times. If the prisoner for any cause (suppose for defects in the counts, or irregularity in the finding by the grand jury) should move to quash them, and afterwards plead, and be convicted: would (not the court who tried him, and who knew the evidence, and the incidents of the trial, but) the appellate court, of its own mere motion, take up the subject with a view to its possible prejudice to the prisoner on the trial, and award him a new trial upon that ground? I apprehend not, and that there is no precedent of any such case.

In point of fact, the appellate court cannot know that the prisoner was prejudiced or embarrassed. It cannot know what the evidence was, as it is not in the record. And in truth the prisoner never presented the subject to the court, in any way.

Suppose, on this head of embarrassment or prejudice at the trial, the jury had acquitted the prisoner on the three counts objected to, and convicted him on the other four: would this court be prepared to grant a new trial? If not, I humbly think it is conclusive to shew they should not in the present case. For it is obvious, his embarrassment or prejudice may have been the same, whether acquitted or convicted on the three counts; since, though acquitted, he was tried upon them improperly, and much evidence may have been given in support of them, and much contest had about it before the jury. Yet, I feel assured, the court in such case would not grant a new trial.

Nor do I think they ought to grant it, because the imprisonment may have been enhanced for one crime, from evidence having gone to the jury of others. To assume this, would be to say there could be no trial of a prisoner on an indictment which charged more than one offence. If convicted of more

than one, the evidence of double guilt offered to the jury may have served to corroborate each charge, to contribute to the conviction for each, and to enhance the punishment of each; and, if acquitted of one charge, and found guilty of another, it may be said, the evidence, though short of proof of legal guilt on one, may have shewn circumstances of suspicion, or of moral delinquency, which served to fix the other charge, or increase its punishment. I do not think any such ground for a new trial was ever sustained. Trials may be, and often are, had on the same indictment for more than one charge;—and this, too, where the party has been acquitted of some and found guilty of other charges, or judgment arrested on some counts and given upon others: yet I never heard it objected before, that the evidence of one charge might have sustained another, or aggravated its punishment, and that therefore the party was entitled to a new trial.

If it be said, the jury have punished for more than one offence, because they have exceeded the minimum, I answer, this is against their finding: for, if they had punished for two offences, they must have found four years of imprisonment, since the minimum for all the offences charged is two years. If they had found two years only, it seems it would have been considered sufficient, as precisely equivalent to the finding of guilty, at the common law, where the court adjudged the punishment. But the finding of three years stands upon the same footing with that of two; for the latter would be good only because it is a finding, necessarily, on one count; and the finding of three years can be no more, unless upon the idea that the evidence under the counts excepted to, added one year to the punishment given for his guilt upon the others; which I have attempted to combat. It is true, that if the imprisonment had been for four years or more, the reasoning of the court in this case might apply; though I believe, that when the jury convict, in point of fact, for two or more offences, they attach a specific punishment to each, and judgment for consecutive imprisonment follows.

In conclusion, I have to say, that I sat in Page's case, and that I think its doctrine ought not to be extended. Neither the counsel, nor the court, I am sure, thought the prisoner would have been entitled to a new trial, if the verdict had found him guilty of the uttering. The question was, whether the verdict responded at all to the counts for uttering, as it found him guilty only of the forgery: had it found him guilty of the uttering also, it was supposed no question could have been raised upon it.\*

LEIGH and NICHOLAS, J., also dissented from the opinion of the majority of the court.

Judgment—that the circuit superior court erred in refusing to quash the last three counts of the indictment; \*therefore, judgment reversed; and this court proceeding to give such judgment as

\*Note by FRY, J.—When this case was decided, I had not seen Kirk's case, 9 Leigh 627, nor was it adverted to in the discussion of the present case. It may be referred to, I think, as strongly supporting the views I have taken in this opinion.—Note in Original Edition.

the circuit superior court ought to have rendered on the prisoner's motion to quash the last three counts of the indictment, it is considered that the said last three counts be quashed, &c.

And it appearing that the prisoner had been removed to the penitentiary according to the sentence of the circuit superior court, a habeas corpus was awarded, directed to the superintendent of the penitentiary, to bring the prisoner before this court; upon the return of which, the court committed him to the jail of Henrico county, to be thence conveyed by the sheriff of Henrico to the jail of Kanawha, and delivered to the custody of the jailor thereof, in order that the prisoner should have a new trial on the first four counts of the indictment.

# 657 \*Armistead v. The Commonwealth.

June, 1841.

[37 Am. Dec. 633.]

**Criminal Law—Jurors—Opinion Formed—Rule.**—Upon a question whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is, That one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, or conversation with witnesses, or common report, is not an indifferent juror. And it is immaterial whether such opinion has been expressed or not.

**Same—Same—Same.**—And if the person called as a juror has been so inconsiderate and unjust as, upon insufficient or no evidence, to have prejudged the prisoner's cause, much more is he unfit to be trusted with it as a juror.

**Same—Same—Same—Case at Bar.**—A person called as a juror, stated that he had had a conversation with the prosecutor shortly after the alleged offence committed, and heard from him a general statement of the facts, though he did not know whether that statement mentioned all the facts; on that statement he had formed and expressed a decided opinion that the prisoner was guilty; he knew the prosecutor, and had entire confidence in his veracity; he had forgotten some of the circumstances by him related; and the opinion he had formed was not such but that it would yield to evidence; he would try the prisoner's cause by the evidence alone, and had no doubt he could give him a fair trial; he had no prejudice against him; upon a challenge for cause, HELD, this person was not indifferent, and the challenge should have been sustained.

Error to a judgment of the circuit superior court for the county of Henrico and city of Richmond. Armistead was indicted for stealing a horse the property of one Howard,

**\*Jurors—Competency—Opinion Formed.**—See, on this question, the principal case cited in *foot-note* to *Maile v. Com.*, 9 Leigh 661; *Heath v. Com.*, 1 Rob. 742; *foot-note* to *Com. v. Hallstock*, 2 Gratt. 564; *Clore v. Com.*, 8 Gratt. 621 (see *note*); *Jackson v. Com.*, 23 Gratt. 931, 933 (see *note*); *foot-note* to *Shinn v. Com.*, 32 Gratt. 901; *Dejarnette v. Com.*, 75 Va. 872; *Washington v. Com.*, 86 Va. 407, 10 S. E. Rep. 419; *Younger v. State*, 2 W. Va. 586; *State v. Baker*, 33 W. Va. 324, 10 S. E. Rep. 641; *Ex parte Crittenden*, 6 Fed. Cas. 822. See generally, monographic *note* on "Juries" appended to *Chaboon v. Com.*, 20 Gratt. 733.

tried, convicted, and sentenced to confinement in the penitentiary for five years.

In empanelling the jury for the trial, Jacob Shook being called as a juror, and being at the prisoner's instance sworn to answer questions touching his indifference, stated, that shortly after the loss of the horse by Howard, for the stealing of which the prisoner was indicted, he had a conversation with Howard in regard to the circumstances attending the loss of his horse;

that Howard made a general statement 658 of those circumstances; \*whether that statement embraced all the circumstances, Shook could not say; but, upon the facts stated by Howard, Shook declared, he had then formed and expressed a decided opinion as to the guilt or innocence of the prisoner; and he further voluntarily declared, that that opinion was against the prisoner: that the opinion he formerly expressed, he yet entertained, though he had forgotten some of the circumstances related by Howard: that he knew Howard well, and he was a respectable man, in whose veracity he had entire confidence: that the opinion he had formed was not such but that it would yield to the influence of the evidence, that he would try the prisoner's case by the evidence alone, and had no doubt he could now give him a fair trial; and that he had no prejudice against him. And thereupon the prisoner challenged the juror for favour, because it appears by his own statement that he was not impartial. But the court overruled the objection, and decided that the prisoner should be required to accept the juror, or challenge him peremptorily: to which opinion the prisoner excepted.

And now he applied to this court for a writ of error to the judgment, which was allowed.

Lyons and Scott, for the prisoner.

The attorney general, for the commonwealth.

SCOTT, J., delivered the opinion of the court. It was correctly remarked by the attorney general, that it is not easy to lay down a rule which can be applied with certainty to every case that may arise. Such are the number and variety of the shades of opinion, from a slight and evanescent impression to the firmest and most deeply rooted conviction, that, though the extremes may be readily discerned, it is often difficult to determine, where the impression that will not bias the judgment, deepens into an opinion which will turn the 659 \*scale in a doubtful case. Nevertheless, it is proper, that the court, in deciding a case before it, should not content itself with acting on the peculiar circumstances of that case, and leave others, not identical with it in all their features, to stand upon their own insulated grounds, but should look for principles, and adopt such as may conduce to the great end proposed in the selection of men to pass upon the liberty or the life of the citizen, who (in the language of the law) should "stand indifferent as they stand unsworn." To adopt such principles is to establish rules; and it is certainly desirable, that they should be as general as the nature of the subject will admit. This the court attempted to do in *Osiander's case*, 3 Leigh 780. The criticism upon the lan-

guage there employed, and the attempt to substitute other terms in defining the character of the opinion which should disqualify a juror, has not satisfied us that the definition attempted by the court in that case, is not as precise and accurate, and as easily applied in practice, as any we can now give.

It was there said, that a person who has formed and expressed a decided opinion, that the accused is guilty or innocent of the offence for which he is about to be tried, is unfit to sit upon the trial.

It is supposed that there is difficulty in ascertaining the true meaning of the term "decided," when applied to opinion. When the question of the truth or falsehood of a proposition is presented to the mind, the wise and discreet examine, reflect, deliberate; and then, and not till then, decide. Some examine with more patience and perseverance, and reflect more profoundly than others; some gifted beyond the ordinary lot of man, or fancying themselves endowed with an intuitive perception of truth and error, decide after little, nay almost without any, reflection: but whether the solution has been arrived at by the longer or the shorter process, the question no longer remains for

660 deliberation; it is decided. \*Some minds are so sceptical, that they receive nothing as true, which is not proved by plain and direct evidence, or established upon mathematical demonstration; while others readily adopt the most absurd notions, though unsupported by any thing like evidence, and destitute of all foundation in reason and in the nature of things. And we not unfrequently find opinions of the latter class, as immovable as those which are the result of the most laborious investigation. The mind is, however, in both cases, made up; the question is settled; it is decided. And although both classes of persons may say, and believe they say truly, that they are open to conviction, willing to hear evidence and listen to reason, and either adhere to or abandon their opinions as these may dictate, few would be willing to stake their lives and fortunes on the success of an attempt to overturn opinions, which their professors fancy themselves to be thus willing to abandon at the command of truth and justice. The term "decided" used in the rule objected to, is (if any thing) rather too strong and definite for the subject to which it is applied.

Let us see, whether the terms proposed to be substituted, and by which, it is said, this case ought to be determined, are less liable to objection. It is said, that the opinion which should disqualify a man from being a juror, should be "strong and abiding." Now, is the word strong, when applied to opinion, more forcible than the word decided? We have on our minds some impressions which are weak, some strong, some stronger, and others which are decided, and which approximate very nearly to the strongest. But "the opinion should be abiding:" most certainly; for however strong and decided an opinion, or (to use a stronger word) a conviction may be, if it has been abandoned, no longer exists, no longer abides in the mind, it cannot disqualify a juror. But if the term "abiding" be not used in this sense, but is intended to apply to the case of a  
661 person, \*who, although he has made up

his mind, cannot at the moment recall either the evidence or the process of reasoning which wrought the conviction, it should not enter into the definition. When we have made up an opinion on any question, we more easily recall the conclusion at which we arrived, than the process by which we arrived at it; but when upon an examination, that process is brought to our attention by others, or by an effort of our own memory, we are prepared to yield our assent to it, and far more readily adhere to our former opinions than adopt new ones.

Again, it is said, the opinion should be "deliberate and settled;" that, at least, there should be something of deliberation in the formation of it. It has been before remarked, that opinions are formed with more or less deliberation, and sometimes even without deliberation; and it cannot be denied, that opinions of the latter class are, sometimes at least, adhered to with as much obstinacy as those which have been the result of the most patient enquiry. Still, however, it is admitted, that the greater or less deliberation with which an opinion has been formed, is an important consideration in the enquiry whether it is a decided one or not. But if this enquiry should lead to the conclusion, that the opinion under examination is a decided one, its having been formed without due deliberation, so far from removing the disqualification, adds to it: it proves, that the man who would thus lightly decide upon the guilt of his fellow man, is unfit to take his seat among the good and lawful men who alone should sit upon the trial.

This view of the subject applies also to the kind of evidence on which the opinion is founded; whether it be conversations with witnesses, testimony given on a former trial, hearsay or common report. The opinion will, generally, be more or less decided according to the nature of the evidence  
662 on which it is founded. But \*if it be decided, he who entertains it is not the better qualified to discharge the important duty of a juror, because he has founded it on common report. A philosophic mind, accustomed to arrive at truth by painful and laborious research, may wonder that a rational being should pronounce his fellow man guilty of moral delinquency, upon no better evidence than common report: yet the evidence of history and our own observation prove, that such things have happened, and do happen daily. The benignity of the law has thrown around all who are put upon their trial for crime, its protection against this imperfection of human reason and human justice. Therefore, if there be good cause to believe, that the accused has been prejudged by a large portion of those from among whom his triers are to be selected, the venue is changed. And equal care is taken, when he stands upon his deliverance, that his fate shall not be placed in the hands of men by whom he is already condemned.

We, therefore, re-affirm the rule laid down in *Osiander's* case: that he who has formed and expressed a decided opinion, that the prisoner is guilty or innocent of the offence for which he is about to be tried, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, conversation with witnesses,

or common report, is not fit to sit upon his trial. We go further, and say, that it is immaterial whether that opinion has been expressed or not.

It is supposed to be difficult to apply this rule in practice. The juror is, most commonly, the best judge whether or no his prepossessions amount to a decided opinion. If, however, upon ascertaining the sources of information that have been open to him, and the degree of reflection and deliberation which he has bestowed upon the subject, or the want of precision and accuracy of his notions of what constitutes a decided  
663 opinion of \*the prisoner's guilt or innocence, it should appear to the court, that the impressions are not such as are contemplated by the rule, the challenge for cause will be overruled. This will more frequently happen, when the opinion is founded on hearsay or common report; and, generally, opinions founded on mere reports in the country ought to be regarded as hypothetical, or so slight as not to disqualify the person entertaining them. But if upon a further examination it shall appear, that this is not the true state of the juror's mind, but that he has been so inconsiderate and unjust, as upon insufficient evidence, or no evidence at all, to have prejudged the prisoner's cause, he is doubly unfit to be trusted with it.

When the case at bar is brought to the test of the rule now stated and explained, there is little difficulty in deciding that the court below erred. The juror who was challenged, had conversed with the prosecutor, the most material witness for the commonwealth; and upon a statement of facts made by him, had formed, and still entertained, a decided opinion that the prisoner was guilty. It is vain for a man in this state of mind to say, that he would give the prisoner a fair trial; that he was not prejudiced against him; that he would judge him by the evidence, and decide according to the evidence. Whatever confidence he may have in his ability to erase from his mind the impressions made by his conversation with the prosecutor, of whose respectability and veracity he has no doubt, the law has no confidence in him; however willing he may be to trust himself, the law will not trust him.

FIELD, J. I concur with the other judges in the opinion that the judgment in this case should be reversed. But I do not entirely concur in the opinion which has been delivered by judge Scott. It seems to me that some of the principles set forth  
664 in that opinion, are in \*conflict with the decision of this court in Maile's case, 9 Leigh 661. That case was decided by a very full court, after much debate and deliberation. I was one of the majority of the court which decided it: and I then thought that an opinion founded on mere rumor was a hypothetical opinion, and such as ought not of itself to disqualify a man from giving the prisoner a fair and impartial trial. I yet retain the same opinion: I am not willing to subscribe to principles that appear to me in conflict with the decision of Maile's case.

Judgment reversed, and cause sent back for a venire de novo.

665 \*The Commonwealth v. Semmes.

June, 1841.

**General Court—Admitting to Bail—Jurisdiction.**—A prisoner in close jail upon an indictment for murder, applies to the circuit superior court in term time, to be admitted to bail, and that court refuses to bail him; and then he presents a petition to the general court, praying to be let to bail: HELD, the general court has original concurrent jurisdiction with the circuit superior court, and with the judge thereof in vacation, to admit the prisoner to bail for good cause to it shewn.

**Criminal Law—Bail—When Proper to Allow.**—It is good cause for admitting to bail a prisoner confined in close jail upon an indictment for murder, that he is labouring under a present painful, severe, and dangerous disease, caused by his imprisonment, and likely to be so aggravated by a continuance thereof as probably to terminate fatally.

**Same—Same—Infant—Recognizance.**—An infant prisoner being admitted to bail, his sureties were required to enter into the recognizance of bail, without his joining therein himself.

**Same—Same—When Habeas Corpus Dispensed with—Case at Bar.**—The general court, on the petition of a prisoner in custody on an indictment for murder, to be let to bail on account of the ill state of his health, forbore, on the same account, to bring him before it by habeas corpus, heard his application for bail in his absence, and resolved that he ought to be let to bail; whereupon, the judge of the circuit superior court wherein he was indicted, in vacation, admitted him to bail accordingly.

Petition to be let to bail. Semmes was indicted for the murder of professor Davis of the university of Virginia, in the circuit superior court of Albemarle, at its May term 1841, arraigned, and pleaded not guilty. But his counsel moved for a continuance on the ground that such was his ill state of health, that he was incapable at that term of undergoing the protracted trial which was likely to ensue; and the court, upon the testimony of three gentlemen, his attending physicians, as to his actual state of health, upon its own view of his situation, thought it improper to put him upon his trial, and continued the case till the next term.

The prisoner's counsel then prayed the court to admit him to bail; representing the apparent severe and dangerous disease under which he was then labouring;  
666 \*that it was originally caused, and had been continually aggravated, by the condition of the jail in which he was confined; and that if he should be continued in confinement, it would be yet more and more aggravated, and in all probability prove mortal. Several witnesses were examined touching the alleged grounds of the application. And the court upon consideration of the evidence, refused to let him to bail; directing, however, that he should be removed

\***Criminal Law—Bail.**—In Quarrier's Case, 5 W. Va. 49, it is said: "The petition, instead of showing probable cause to believe that the petitioner is detained without lawful authority, shows clearly that he is detained regularly by lawful authority, upon indictments charging him with the commission of divers felonies, and does not allege or show good cause, or any cause, why he should be admitted to bail or discharged from custody, by *The Commonwealth v. Semmes*, 11 Leigh 665; Archer's Case, 6 Gratt. 705."

from the felon's room in the jail, where he had hitherto been confined, into the debtor's apartment, and that measures should be taken to render this as comfortable as possible.

And now the prisoner presented a petition to this court, praying to be admitted to bail on the same grounds on which he had made the application to the circuit superior court; adding that his situation had been, since he was remanded to jail, daily growing worse and worse, till now he was reduced to the lowest state of emaciation and debility; and that he verily believed, that, if his present confinement should be continued without intermission, he could not live till the time appointed for his trial, or if he should linger till then, he would certainly be less able to undergo a trial than he was at the last term. And he prayed habeas corpus (if the court should think it necessary) to bring him before it.

Upon this application, several witnesses were examined. It appeared that the prisoner was a youth of about nineteen years old. That he was committed to jail for the crime for which he now stood indicted, in November 1840, and there confined in the felon's apartment; a very small, damp and ill ventilated room, and incapable from its construction of being rendered more comfortable. That about the latter end of March, he had a violent attack of inflammatory or acute rheumatism, attended with extreme pain and high fever, which confined him constantly to his bed. That the symptoms

667 \*of the disease became daily more aggravated until May term; shortly after which, by the orders of the court, he was removed to the debtor's apartment, which was in itself much more comfortable than the other, and measures had been taken to render it as comfortable as possible. And that, nevertheless, the disease continued without abatement, until he was attacked with another and, in his very debilitated state, yet more dangerous disease, which seemed at first a bilious fever, but it had assumed a typhus form, and he was now wasted to an extreme degree. But there was some difference of opinion, whether the rheumatism with which he was first attacked in March, was imputable to the state of the room in which he had been confined? And it appeared, in fact, that he had, some year or more before his imprisonment, been afflicted with a severe disease of the same kind. Whether the removal of him to the debtor's apartment, after the care that had been taken to render it comfortable, was not of itself sufficient to obviate the danger apprehended from his imprisonment? Whether his present disease was at all imputable to his confinement there? Whether it was probable he could recover his health, if he should be continued in confinement during the summer? Whether it was not necessary to the preservation of his life, that he should be enlarged, and permitted to enjoy free and wholesome air, and the most comfortable lodging, where his friends might have constant access to him, and give him their unremitted care and attendance? The result of the evidence, according to the judgment of the court, will be found in the opinion it delivered.

The question upon the application for bail, was argued by Lyons, Peyton and Leigh for the prisoner, and the attorney general for the commonwealth. The argument turned mainly upon the questions of fact: but there was one question of law, and another involving a point of law, raised by the attorney general.

668 \*I. The attorney general submitted, that this court had no original jurisdiction to admit a prisoner to bail, whom the circuit superior court had refused to bail, upon his direct application to this court.

The counsel for the prisoner, in answer to this objection, referred, first, to the provision of the general court law, 1 Rev. Code, ch. 67, § 5, p. 221, that "the jurisdiction of the said court shall be general over all causes, matters and things at common law, as well criminal as civil, except in such cases as, by the constitution of the U. States or of this commonwealth, or any statute made by the congress of U. States or the general assembly of this commonwealth, are or shall be vested in any other tribunal; in any of which cases the jurisdiction of the general court shall cease, unless concurrent jurisdiction be thereto expressly given by this act or some other statute." And then they shewed, that concurrent jurisdiction to admit prisoners to bail, was expressly given to the general court by another statute, namely, the statute concerning bail in criminal cases, Id. ch. 167, § 1, whereby it was provided, that "if the crime be punishable with death or confinement in the jail and penitentiary, and there be good cause to believe the prisoner guilty thereof, he shall not be admitted to bail by any justice of the peace, either in court or out of court; but, for good cause shewn, the general court, or any superior court of law, or any judge of the general court in vacation within his circuit, may admit to bail any person before conviction." It was clear, then, that the circuit superior court of Albemarle, or the judge of that circuit in vacation, might now, for good cause, admit this prisoner to bail, notwithstanding the refusal of the court to let him to bail at the late term; and that this court had concurrent jurisdiction with that court and with the judge thereof in vacation, to admit the prisoner to bail.

II. The attorney general said, that no doubt was raised here, that there was 669 cause to believe the prisoner guilty \*of the murder of which he was indicted: the only ground of the application was the ill state of his health. He cited the words of lord Mansfield in *mrs. Rudd's case*, 1 Cowp. 333, that "as to the allegation that the state of the prisoner's health was such as to be endangered by confinement, it was not of itself a sufficient circumstance, in such a case, to induce the court to let the prisoner to bail." There, the crime imputed was forgery; here, murder. And he referred to 1 Gwill. Bac. Abr. Bail in criminal cases; D. p. 353, and 2 Curwood's Hawk. P. C. ch. 15, § 80, n. 4, where, it being laid down in the text of both books, that a prisoner charged with felony may be bailed, "where he may be in danger of losing his life by a dangerous distemper &c. if he be not bailed." the modern editors add, in their notes, this.

qualification, that "the indisposition upon which the court will bail, must be a present indisposition arising from the confinement, and from any constitutional or family distemper, or from the act of the prisoner." And he argued, that as the prisoner had been subject to the disease of acute rheumatism before his confinement, that, therefore, was a constitutional disease, which might, and probably would, have attacked him again, at the same season of the year, wherever he might have been residing. Then, as to his present disease, this could hardly be ascribed to his confinement in the debtor's apartment of the jail, not in itself very uncomfortable, and rendered as comfortable as possible through the particular care taken by order of the court to make it so; nor could such a disease be peculiarly liable to aggravation by such confinement. He said, the crime of which the prisoner was accused, was of a very atrocious nature; and the court ought not to enlarge him upon bail, on doubtful evidence as to his disease, its cause, its nature, and its decree, and the probability of its being aggravated and rendered fatal by a continuance of his imprisonment.

670

\*The prisoner's counsel answered, that the reports of Mrs. Rudd's case gave no exact information of the state of her health; what was her disease, how it was produced, whether it endangered her life, whether, in its nature or degree, it was likely to be alarmingly aggravated by her continuance in close confinement. It was in reference to her state of health as it appeared by the affidavits, that Lord Mansfield said, "that was not of itself a sufficient circumstance to induce the court to let her to bail." He could not have meant to say, that no degree of disease, though caused and likely to be grievously aggravated by imprisonment, and threatening to prove fatal if she should be continued in jail, would be of itself a circumstance which would induce the court to bail her: that would have been contrary to all the authorities: it would have contradicted the proposition stated in 2 Hawk. P. C. ch. 15, § 80, even as qualified by Curwood's note. That a prisoner indicted of murder or treason be in such an ill state of health that longer confinement will bring his life in danger, is good ground for letting him to bail, was admitted in Kirk's case, 5 Mod. 454, in Harvey of Combe's case, 10 Mod. 334; 3 Vin. Abr. Bail. H. a. pl. 9, p. 534, and in Lord Montgomery's case there referred to. Harvey, being arrested for treason, shortly after the arrest stabbed himself: and the court said, that "this indisposition was not such as to induce the court to bail him, because it was occasioned by his own act after he was in custody, and he was then much better than he had been, neither was the indisposition such as manifestly endangered his life, as it might be in the case of an acute distemper: the affidavits were only, that his being confined for a few days might make his case the more doubtful, there being then some ill symptoms upon him." And the court distinguished it from Lord Montgomery's case, whose "sickness was occasioned by his confinement." As to the note of Gwillim in 1 Bac. Abr. p. 353, and of

671 \*Curwood on 2 Hawk. P. C. ch. 15, § 80, that "the indisposition upon which

the court will bail, must be a present indisposition arising from the confinement, and not from any constitutional or family distemper, or from the act of the prisoner," the authority referred to by both of those editors, was Sir W. Wyndham's case, 2 Stra. 4. But that case by no means warranted the proposition, that the disease for which the court might properly bail, must not be a constitutional disease; unless the epithet constitutional was intended to be explained by the alternative epithet family distemper. According to Strange's report of that case, the court said, "the next thing relied on" [upon the application for bail] "is the illness of Sir W. Wyndham, which appears to be a distemper incident to the family. We are of opinion, that this is not ground enough singly to induce the court to admit him to bail; for it must be a present indisposition arising from the confinement; and so we held this term, in the case of Mr. Harvey of Combe, who stabbed himself after his examination, and was refused to be bailed, because his illness was from an act of his own." The same case would be found reported, very much at large, 3 Vin. Abr. Bail. H. a. pl. 7, p. 515-534, and from that report it appeared, that Sir W. W. was committed to the tower in October 1715, and that his disease was an affection of the lungs, which was thus stated by his counsel from the affidavits—"that Sir W. W. had this inflammation of the lungs from his youth; that his father died of it, about the age he was now of; that in 1710, he was forced to leave his town [London] and go into the country; that in 1714, the cough returned upon him violently; that his sickness and indisposition were now to be imputed to his want of air and exercise; and that Dr. Horney, the physician of the tower, was of opinion, that if his disorder should increase upon him during this hot season of the year, it might endanger his life." There

was a prisoner who had an hereditary  
672 \*predisposition to pulmonary disease, and a cough which had come on a year before his commitment, so that it certainly was not caused by his imprisonment; and there was no allegation that he was in any present danger, or that his cough had been at all, or would probably be alarmingly aggravated by the confinement, but only that "if the disorder should increase upon him, it might endanger his life." And, according to the report in Viner, the court said, that "as to the affidavits concerning the indisposition, they were nonsense, and that the indisposition must be a present indisposition, not in purpose or expectation." In fact, Sir W. W. was, for a long time afterwards, a distinguished member of parliament; he made a memorable speech for the repeal of the septennial act, in 1734. The court of King's Bench, then, did not say, in his case, that it would be improper to bail a prisoner on account of disease, if it was a constitutional distemper, but only that Sir W. W.'s disorder was a distemper incident to the family; the plain sense of which was, that it was not caused by his confinement, but might have come on, and the symptoms might have been aggravated, in any situation in which he might have been placed, as well as in the tower. It affirmed no such vague proposition as had been deduced from



the opinion it gave, that a prisoner should not be bailed on account of disease however severe or dangerous, if the disease was a constitutional distemper; a phrase that included all diseases but such as are merely local; all diseases which affect the whole system. And even in the case of a prisoner who had an hereditary predisposition to a particular disease, the court clearly did not mean to say, that if an alarming access of such a disease should be caused by his imprisonment, daily aggravated by it, and likely to terminate in death if the cause which produced and aggravated it should be continued,—this would not be a proper ground for admitting the prisoner to bail. It would,

673 \*indeed, have been strange, if the court had affirmed such a proposition; for it would have been nothing less than to affirm, that an hereditary predisposition to disease, which rendered the severity of imprisonment but the more likely to bring it on, and the danger to life the more certain or probable, was a good reason for refusing bail, which, without such aggravation of the danger, might be allowed. The argument of the attorney general rested on the force of the epithet "constitutional distemper," introduced, without warrant from any authority, by the modern editors of Bacon and Hawkins; and the prisoner's counsel submitted, that it had no ground of law to support it. But how was it shewn, that the disease of our prisoner was a constitutional disease? He had had an attack of acute rheumatism some time before his being imprisoned, and, after he had been in jail, confined in a low, narrow, peculiarly damp, and ill ventilated room, he was seized with another disease of the same kind but of peculiar severity, the symptoms of which had been daily more and more aggravated: and it was now argued, that this disease ought rather to be imputed to a constitutional predisposition manifested by his former illness, than to his confinement under circumstances so well calculated to produce it. As reasonably might it be supposed, that if a person, having once had a violent bilious fever, should, some months after his perfect recovery, be exposed to the malaria of lower South Carolina, and be then seized with the country fever, this might fairly be imputed, not to the immediate, apparent and sufficient cause, but to his predisposition to bilious disease. The counsel then went into an examination of the evidence, touching the prisoner's situation, the cause and nature of his disease, the present danger of a fatal termination, and the necessity of enlarging him upon bail, in order to give him hope of life. And they

said though the crime he was accused of, was an atrocious \*one, that consideration ought not to enter into the question whether he ought to be let to bail; since the court ought not to presume, because he was accused of the crime, therefore he was guilty of it.

PER CURIAM. The court is of opinion, that the testimony in this case shews, that the petitioner has contracted a painful and dangerous disease, since his confinement in jail, which disease was the consequence of

his having been for a long time confined in a very small, very damp, and very badly ventilated room, and which disease had reduced him so low at the late term of the circuit superior court of Albemarle, as to render it improper, in the opinion of that court, to put him upon his trial; and that since the late term of that court, the petitioner has either contracted a new disease, or the old one has been so aggravated, as to render it certain, that his longer confinement must prove injurious to him, by greatly increasing his disease, and will, in all human probability, cause it to terminate fatally. The court is, therefore, of opinion, that the petitioner shews himself entitled to be bailed, and ought to be admitted to bail upon finding two or more sureties to the amount of 25,000 dollars,—and being an infant, he is not to be required to enter into a recognizance himself.

BROWN and FRY, J., dissented.

Note.—The state of the prisoner's health appearing to be such, that, probably, he could not now be safely removed, the court, therefore, did not order a habeas corpus to bring him before it, but only entered its opinion on record, that he ought to be admitted to bail; and then, Thompson, J., admitted him to bail accordingly, in Albemarle.

675 \*DECEMBER TERM, 1841.

JUDGES PRESENT.

*Smith,  
Field,  
Scott,  
Leigh,  
Estill,  
Brown,  
Duncan,*

*Fry,  
Clopton,  
Baker,  
Christian,  
Wilson,  
Johnston,  
Gholson,*

*Robertson.*

Abrahams v. The Commonwealth.

December, 1841.

General Court—Jurisdiction to Award Writ of Error to Inferior Court.—The general court has no jurisdiction to award a writ of error to a refusal of a judge of a circuit superior court, in vacation, to award a writ of error to a judgment of an inferior court.

Same—Same.—Nor has this court jurisdiction to award a writ of error to a judgment of an inferior court.

Petition for a writ of error. The husband's court of the city of Richmond imposed a fine of 20 dollars on Abrahams, for permitting a slave to go at large and hire himself out contrary to the statute 1 Rev. Code, ch. 111, § 81, p. 442. Abrahams appeared in court, and made many objections to the regularity of the proceeding, and, among others, that the court had no original jurisdiction in such a case; that the court could not take cognizance of it, until it should have been acted on by a magistrate out of court. The court overruled the objections, and he filed a bill of exceptions, stating the \*whole proceedings, and all his objections thereto. He pre-

\*See note to Brown v. Com., 6 Va. Law Reg. 246, citing the principal case.



677 sented a petition to the judge of the circuit superior court for the county of Henrico and city of Richmond, in vacation, praying a writ of error to the judgment; which the judge denied. And now he represented a petition to this court, praying a writ of error to the refusal of the judge of the circuit superior court to award the writ.

Gregory, for the petitioner.

SMITH, J. It is the unanimous opinion of the judges, that this court has no jurisdiction of this case. The common law writ of error can only be awarded to some judgment, order or proceeding, of a court of record: and there is no statutory provision, authorizing this court to award such writ, for the purpose of reviewing the decision of a judge of a circuit superior court, in vacation, overruling an application for a writ of error. Nor has this court any jurisdiction to award a writ of error to the judgment of the hustings court; Anderson's case, 4 Leigh 693. It being wholly unnecessary, we have not examined the record, for the purpose of ascertaining whether there was any error in the proceedings.

Writ of error denied.

677 \*Green v. The Commonwealth.

December, 1841.

**Criminal Law—Bail—What Is Good Cause for—Case at Bar.**—Prisoner examined in a corporation court, and sent on for trial in the circuit superior court, on charge of aiding and abetting an officer or a bank to embezzle money and bank notes confided to his care to amount of 100,000 dollars or more, and of larceny of money and bank notes of the bank to the same amount; 24 indictments are preferred against him for aiding and abetting the officer to embezzle, and for larceny of, 24 several sums of the same money, at several times, as several and distinct offences; prisoner is brought to trial on one of the indictments, and acquitted; it appears, that the indictments are founded on a single criminal transaction, and though the acts charged in the indictments might be prosecuted as several offences, yet they might all have been included in one indictment: HELD, the acquittal of the prisoner in one case, furnishes such a presumption of his innocence in the others, as entitles him to be bailed.

Upon a petition of a prisoner in custody on sundry indictments of felony, to be admitted to bail.

Green was examined in the hustings court of Richmond, on charges, of feloniously aiding, abetting and counselling Dabney, late first teller of the bank of Virginia, to embezzle and fraudulently to convert to his own use, money and bank notes, to the amount of 100,000 dollars and more, the property of the bank, placed under the care and management of Dabney as first teller; and of larceny, committed by Green himself, of money and bank notes the property of the bank, to the same amount of 100,000 dollars or more: and, on the 15th June 1840, he was sent on by the hustings court, to be tried for these offences in the circuit superior court for the county of Henrico and city of Richmond, and, the next day, committed to the custody of the sheriff and jailor of Henrico.

In the circuit superior court, the charge was distributed among no less than twenty-four indictments, charging the prisoner with aiding and abetting Dabney to embezzle, and with larceny of, twenty-four several \*sums of money or bank notes, at several times, as so many several and distinct offences. The indictments were all alike, containing one count founded on the statute of February 1820, Supp. to Rev. Code, ch. 223, § 2, p. 278, for feloniously aiding, abetting and counselling Dabney to embezzle, and feloniously and fraudulently convert to his own use, money or bank notes, the property of the bank, confided to his care as first teller, and another count charging the prisoner with larceny of the money or bank notes.

The trial of these indictments was delayed (by causes which it is needless to mention) till October 1841; when the prisoner was brought to trial on one of them; and, after a trial which lasted from the 30th October till the 12th November, he was acquitted by the verdict of the jury. There was not time during the residue of the term to try him upon any of the other indictments (indeed, the verdict was rendered on the last day of the term) and the court remanded him to jail, there to be held in custody to answer the remaining twenty-three indictments.

And now he presented a petition to this court, praying that he might be let to bail, and a writ of habeas corpus to bring him before the court, in order that he might be heard on that application, and be bailed.

The court ordered the habeas corpus; and upon the return thereof, on the motion of his counsel, a subpoena duces tecum was sent to the clerk of the circuit superior court, to bring into this court the original indictments, and all the records belonging thereto; which were brought into court accordingly, and from them the above state of the case has been collected.

In support of the application for bail, the prisoner's counsel, Taylor and Lyons, represented the long confinement of eighteen months which he had already undergone: that the charges had been

679 multiplied against him by preferring twenty-four indictments for several imputed offences, all of the same kind, growing out of the same transaction, and resting on the same evidence and the same grounds of law; whereas the whole might as properly have been included in one indictment: that as he had been already tried upon one of these indictments, selected by the attorney for the commonwealth, doubtless, as being the strongest case, and after a full investigation, and a long protracted trial, acquitted by the verdict of the jury, this acquittal afforded a most persuasive (if not conclusive) argument, that there could be at the most only a light suspicion of his guilt upon the other indictments, or rather, indeed, sufficed to shew his innocence: and that, considering the number of juridical days allowed for the terms of the circuit superior court, the mass of criminal business there, and the time which the recent trial had occupied; if the trials of the other twenty-three indictments should be alike protracted, as certainly they might

and probably they would be, the prisoner might be confined in jail for ten or twelve years, before his innocence could be established upon all the indictments; nay, probably enough, he might be confined for life; and oppressive and cruel persecution of a man, whom his late trial and acquittal on one of the indictments, in truth and in substance for the same offence, shewed to be probably innocent of all the charges.

SCOTT, J., delivered the opinion of the court. It appears from the record and proceedings of the examining court, and the indictments, taken together, that the latter are founded on a single criminal transaction; and although the acts charged in the several indictments, are each criminal in themselves, and may be prosecuted as separate offences, yet they might all have been included in one indictment, and the prisoner compelled to submit to a trial by one jury. It is a fair presumption, 680 \*that the commonwealth has put him upon his trial in the case in which the proof against him was strongest: and the jury having on a fair and full investigation found him not guilty in that case, furnishes such a presumption of his innocence in the others, as entitles him to bail.

The prisoner was thereupon bailed, upon a recognizance of himself in the penalty of 10,000 dollars, and sufficient sureties in the same sum, that he should appear and answer the remaining indictments in the circuit superior court.

#### 681 \*Slaughter v. The Commonwealth.

December, 1841.

[37 Am. Dec. 688.]

#### Criminal Law—Murder or Manslaughter—Distinction.\*

—Question whether, on circumstances of the case, homicide was murder in the second degree or manslaughter?

Same—Murder in Second Degree—Case at Bar.—S. having conceived and declared design to kill P. the parties met afterwards in front of S.'s own house, and a quarrel ensued, in which S. gave the first offence; P. proposed a fight; upon which S. retired for a very brief time into his house, armed himself with a loaded pistol which he concealed in his pocket, and instantly returned so armed to

\*Criminal Law—Self-Defence.—Although the slayer provoked the combat, or produced the occasion, yet, if it was done without any felonious intent, the party may avail himself of the plea of self-defence. *Hash v. Com.*, 88 Va. 194, 18 S. E. Rep. 398, citing *Slaughter's Case*, 11 Leigh 681.

Appellate Practice—Judgment of Lower Court—Reversal.—In *Read v. Com.*, 22 Gratt. 942, MONCURE, P., in discussing the rules that govern the court in considering the judgment of the lower court, says, "I think this is clearly a case in which we ought not to reverse the judgment on the ground we have been considering. For the rules which govern this court in such case, I refer to the following decisions: In civil cases, *Ross v. Overton*, 3 Call 309; *Brugh v. Shanks*, 5 Leigh 598; *Mays v. Callison*, 6 Leigh 230; *Brown v. Handley*, 7 Leigh 119; *Mahon v. Johnston*, 7 Leigh 317; *Bell v. Alexander*, 21 Gratt. 1, and *Blosser v. Harshbarger*, 21 Gratt. 214, and in criminal cases, *Slaughter's Case*, 11 Leigh 681; *McCune's Case*, 2 Rob. 771; *Hill's Case*, 2 Gratt. 594; *McWhirt's Case*, 3 Gratt. 594; *Grayson's Case*, 6 Gratt. 712; *Valden's Case*, 12 Gratt. 717, and *Bull's Case*, 14 Gratt. 613."

the scene of quarrel; then P. threw a brick bat at S. which did not hit him, but falling short of him broke, and a small fragment struck S.'s child, standing within his own door, who cried out; and S. hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "he has killed my child and I will kill him," advanced towards P., deliberately aimed and fired the pistol at him then retreating with his face towards S. and the shot took effect and killed P. Upon trial of indictment against S., verdict guilty of murder in the second degree: HELD, the jury might well impute the killing to the previous malice, and not to the sudden provocation of P.'s assault, and therefore the verdict was right.

Same—Same—Same.—Two persons quarrel, and one throws a brick bat at the other, who has privately armed himself with a deadly weapon, and keeps it concealed, in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon and with it kills the assailant, though then retreating; jury finds this killing murder in the second degree: HELD, upon these circumstances, even without proof of any previous malice, the verdict could not be disapproved.

Petition for a writ of error to a judgment of the circuit superior court of Petersburg. John Slaughter was there indicted for the murder of Joseph Pledge, tried, and convicted by the verdict of the jury of murder in the second degree, and the term of his imprisonment in the public jail and penitentiary was thereby ascertained to be eighteen years. Whereupon, he moved the court to set aside the verdict, and grant him a new trial, on the ground that the verdict was contrary to evidence. The court overruled the motion; and at the 682 \*prisoner's request, certified the following facts as proved in the case:

On the 9th July 1840, Pledge, the deceased, who lived in the neighbourhood of Blandford (part of the town of Petersburg) rode to Blandford, and falling in conversation with one Jones there, asked him the news: Jones informed him that having understood that Slaughter, the prisoner, suspected him, Jones, of having thrown an anonymous letter into his yard, which had given him much offence, he had seen Slaughter, and acquitted himself of the charge, and that Slaughter suspected Pledge of being the author; whereupon, Pledge said, he would ride to Slaughter's house and clear himself of the charge; and he rode in that direction. That Jones, hearing Slaughter rave out in an angry voice, went to Slaughter's house, to satisfy himself that Pledge had not exaggerated what he had told him, and found from the conversation that he had not. That Slaughter was then sitting in his chair on the side walk before his own door, and Pledge on his horse in the street near him, endeavouring to satisfy him that he was not the author of the offensive letter. That Slaughter told Pledge to go away; that he did not wish to have anything to do with him. That Pledge assured Slaughter that he had not written the letter, and took out his pocket book and asked Slaughter to compare his handwriting, which he offered to exhibit, with the letter, and he would be satisfied that he did not write it. Slaughter angrily told him, that if he would ac-

knowledge himself the author, he would kill him; that he should not live to get off of his horse: Pledge then said, "Jack, you would not kill me, would you?" to which Slaughter answered, "yes, by God, you or any other man, if he were Jesus Christ or God Almighty, if he will only say that he wrote that letter." Pledge then said, "if you are not satisfied, and will go down to the river, I will give you what you want;"

adding that he was not armed:

683 Slaughter \*did not offer to go. That

Pledge then said to Slaughter, "I never take private advantages of any one;" Slaughter answered, "nor I neither;" and Pledge replied, "you don't take private advantages!" That Pledge then rode off with his pocket book still in his hand, and Slaughter called him "a damn'd free negro mulatto looking son of a bitch." That Pledge immediately dismounted, and asked a black boy to hold his horse, who refusing to do so, he walked across the street, fastened his bridle to the sill of a house that had been burnt, near a pile of bricks, picked up a half brick, and advanced a few feet towards Slaughter. That Slaughter, as Pledge was dismounting, ran into his house, and had returned, and was standing on the side walk near his own door, with his hands in the pockets of his pantaloons, when Pledge, at the distance of twenty-three yards, threw the brick bat at him, which struck the street about five feet from Slaughter's feet and broke: some small fragments entered Slaughter's door, where his son (a child) was standing, who cried out. That Slaughter immediately called out to one Williams (a boarder in his family, who was standing inside of the door) "take notice, he has killed my child, and God damn him, I will kill him;" then rushed towards Pledge, drew a pistol from his pocket, cocked it, advanced to within about twelve paces of Pledge, took deliberate aim at him, and fired: Slaughter then drew another pistol, but before he fired it, Pledge applied his hand to the inner side of his left thigh, and said, "gentlemen, he has shot me," and fell. That after Pledge threw the brick bat, he advanced one or two steps, with his hands holding the lappels of his coat, and said to Slaughter "shoot and welcome;" but as Slaughter advanced, Pledge retreated slowly, with his face towards Slaughter, still holding his lappels with his hands; and was so retreating slowly when he was shot. That the ball severed the femoral artery of Pledge, and

684 he died in about half an hour. \*One witness testified, that Pledge, after throwing the brick bat, picked up another, which he had in his right hand, holding his lappel; and as he applied his left hand to his wound, his right hand fell and the brick dropped. A woman testified, that she was looking out of the window of her house, about sixty yards from the scene, and thought that something fell from Pledge's right hand; and her two sons, one in his twelfth and the other in his thirteenth year, stated that they were distant about sixty yards, and that Pledge picked up another brick, which dropped from his hand; but many witnesses testified that they saw the whole scene, and saw no sec-

ond brick. It appeared that Pledge was in good temper, and manifested no anger, till the words were uttered by Slaughter as he was riding off, "that he was a damned free negro mulatto looking son of a bitch;" that Slaughter was in a high state of passion from the time the subject of the anonymous letter was mentioned; and that his child was not wounded or seriously hurt, and he did not look at the child to see whether he was or not. By the evidence on the part of the prisoner, it appeared, that an anonymous letters had been, some nights before, thrown into his yard; this letter was not produced at the trial; it was proved, that it had been burned by a member of his family, because he became violently excited whenever he saw it; it was in these words: "A. B. C. and fifty others give you notice, that you are to quit Blandford in twenty days, or you will be taken out and well dressed." That Slaughter had been, some years before, taken out and lynched. That he was of infamous character, and, on that account, great and almost universal prejudice existed against him. That for some nights before the homicide, he had slept in an upper room of his house, and had prepared a pair of small pocket pistols (with one of which he shot Pledge), a large pistol, and a scythe blade with the shank straightened, and a wood

685 handle put to it, as a means \*of defence against such an attempt. That

on the day before the homicide, Williams (Slaughter's boarder) dined with Pledge and his family, when the subject of the rumoured purpose to lynch Slaughter being mentioned, Pledge's wife begged him to have nothing to do with it, and Pledge answered, "that she had his word that he would not, and he would keep it; that there were enough to do it without him, and if all failed, then he would step in;" and in the morning of the day on which Pledge was killed, Williams communicated this conversation to Slaughter, and advised him to be on his guard; but it did not appear, that Pledge knew that this communication had been made to Slaughter. That on the Sunday night before, Pledge said, that he and others would lynch Slaughter that night; and that he said, three days before, that he had a negro man, who, if he told him, would go into Slaughter's house and bring him out; but he did not say he would make the negro man do it; and it did not appear, that Slaughter knew of these remarks having been made by Pledge. It also appeared, by the commonwealth's evidence, that on Tuesday, two days before Pledge was killed, Slaughter being at the store of one Patterson, collecting some money, one Sykes approached the store with a stick in his hand; that Slaughter drew two pistols, and presented them, telling Sykes, if he approached nearer, he would shoot him; that Sykes got an axe, and Slaughter retreated, and as he went off said, "I will kill you and Joe Pledge (the deceased) and two or three other damned rascals in Blandford, and then I will be satisfied:" he believed Sykes to be concerned in a plot to lynch him. And he told Jones, the day before the homicide, that he believed Pledge wrote the

anonymous letter which was thrown into his yard. And this being the state of facts appearing by the evidence, the prisoner excepted to the opinion of the court overruling his motion for a new trial.

686 \*The court then passed sentence upon the prisoner according to the verdict. And now he presented a petition to this court praying a writ of error to the judgment.

Collier, for the prisoner.

The attorney general, for the commonwealth.

JOHNSTON, J., delivered the opinion of the court. The error complained of is the refusal of the circuit superior court to set aside the verdict, on the ground that it was contrary to the evidence; and this court is now called upon to review that decision upon the facts stated in the bill of exceptions.

The prisoner in his petition, and his counsel here in argument, contend, that the facts as stated in his bill of exceptions warranted a conviction only of manslaughter, and not of murder in the second degree; and upon the correctness of this proposition depends the decision which this court is now called upon to make. The distinction between these two offences is too well established to admit of doubt in the present day. In the one, malice is a necessary ingredient; in the other, it is wanting. In the one, the crime is attributed to a wicked, depraved and malignant spirit; while in the other, it is imputed by the benignity of the law, to human infirmity. If for instance, death ensues from a sudden transport of passion or heat of blood, upon a reasonable provocation, and without malice, it is considered as amounting only to manslaughter. 1 Russ. on Crimes, 486. But the person relying upon the plea of provocation, must make out the circumstances of alleviation to the satisfaction of the jury, unless they arise out of the evidence adduced against him; as the presumption of law deems all homicide to be malicious, until the contrary appears. He must shew, that sufficient provocation had been given, and that the act or

687 \*blow which produced death was attributable to the passion of anger arising from that provocation. This doctrine is forcibly illustrated in the cases of the Queen v. Kirkham, 8 Carr. & Payne, 115, and of the King v. Thomas, 7 Id. 817; 34 Eng. C. L. Rep. 318; 32 Id. 751. In the former it is said, "If a person has received a blow, and in the consequent irritation, immediately inflicts a wound that occasions death, that will be manslaughter. But he shall not be allowed to make this blow a cloak for what he does; and, therefore, though there have been an actual quarrel, and the deceased shall have given a great number of blows, yet if the party inflict the wound, not in consequence of those blows, but in consequence of previous malice, all the blows would go for nothing." In the latter, the judge says, "There is no doubt here, but a violent assault was committed; but the question is, whether the blow given by the prisoner was produced by the passion of anger excited by that assault?" And so in the case

before us, we may say, the deceased committed a violent assault upon the prisoner in throwing the brick at him; but did the prisoner shoot him in consequence of the ungovernable passion excited by that assault? or did he seize upon it as an opportunity of gratifying his previous malice, and carrying into effect a preconceived design to take the life of the deceased? These were questions that belong to the jury to decide, and if the record contains testimony from which the jury might reasonably conclude, as they did, that the killing was the result of malice aforethought, then it would be an invasion of their province for this court to interfere and set aside their verdict. But if on the other hand, there were no evidence contained in the facts as certified (which constituted all the testimony in the case) from which this conclusion might be reasonably drawn, then, undoubtedly, it would be the duty of this court now, as it would have been the duty of the court below, to set aside the verdict, and direct a new trial.

688 \*Without going into a minute detail of the evidence here, this court is of the opinion, after a careful examination of all the testimony stated in the bill of exceptions, that the jury were well justified in the verdict which they rendered against the prisoner. The evidence clearly shews, that he considered the deceased the author of the anonymous letter thrown into his yard, at the very sight of which he became so "violently excited," that a member of his family threw it into the fire to prevent him from seeing it again: that two days before the fatal occurrence, he declared, "that he would kill a man named Sykes, and the deceased, and two or three other damn'd rascals in Blandford, and then would be satisfied;" and he told Jones, the day before the homicide, that he believed the deceased wrote the anonymous letter: and that he prepared the pistols, and a scythe blade, some nights previous to the homicide, as a means of defence against the attempts to lynch him threatened in the letter. These antecedent declarations and circumstances, coupled with the conduct of the prisoner when the deceased went to see him for the purpose of convincing him that he was not the author of the offensive letter; his refusal to listen to his explanation; his violent manner and abusive language; fully authorized the jury in coming to the conclusion, that the deceased fell a victim to the malice and revenge entertained towards him by the prisoner, from the time the anonymous letter was first thrown into his yard.

But throwing out of view every thing that occurred anterior to the day on which the killing took place, and confining our consideration to what then occurred entirely, this court is of the opinion, that the facts proved make out a case of murder, and not of manslaughter only. "If, after an interchange of blows on equal terms, one of the parties on a sudden, and without any such intention at the commencement of the affray, snatches up a deadly weapon, and kills the other party with it, such

689 \*killing will be only manslaughter.

But if a party, under colour of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other party;" or "if, at the beginning of the contest, he prepares a deadly weapon, so as to have the power of using it in some part of the contest, and uses it accordingly in the course of the combat, and kills the other party with such weapon, the killing, in both these cases, will be murder." 1 Russ. on Crimes 446. Now, the application of these principles to this case is easy and obvious. The prisoner at the beginning of the contest, so soon as he saw the deceased in the act of dismounting from his horse, ran into his house, and armed himself with a deadly weapon (as we are bound to infer from the evidence), returned, and placed himself on the side walk, with his hands in the pockets of his pantaloons. So soon as the deceased, who was at the distance of twenty-three yards, threw the brick bat at him, the prisoner "rushed" towards him, drew from his pocket a pistol, cocked it, advanced to within twelve paces of the deceased, took deliberate aim, and fired, while the deceased was retreating slowly with his face towards the prisoner; then drew forth another pistol, but before he fired that, the deceased fell, mortally wounded. Here, we have the preparation of the deadly weapon beforehand, the use of that weapon from the beginning, and the fatal fire given when his adversary was actually retreating. Surely, this was murder; and these facts would have justified the verdict, even if no previous malice had been proved.

Writ of error denied.

#### 690 \*Richards v. The Commonwealth.

December, 1841.

**Juries De Medietate Linguae—Discretion of Court—Statute.**—The statute 1 Rev. Code, ch. 75, § 13, that "juries de medietate linguae may be directed by the courts respectively," is not imperative that the courts shall direct such a jury in cases, even of a criminal nature, in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appear proper.

Petition for a writ of error to a judgment of the circuit superior court of Chesterfield. Richards was indicted of perjury, and pleaded not guilty. He represented to the court, and proved, that he was an alien and a native of England; and, therefore, he moved the court to order a jury de medietate linguae to be summoned for the trial of the cause:† whereupon the court ordered

**\*Juries De Medietate Linguae—Discretion of Court.**—For the proposition that the granting of juries de medietate linguae under the statute 1 Rev. Code, ch. 75, § 13, is discretionary with the court, the principal case is cited in Atlantic, etc., R. Co. v. Peake, 87 Va. 134, 12 S. E. Rep. 348: Brown v. Com., 11 Leigh 712. See monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

†The statute of 1788, ch. 67, for establishing district courts and regulating the general court, provided, that juries de medietate linguae might be directed by the district courts. 12 Hen. Stat. at large, p. 746. At the revival of 1792, the provision was made general; the statute concerning juries providing, that

the sheriff to summon a jury for the trial, of whom six should be citizens qualified as the law directs, and the other six aliens and natives of Great Britain, if so many could be found, if not, then so many other aliens as would make the number of aliens six. The sheriff accordingly summoned six citizens and six aliens subjects of Great Britain. But of the aliens summoned, three failed to attend: one of the other three was rejected on the challenge of the accused for cause: the other two were elected and sworn. The defendant then moved the court, either to issue process for compelling the attendance of the other aliens who had been summoned, or to order

the sheriff to summon other aliens 691 for the "purpose of making up a jury of six aliens and six citizens, and that the trial should be delayed for the purpose; the attorney for the commonwealth having admitted, that there were other aliens in the county sufficient to make up the number of six: but the court overruled the motion, and the jury was completed from bystanders, in the usual way: to which the defendant filed exceptions. The jury thus impaneled found the defendant guilty, and assessed a fine of 100 dollars. And the court adjudged, that he should pay the fine and the costs of the prosecution, and that he should be imprisoned, without bail or mainprise, in the common jail of the county, for twelve months, and until he should satisfy and pay the fine and costs.‡

And now the defendant presented a petition to this court, alleging that the circuit superior court erred in not ordering further process to complete the jury de medietate linguae, and praying a writ of error to the judgment.

French, for the petitioner.

The attorney general, for the commonwealth.

DUNCAN, J., delivered the opinion of the court. The question for the consideration of the court is new, although founded upon a statute as old as 1788. It is important, in order to a proper construction of that statute, not only to look to the language employed in it, but to see how the law stood prior thereto.

In the statute branching out the general court into district courts, passed in 1788, it is provided, that juries de medietate linguae may be directed by the [district] court. But the manner in which this power was to be executed, was not indicated by the statute.

692 \*By an ordinance of convention passed in 1776, it is provided, that the common law of England, all statutes made in aid of the common law prior to the 4th year of king James I. and which are of a general nature not local to that

"juries de medietate linguae may be directed by the courts respectively." Rev. Code of 1792, Pleasants's ed. of 1808, ch. 73, § 13, p. 101. And the revised statute of 1819, concerning juries, reenacted the provision in the same words. 1 Rev. Code of 1819, ch. 75, § 13, p. 266.—Note in Original Edition.

‡The judgment was according to the statute. 1 Rev. Code, ch. 148, § 1, p. 571.—Note in Original Edition.

kingdom, shall be the rule of decision, and shall be in full force, until the same shall be altered by the legislature. The common law of England or the english statutes falling within the purview of this ordinance of convention, furnish the only means of determining the construction to be given to the statute of 1788.

By the common law, the crown might, in the exercise of its prerogative, and occasionally did, exercise the power of giving to aliens a trial by a jury de medietate linguæ; but the power was exercised, or withheld, at the discretion of the crown. And so the law remained in England, until the reign of Edward III. when a policy was adopted, purely local in its object, which became the foundation of the subsequent power and glory of the british empire. In order to attract to England, artisans from the continent, where manufactures were greatly in advance of England, the strongest inducements were held out, and privileges were extended to aliens, which, in the language of an english historian, "were not permitted by any other government in the world." In pursuance of this policy, the statute staple was passed in the 27th year of Edward III. whereby marts for the purpose of exclusive trade were established, where strangers were invited to settle; and to protect them from the prevailing prejudices of the english people against them, special tribunals were created for the adjudication of all causes connected with trade and commerce; and whenever an alien became a party, a jury de medietate linguæ was directed for the trial of his cause. But as the jurisdiction of these tribunals was limited to the trial of civil causes growing out of

mercantile or trading transactions, 693 in \*the following year, the statute 28 Ed. 3, stat. 2, ch. 13, was passed, giving, in all cases, whether civil or criminal, when an alien was a party, a jury de medietate linguæ, if he required it. This was not a discretionary power vested in the courts, but mandatory at the will of the alien. This mode of trial, then, which by the common law was a mere favour to be extended or withheld by the crown, became the right of the alien, when demanded of the courts. The statute of 28 Ed. 3, was in force in England, when the ordinance of the Virginia convention in 1776, and the subsequent statute of 1788, were passed; and in deciding the question before us, it is necessary to determine whether the statute of the 28 Ed. 3, was adopted by the ordinance of convention of 1776; since, if it was, it furnished the rule for the construction of the statute of 1788, declaring that the courts may order juries de medietate linguæ; but if the statute 28 Ed. 3, was not adopted by the ordinance of convention, then the common law, and not the statute, furnishes the rule for expounding the Virginia statute.

A majority of the judges are of opinion, that the statute of the 28 Ed. 3, never was in force in Virginia, either during its colonial dependence, or by force of the ordinance of convention of 1776, and that the Virginia statute of 1788 was only intended to confer upon the judiciary the same dis-

cretionary power over the subject which by the common law constituted a portion of the royal prerogative. We find, upon an examination of the records of the general court, from the year 1776, down to 1788 (when the Virginia statute was enacted) during which time this court had judicial cognizance of the business of the country,—a period too when the public mind was inflamed by the revolutionary struggle,—that there was no case in which a jury de medietate linguæ was allowed, nor have we

found any memorial of the exercise of 694 the power during the colonial \*government. And it may be proper to remark, that had it been the intention of the legislature in 1788, to adopt the english statute of 28 Ed. 3, it is not probable, with the statute before it, that it would have used language which, in its ordinary acceptation, implied a discretion, when the statute it was adopting was mandatory: nor is it probable that, in this particular instance, the legislature would have departed from the rule, which we believe was applied to every other english statute incorporated into our code, of adopting the same language employed in the english statute, only changing or modifying the language to suit the altered condition of the country, because, in adopting an english statute into our code, it carried with it the construction given to it by the english courts prior to its adoption here. And such, doubtless, would have been the form of the Virginia statute of 1788, had the legislature intended to adopt the english statute of 28 Ed. 3. But if the legislature intended only to adopt the common law discretionary power upon this subject, then the terms employed were consistent with that intention. And as the common law was declared to be in force in virginia, the only necessity that existed for legislating at all upon the subject, arose from the separation in this country, of the executive and judicial powers of the government: whereas by the common law this discretionary judicial power was vested in the crown, the power, when authorized to be exercised here, was transferred to the courts.

Some of the judges are of opinion, that the principles of the statute of 28 Ed. 3, are unsuited to the nature of our institutions, the character of our people, and the structure of our judiciary. The english statute was enacted in aid of a wise policy at the time; yet it was a local policy, confined to the country in which it originated; and the comity of nations, except

in that particular instance, has never 695 gone so far as to \*extend to aliens

higher judicial privileges than were extended to citizens. In England, the jealousy of the common law denied to aliens the privileges of citizenship. To compensate the alien for the disabilities under which he laboured, a jury to try his causes, composed of equal numbers of aliens and citizens, was allowed to him. And, practically, there was no great inconvenience in doing so, compared with benefit to be derived from attracting to the country the skill and capital of foreign artisans and merchants, then rendered necessary by the

infant state of the trade and manufactures of the country. Besides, the aliens, in that country, spoke a different language, and were collected together at the various marts of trade, and could easily be distinguished from the citizens. It is not so, and never was so, in this country. The moment an alien sets his foot upon our shores, he acquires rights unknown to the laws of England. All aliens may, in a few years, become citizens: they are scattered through the country, instead of being confined, as originally they were in England, to certain places; three-fourths of them speak the language of the country, and are in some degree familiar with its laws; and from the recent settlement of the country by immigrants from abroad, and the continual influx of foreign immigration, there can exist no such prejudice against them as gave rise to the statute of 28 Ed. 3. And let us see what would be the practical operation of the english statute, if it were in force here. Suppose the statute authorized a trial by a jury *de medietate linguæ* in all cases where an alien is a party, civil as well as criminal, except treason, if the demand exceed twenty dollars, and the alien require it: the court must order, and the sheriff must summon, if they can be found in his county, a jury composed, in part, of six aliens; and it will be no excuse, that his county is large, and the aliens dispersed. If six may be found, he must  
696 hunt them up; \*and, in the meantime, the trial must be suspended (as was required in the case under consideration) until they can be got. A large proportion of the aliens in this country (differing, in that respect, from aliens in England) speak the language of the country; and, owing to the facility of acquiring citizenship, it would be difficult to ascertain, whether the foreigner was an alien or a citizen; yet the sheriff must be presumed to know who are aliens, and who are not, and the courts may, in every case, be called upon to decide whether the juror, who is summoned as an alien, may not be a naturalized citizen. But these are not the only anomalies growing out of such a proceeding: the citizen can only have his cause tried by jurors having a certain property qualification; a qualification supposed to be a test of the fitness of the juror to act in that capacity. But the alien can have his cause tried by a jury, half of whom may be fugitives and vagabonds, the "scum of the old world cast upon our shores;"—for if there be six aliens in the county, let them be what they may, they must be put upon the jury, if the alien wills it. The aliens, so placed upon the jury, may not understand a word of our language, and yet they are to try a cause, the testimony and the pleadings in which are in a language of which they are ignorant, and must decide upon laws about which they know nothing. Nor are these all the objections that may be urged against that mode of trial. The great end and aim of jury trial, is to insure fairness and impartiality; and every safeguard should be placed around that mode of trial: yet, if in every case where an alien is concerned, a jury *de medietate linguæ* is to be allowed (and it must be

demandable of right in every case, or in none) with what ease, amounting almost to certainty, may justice be defeated? For example, let an alien employed upon our public works (where they are found in numbers) murder, assault, or other-  
697 wise maltreat a citizen; if \*when put upon his trial for it, he is entitled to six jurors who are aliens, probably his countrymen, peradventure his associates, men like himself, with no interest in the country, indifferent to its laws, and reckless of its peace; would such jurors convict? We are aware, that this reasoning may be considered as applying to the impolicy of the law, rather than as proving that the law does not exist. But we are of opinion, that it is a fair argument for the purpose of shewing that the legislature did not intend, when it enacted the statute of 1788, to incorporate in it the english statute of 28 Ed. 3, open as it would be, in its application to this country, to the objections that have been pointed out, but only intended to confer upon the courts the ancient common law discretionary power over the subject,—a sound judicial discretion.

It is to be observed, further, that the legislature in 1792, when engaged in the great work of establishing a code of laws adapted to the altered condition of the country, after having enacted many of the english statutes, very frequently in the identical language of them, re-enacted the statute of 1788, and then repealed all the english statutes which had been temporarily adopted by the ordinance of convention of 1776. If, therefore, the statute of 28 Ed. 3, was intended to be embraced by the ordinance of convention, it was, as an english statute, repealed by the act of 1792, leaving the Virginia statute of 1788 concerning juries *de medietate linguæ*, without any support from the english statute, and depending alone upon the common law as furnishing the means for expounding it. So that, if the statute of 28 Ed. 3, was ever in force in Virginia, it ceased to be in force after the repealing statute of 1792.

We have felt the force of the argument, that the word *may*, used in the Virginia statute, should be construed imperatively, and be taken as equivalent to *shall*. It is undeniably correct, that when the  
698 performance of a \*public duty is required of the court, the word *may* is mandatory. Thus the county courts may lay a levy for certain purposes; this would be construed *shall* lay a levy &c. and in criminal cases, where a benefit or privilege is intended to be secured to the prisoner or accused, ordinarily and as a general rule, the term *may*, if employed, will be construed imperatively. But this rule must always yield to the obvious intention of the legislature. We have endeavoured to shew, that the intention of the legislature was only to give to the courts a discretionary power to direct juries *de medietate linguæ*; and that, consequently, the word *may*, as used in this statute, should receive its literal interpretation.

A majority of the court, therefore, are of opinion, that the circuit superior court in the case under consideration, although in



the first instance it directed a jury de medietate linguæ, might with propriety, for aught that appears in the record, have refused to do so; and that the same discretionary power that justified the order to summon such a jury in the first instance, authorized the court to refuse it in the last; and nothing appears in the record to shew that the discretion given by the statute has not been properly exercised.

BROWN, FRY, CHRISTIAN and ROBERTSON, J., dissented from the opinion and the judgment. And the following opinion (in which Fry and Christian, J., expressed their concurrence) was delivered by

ROBERTSON, J. No question which concerns the due administration of the criminal laws of a state can be regarded as unimportant. Especially is it incumbent on those whose province it is finally to determine the true construction of the penal code, to pause and ponder well before they break down or weaken the barriers erected against oppression and prejudice.

On this account perhaps, rather than 699 on account of its \*practical or intrinsic importance, the present case has received a more than ordinary share of attention. Finding myself, after the best consideration, constrained to dissent from the opinion of a majority of the court, it is but respectful to them, as well as due to myself to assign some of the reasons which have influenced my judgment.

The privilege of a jury de medietate has existed in England from an extremely remote antiquity. It is said, no medietas linguæ was at the common law; and it seems certain that the courts had no power to award it: but in the old treatise entitled *Trials per Pais* (p. 210,) we are told that "this trial, by the common law, was wont to be obtained of the king by his grant." Be this as it may it, it was allowed as early as the reign of Ethelred (in the 10th century) to welshmen, who were then aliens: and to a jew as early as the 9th of Edw. 1, (the year 1281). It was expressly accorded (only however in civil cases) to alien merchants by the statute of the staple, 27 Edw. 3, stat. 2, ch. 8, (1353); indeed, if the parties were all aliens, a full jury of aliens was given: and by a statute passed the succeeding year, the jury de medietate was extended to all aliens, and to "all manner of inquests and proofs." (28 Edw. 3, ch. 13, § 2.) And on this footing it continued until doubts of its existence were created by the general terms of the statute 2 Hen. 5, stat. 2, ch. 3, declaring the qualifications of jurors. To remove these doubts or remedy the inconvenience, the 8 Hen. 6, ch. 29, was passed, evincing the great solicitude of the english people to preserve the privilege unimpaired. In the same spirit, it is believed, the courts of England have expounded the statutes according it. They have held that subsequent statutes, no matter how generally expressed, fixing the qualifications of jurors, do not apply to de juries de medietate: that in trials where medietas linguæ is required, the alien may be aided de circumstantibus,

700 \*and this, though it seems, by the words of the act, no tales is granted

in such cases), because the statute was made or the speedy execution of justice, and should be expounded favourably to serve the intent of the makers. 2 Hawk. P. C. ch. 43, § 35; 21 Vin. Abr. 187; Jenk. 288, pl. 14, 10 Rep. 104, citing Julius Cæsar's case. The tales moreover, we are told in the quaint language of the author of *Trials per Pais* (p. 72, 74,) ought to be of the same quality as the quales; for "tales are words similitudinary: therefore, if the first jury be per medietatem linguæ, so ought the tales to be." Nor have I been able to find a solitary instance on record, of refusal by the english courts to award the writ in question when prayed for in due time by an alien, since the statute of Edw. 3,—though Blackstone says (3 Black. Comm. 361,) some question may now exist how far the statute 3 Geo. 2, ch. 25, hath undesignedly abridged this privilege in civil cases.

Turning to our own state, we find it much more difficult to ascertain the true history, origin or extent of the privilege in question. We have no printed reports of criminal cases of an earlier date than 1789, nor any printed report whatever, so far as I have discovered, of a decision on the particular subject.

It is doubted whether the privilege existed at all, either by law or usage, during our colonial history. It is doubted also whether it could be granted under the ordinance of 1776, adopting the common law of England, and all acts of parliament prior to the 4th of James I. "and which are of a general nature, not local to that kingdom."

I deem it unnecessary to give the reasons which incline me to the opinion that it was always demandable of right in Virginia, since that opinion has no influence on the particular question before us. That question must depend on the proper construction of laws passed since the revolution, and which I now proceed to consider.

701 \*The first instance we have been able to find of any direct legislation upon the subject, is in the act "establishing district courts and for regulating the general court," passed in 1788; 12 Hen. stat. at large, p. 730. The 44th section is in these words: "Juries de medietate linguæ may be directed by the court to be summoned." In 1792, this provision was transposed to the act "concerning grand juries, petit juries, and veniremen," with a slight alteration in phraseology: "Juries de medietate linguæ may be directed by the courts respectively." 1 Old Rev. Code, ch. 73, § 13. This last act preceded that repealing the british statutes, though both were passed at the same session. I note these circumstances to shew that the provision was probably intended to obviate the consequence which would have resulted to aliens, in respect to this privilege, by the repeal of the british statutes; and to shew that it was not casually or inadvertently introduced into our code at the session of 1792, but upon deliberate consideration. And it was again deliberately re-enacted at the revival of 1819: see the act to reduce into one the several acts concerning grand



juries and petit juries, 1 Rev. Code of 1819, ch. 75, § 13, p. 266.

The privilege therefore has existed of right or in the discretion of the several courts of criminal jurisdiction, undeniably, by express statutory provision, for upwards of fifty years.

The instances in which it has been claimed (much to the honour of our state) have not been frequent. Several of the judges of this court, I understand, have awarded it in their respective circuits. Only one instance has fallen under my own personal observation, in which it was applied for; the trial of Lowther for murder, before the late superior court of law for Henrico county. In that case, on the prisoner's motion, judge Brockenbrough quashed the venire facias and panel, and awarded a venire facias de medietate linguæ. \*The present case, and that of Brown, now before us on petitions for writs of error, are the first, so far as my information extends, in which the jury de medietate was ever refused in a criminal case, when asked by an alien in proper time.

In the case of Richards, the more immediate subject of consideration, the writ in point of fact was actually directed, and a jury de medietate summoned. Of the aliens summoned, there only appeared, one of whom was challenged by the prisoner for cause; and there being a defect of jurymen such as the precept required, the prisoner moved the court instant, either to compel the attendance of the veniremen who had been summoned, or to order the sheriff to summon as many other aliens as would make up a jury de medietate. The court overruled his motion, notwithstanding the admission of the attorney for the commonwealth that there were other aliens in the county sufficient to complete the jury, and a jury was impaneled consisting of ten denizens and two aliens; the first, it is believed, of that description, ever impaneled under such circumstances, either for the trial of a denizen or an alien.

If the prisoner was not entitled to a jury de medietate, it was clear error to put aliens of any number on the panel: if he was, he was entitled to a full moiety of aliens, provided they could be had. 21 Vin. Abr. 188, pl. 5; Id. 189, pl. 1. Such, as I understand it, is the law, and so are the precedents: and I am yet to see one to the contrary, if such exist in England or in Virginia. Ought we now to make this precedent?

It is said the language of our statute differs from that of the english statute, and justifies a different course of proceeding: and the attorney general contends, that under our act the privilege is in no case demandable of right, but the grant of it is discretionary with the courts. Such is not my opinion. It is true the terms used are, that juries de medietate 703 may be directed. But where a statute directs a thing for the sake of justice or the public good, may is the same as shall. Salk. 609; 6 Bac. Abr. 379. Had the law used the term "must" or "shall," it might have been construed as compulsory on the courts in all cases where aliens were parties, whether civilly or criminally, and

whether they prayed for such juries or not. But the learned committee of revisors who first inserted the provision in the bill concerning juries, as well as the general assembly who made it the law, must be presumed to have known, that to the general rule giving the privilege in question, as well as to all others, there were or might be some exceptions. It was known that in England the writ would never be issued unless prayed for; nor unless prayed for in proper time, (although it has been allowed in England even after the return of a distringas, 21 Vin. Abr. 189, pl. 2, note, notwithstanding it was not prayed for at the venire facias, as it was in this case); nor where denizens and aliens were joint defendants. 21 Vin. Abr. 188, pl. 10. In all these cases, possibly in others, even the courts of England might refuse a jury de medietate, notwithstanding the peremptory terms of the statute of Edw. 3, which declares that "in all manner of inquests and proofs" amongst aliens and denizens, one half of the inquest or proof "shall" be denizens, and the other half of aliens, if so many &c. But neither these nor similar exceptions abrogate the general rule, or render it, in my opinion, the less obligatory. Neither do they, or the terms of our statute under which their observance may well be justified, render it, as seems to be supposed, wholly discretionary or optional with the court, in all cases, to grant or withhold the privilege. The law, in my opinion, is imperative; and equally so in reference both to the general rule and the acknowledged exceptions. The court, in this view, has no discretion to grant the writ in the excepted cases, nor to refuse it in others. In no case is the grant

704 or denial ex gratia. \*In some cases the alien may have no right to claim it: but in all others the right to claim it does exist, and, in my opinion, not as a matter of favour, but ex debito justitiæ,—a right as absolute and as perfect as that to a jury composed of twelve men; and to this extent I wish to be understood in expounding the statute as imperative.

It may be true that in England this privilege may have been allowed anciently ex gratia,—by special grant from the crown (Trials per Pais 210,) as serjeant Hawkins supposes it may now in cases of treason; 2 Hawk. P. C. ch. 43, §§ 37, p. 420. But our constitution, which forbids the exercise by the executive, of any prerogative by virtue of any law, statute or custom of England, did not design that the kingly prerogative of dispensing favours to prisoners ex mera gratia, should be transferred to the judiciary. "To leave it in the breast of the judge to relax or supersede general restrictions and rules whenever he shall think particular cases not within the reason of them," has been always thought of dangerous tendency. 4 Burn's Eccles. Law 88; Fearn on Remainders 429. An arbitrary and uncontrolled discretion, even in a judge, may be well defined the law of tyrants. "It is always unknown: it is different in different men: it is casual, and depends upon constitution, temper and passion. In the best, it is oftentimes caprice: in the worst, it is every vice, folly

and passion to which human nature is liable." The consequences of such a discretion would be peculiarly mischievous under our judicial system, administered as it is by upwards of twenty judges, each in his particular circuit. The law of one circuit might differ from that in another, and no one indeed would be able to say what would be the law in any case, before it should be pronounced; depending, as it would, upon the circumstances of the case, or the humour of the judge; and no means would  
705 exist, in this or any other \*court, of remedying the uncertainty or enforcing uniformity, where the will of the judge alone was the law of the case.

But it cannot be seriously urged that the authority to be exercised by the courts, in this or in any case, is discretionary in the sense in which that authority might have been, or may now be, exercised by the king of England. It is not a royal prerogative which they possess, but at most a judicial discretion, governed by well settled principles, and liable to be controlled by the proper appellate tribunals. Thus viewing it, let us enquire what are the grounds upon which the circuit court refused to impanel a jury de medietate in the present case.

The fact of alienage was proved to the satisfaction of the court. The writ was applied for in proper time; was actually awarded (without objection, as far as appears, by the court of the prosecution), and was duly executed. A part of the aliens summoned appeared, and two were impaneled. The prisoner then applied for supplementary process, to render the privilege to which the court had deemed him entitled, effectual. Such process, in either of the modes in which he was willing to take it, was authorized by law. But the court refused its aid; thus, in effect, suddenly and without the suggestion of any reason whatever, retracting the grant, by refusing to make it effectual, though the means were admitted to be within its reach.

It is said, we are bound nevertheless to presume that this refusal of the court to carry its own judgment and precept into effect, was upon good grounds.

The general proposition, that the decisions of courts of competent jurisdiction are to be held well founded, will be readily admitted. But this doctrine has no application where error in point of law in the judgment of an inferior court appears to an appellate tribunal. Nor, in criminal cases at least, can any matters of fact be

706 inferred by argument, as constituting the grounds of \*such judgment.

In the present case, for my own part, looking only to the record, I am unable to conjecture, and therefore cannot presume, any sufficient reason whatever for such refusal. The case is shewn to be one coming under none of the exceptions already stated. The proof was complete that the prisoner was an alien; and he prayed for the precept in due time. The grant of the precept itself implies a concession of his title to have it; and the commonwealth's attorney admitted a sufficiency of such jurors as would satisfy its exigency. What ground is there for presum-

tion, where there is nothing to shew that any additional fact appeared, or that any new evidence was offered? Prima facie at least, it was a case for a writ de medietate. The court must so have considered it. Is it not incumbent then on the prosecution, to shew the grounds upon which, after it was actually awarded, its due enforcement was refused? If it was discreet in the court in the first instance (as I conceive it most clearly was) to award the writ, it cannot well be that it was also discreet to render it nugatory. To give on due consideration, and take away without suggesting a reason, is not discretion, but caprice. The right to the process being conceded, the right to all means necessary and proper to give it full effect, and vindicate the authority of the court, would seem to follow of course, on general reasoning. But the principle rests upon more solid grounds. The settled doctrines of the law establish its correctness in reference to the particular question before us, and shew that in all cases where a tales becomes necessary to supply a deficiency of the principal panel summoned on a writ de medietate, the tales must be of such as are deficient,—denizens if denizens be wanting, and aliens if there be a defect of aliens; and that this is so, even where the tales are taken de circumstantibus. 10 Rep. 104. It is error, I apprehend, if the tales does not pursue the venire facias.

Trials per Pais 74, 214. "If the  
707 \*venire facias be per medietatem linguæ, the tales ought to be per medietatem linguæ." Id. 72. And it is said, "if eight indigenæ and four alienigenæ be impaneled, it is ill; because it is not per medietatem." 21 Vin. Abr. 188, pl. 5. (This must be understood, provided a sufficiency can be found to complete the jury according to law.) Here the jury appears to be composed of ten denizens, and two aliens only, although a sufficiency of aliens could have been had. If it be said that the court, notwithstanding it had directed a jury de medietate, might subsequently, and without assigning any reason, retract or disappoint the grant, still this does not cure the error; for, admitting this, the jury in such case must be altogether of denizens. If the case then rests upon that ground, the court, retracting the privilege, or refusing to carry it into effect, could not lawfully subject the prisoner to be tried by any other jury than one composed wholly of good and lawful freeholders. There can be no lawful trial except by such a jury, or a jury composed, at the instance of an alien, the one half of good and lawful freeholders, and the other of aliens, if to be bad. The jury in the present case was neither a jury under the special provision for juries de medietate, nor under the ancient law, but constituted in a manner which, under the circumstances, was unauthorized by and unknown to the law of England, or that of our own state.

If upon the facts, so far as they are disclosed in the record, the prisoner was not entitled to a jury de medietate, I can imagine no state of facts sufficient to give him such title. In conferring upon our courts the power to bestow a privilege, originating

in England, and, until adopted by the american states, probably existing in no other country, it seems reasonable to suppose (there being no definite bounds prescribed by our own law) that the mode and measure of its enjoyment were intended to be regulated by the practice and 708 principles regulating \*them in England. This would be so, I think, upon the reason of the thing, independent of the consideration that our language, laws and customs are, in the main, either identical with or similar to those of Great Britain; that the decisions of the english courts are, where applicable, habitually referred to and adopted by our own; and that the very process by which this particular privilege is enforced, as almost all the process we use, is that framed in England, and preserved by the saving clause of our act repealing the british statutes. Looking then to England, nothing further was ever required to entitle an alien to a jury de medietate, so far as I have seen, than that he should allege or prove his alienage, and pray for the writ in proper time. The same rule, I infer, prevails in New York. In the case of *The People v. M'Lean*, 2 Johns. Rep. 381, the only question apparently raised was whether the jury de medietate might be summoned instant. Although it would seem from the statute cited in the case (*Laws of New York*, vol. 1, p. 377-9,) that the right to such a jury rested upon implication, rather than any express provision, the right does not seem to have been contested; nothing more appears than that the prisoner "suggested his alienism, which was admitted."

It may be thought, that the application being to the discretion of the court, facts should be proved tending to shew that a prejudice existed on the part of the citizens against those of the nation to which the prisoner belonged. But in the first place, if any such general prejudice exist in the circuit where he is arraigned, he has a right to a change of venue, wholly independent of the provision relative to juries de medietate: and in the next place, if the prejudice be national, and such as to justify an application for a jury de medietate, the judge himself might not escape the contagion, and thus the privilege would be most apt to be withheld when it was most needed.

709 \*I forbear to go into the question of policy discussed at the bar. Surely, however, it is a mistake to suppose that it was against the policy of Great Britain, and much more that it was against that of the colonies, to encourage the settlement to foreigners. The anxiety of our own state, on the contrary, to afford such encouragement, is strongly expressed in the statutes of naturalization, one of which passed as early as 1671; see 2 Hen. stat. at large, p. 289, 464. The settlements of the french protestant refugees in this state and in the Carolinas, of the swedes and dutch in New York &c. all go to disprove the suggestion alluded to, that the colonial policy was adverse to the introduction of foreigners. Four thousand germans are said to have been imported into Pennsylvania in 1750. Indeed, as it has been

strongly expressed, "the colonies now forming the United States may be considered as Europe transplanted." I have not fully examined what states grant or refuse juries de medietate. The privilege is not allowed in North Carolina; *State v. Antonio*, 4 Hawks's Rep. 200. In South Carolina it is granted by express statute passed in 1783, nearly in the words of the 28 Edw. 3. In Maryland and Pennsylvania it is also said to exist; and in the last was judicially awarded on the ground of usage, shewn by rather loose evidence of a single instance, although no law of the state directly recognized it, and although the chief justice (M'Kean) was of opinion that the reasons which gave rise to the statute of Edw. 3, did not apply to the then government of Pennsylvania. 1 Dall. 73.

But the policy or impolicy of the law is a question addressing itself to a different department of the government. It is enough for us that we find it on the statute book: and I deem it my duty, until the legislature shall think proper to repeal it, to give it a candid exposition and full effect.

710 \*I will add a single remark. It may be supposed that the privilege of a jury de medietate linguæ ought not to be accorded to those who speak the same language as ourselves. But the statute which originally conferred it in England is not per medietatem linguæ, but by the moiety of aliens; and so runs the writ or venire facias. 21 Vin. Abr. 189, (in margin); *Rastall's Entries* 265. Since the era of our independence, the english and ourselves have stood towards each other in the relation of foreigners: and I cannot doubt that every american citizen, if impleaded in the courts of England, may now demand this privilege, which, (as already said,) before it was adopted by the states of America, or some of them, into their codes, it was the boast of England was indulged to strangers in no other country in the world.

The result of my best reflections is a conviction that the circuit superior court of Chesterfield erred in overruling the motion mentioned in the bill of exceptions, and in refusing to give to the petitioner the full benefit of the writ de medietate linguæ, authorized by law, and issued by its own direction: and consequently that the judgment ought to be reversed, and a new trial awarded.

Writ of error denied.

# 711 \*Brown v. The Commonwealth.

December, 1841.

**Criminal Law—Murder—Juries De Medietate Linguæ—Discretion of Court.\***—The courts having a discretionary power to direct juries de medietate linguæ, or not to do so, in cases where aliens are parties: in a prosecution for murder, the mere circumstance of the prisoner being an alien and ignorant of the language, is not sufficient to re-

\*The principal case is cited in *foot-note* to *Richards v. Com.*, 11 Leigh 690: *Atlantic*, etc., R. Co. v. *Peake*, 87 Va. 134, 12 S. E. Rep. 348. See monographic note on "Juries" appended to *Chahoon v. Com.*, 30 Gratt 738.

quire the court, in the exercise of a sound discretion, to direct such a jury.

Petition for a writ of error to a judgment of the circuit superior court of Bedford. Brown having been examined in the county court of Bedford upon a charge of murder, and sent on for trial for the crime in the circuit superior court, the clerk of the county court, in pursuance of the statute concerning criminal proceedings against free persons, 1 Rev. Code, ch. 169, § 9, p. 601, issued a venire facias commanding the sheriff to summon a jury of good and lawful men, freeholders of the county and of the neighbourhood where the fact was committed, to appear at the circuit superior court for the trial of the prisoner; and the sheriff, in obedience to the precept, summoned a jury of citizens and freeholders. The prisoner having been indicted for the murder in the circuit superior court, and upon arraignment pleaded not guilty, moved the court to quash the venire facias that had been issued, and to direct a jury de medietate linguæ to be summoned for his trial, upon proof adduced by him, that he was an alien and a native of Germany, and that he was ignorant of the English language. The court overruled the motion, and the prisoner filed a bill of exceptions to the opinion. A jury was then impaneled in the usual manner. Verdict, murder in the second degree, and term of imprisonment in the penitentiary fifteen years; and sentence accordingly.

The prisoner presented a petition to this court, praying a writ of error, on the ground that he was entitled to a jury de medietate linguæ, and that the court erred in refusing to direct such a jury.

712 \*Wingfield, for the prisoner.

The attorney general, for the commonwealth.

DUNCAN, J., delivered the opinion of the court. The only question raised by the record is, whether the fact, that the prisoner was an alien and ignorant of the language of the court, gives him a right to a trial by a jury de medietate linguæ? This court, during the present term, in Richards's case, has decided, that the statute providing that juries de medietate linguæ may be directed by the courts respectively, is not imperative, but only confers a discretionary power on the courts, to direct such juries. Although the courts, in all cases where a person accused requires a jury de medietate linguæ, should exercise a sound discretion, in directing or refusing the jury, this court, without intending to decide what particular state of facts would make it proper for a court to direct such a jury, is of opinion, that the mere circumstance of the prisoner not understanding the language of the court, is not a sufficient ground to require the impaneling of such a jury; and that there was no error in the refusal of the court, in this case, to direct a jury de medietate linguæ.

ROBERTSON, J. For some of the reasons assigned in the opinion I have just given in the case of Richards, and which apply more strongly to the present case, I think the writ of error asked by the petitioner ought to be awarded. Here there is no room for presumption or intendment.

All the evidence before the court below is inserted in the record. It shews that the petitioner is an alien, speaking a language different from our own, and so imperfectly acquainted with the English tongue, as makes it difficult for him in ordinary conversation to understand others, or make himself understood by them: That on his arraignment he pleaded not guilty, and obtained a continuance: That at the 713 ensuing term, \*on being again brought to the bar, he alleged that he was an alien, and moved the court to quash the venire facias, and to cause a jury de medietate to be summoned, (in which particular the case resembles that of Lowther, to whom the superior court of Henrico granted such a jury): That the court overruled his application, and refused a privilege which the benignity of the law authorized at least, if it did not require, to be granted.

All remedial statutes, especially such as regulate proceedings in criminal cases, ought to be expounded favorably, and so as to serve the intent of the makers. It would not surely have been error in the court in this case to award the process: and I find it difficult to understand how it is, that in a criminal case, upon the same state of facts, it may be either right or wrong, as the judge wills it, to grant a privilege authorized by law. If this privilege may be refused rightfully in all such cases as that before us, I know of none in which it may not be refused; and the decision, in my judgment, goes near to the entire abrogation of the statute, which authorizes the courts to grant it. The only doubt on my mind is whether the petitioner, in praying the writ, did not come too late. But as the venire facias was most probably issued according to the general practice, by the clerk after the continuance, and not by the court; and as all things, on the continuance, stood at the next term in the same plight as at the time of that continuance; more especially as some of the questions in this case are new and important, and have not been argued before the court, I am in favor of awarding the writ of error.

FRY, CLOPTON and CHRISTIAN, J., concurred in the opinion of Robertson, J. Writ of error denied.

#### 714 \*Tooel v. The Commonwealth.

December, 1841.

**Criminal Law—Juries—Necessity for Keeping Together before Whole Panel Chosen.**—In impaneling a jury for trial of an indictment of felony, there is no necessity to keep jurymen who have been elected and sworn together and separate from other persons, under charge of the sheriff, until the whole number shall be elected and sworn.

**Same—Same—Same—Case at Bar.**—In impaneling a jury for trial of an indictment of felony, eight are elected and sworn, and three elected but not sworn: one who had been sworn separates from

\*Juries—Separation—Effect.—On this question, see the principal case cited in Thompson v. Com., 8 Gratt. 643 (see note); Dilworth v. Com., 12 Gratt. 705; foot-note to Phillips v. Com., 19 Gratt. 485; Fleisher v. Hale, 22 W. Va. 50. See also monographic note on "Juries" appended to Chahoon v. Com., 20 Gratt. 733.

the rest, goes some miles off and stays some hours: the other ten are put in charge of sheriff, to be kept together and separate from other persons, till ensuing morning: upon attachment against the absconding jurymen, he is taken the same night, and put and kept in same room with the other jurymen till next morning, but there appears to have been no conversation on the subject of the prosecution: next morning, by allowance of the court, this jurymen is challenged by the prisoner for cause, and set aside: the jury is then completed, and find the prisoner guilty: **HOLD.**

1. **Same-Same-Same-Same.**—The separation of the absconding jurymen from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, does not vitiate the verdict, and is no good reason for a new trial.

2. **Same-Same-Challenge for Cause-Discretion.**—After a jurymen has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause, and strike him from the panel.

Petition for a writ of error to a judgment of the circuit superior court of Rockingham. Tooei was indicted upon the statute 1 Rev. Code, ch. 111, § 30, p. 428, for feloniously carrying thirteen slaves the property of Kipling of Rockingham, one slave the property of Kedrick of the same county, and another slave the property of Brill of the same county, out of the county of Rockingham into the county of Shenandoah in Virginia, without the consent of the owners, or either of them, and with intention to defraud and deprive the respective owners of the slaves. The prisoner was arraigned on the 13th October 1841, and pleaded not guilty. Of the jurors summoned on the venire facias, he challenged

some for cause, and all the others peremptorily; and then eight \*jurors called from the by-standers were elected and sworn, among whom was one Miller, and three others were elected, but not sworn. The venire and the by-standers being all exhausted by challenges and election, the court ordered the sheriff to summon twenty-four good and lawful men, in order that the jury might be completed out of them. In this stage of the proceeding, the juror Miller who had been already elected and sworn, left the court room, on pretence of sickness, attended by an officer; but so soon as he got out of the courthouse ran off, and though pursued, escaped, and went about four miles into the country. The sheriff reported the fact to the court, which thereupon awarded an attachment against Miller for the contempt, returnable forthwith. And then the court, with the prisoner's consent, committed the other ten jurors to the custody of the under sheriffs, to be kept together without communication with any other persons on the subject of the prosecution, and to be brought into court the next morning; and the sheriffs were sworn to perform this duty. The jurors were all brought into court the next morning; and at the same time, the absconding juror Miller, who had been taken upon the attachment, was brought before the court. It was then again demanded of the prisoner, whether he was still willing to be tried by Miller; upon which the prisoner challenged him for cause, and he was set

aside, and his name struck from the panel. Two other jurors were then called and elected, and these together with the two jurors who had been elected but not sworn the day before, were sworn, and thus the jury was completed. The trial proceeded; and the jury found the prisoner guilty, assessed a fine upon him of 100 dollars, and ascertained the term of his imprisonment in the penitentiary to be three years.

The prisoner moved the court for a new trial; and produced the affidavit of one of the under sheriffs, by which it appeared, that Miller was taken upon the attachment, \*brought back and put in the same room with the other ten jurors, who had been put under charge of the sheriffs, about nine o'clock of the night of the 13th October, and kept with the other jurors all night; that in fact he slept in the same bed with one of them. But it appeared by the affidavit of another of the sheriffs, who staid with the jurors in the same room, that during all the time Miller was there with the rest, he the sheriff heard no conversation between Miller and any of the jurors, and no conversation of any of the jurors with the others, on the subject of the prosecution; but Miller slept in the same bed with one of the jurors, and he the sheriff was asleep part of the night while Miller was in the room. The court overruled the motion for a new trial, but ordered the affidavit to be made part of the record; and then proceeded to pass sentence upon the prisoner according to the verdict.

And now G. N. Johnson, for the prisoner, presented a petition to this court, praying writ of error to the judgment, alleging as errors in the proceedings: 1. That it was not lawful or proper to keep the jurors who were elected and sworn on the 13th October, together with the three others who, though elected, were not sworn. 2. That it was not competent to the court, to discharge a juror who had been sworn (as Miller had been), though challenged by the prisoner; at least, not without discharging the whole panel; for which the petition referred to the provision in the 12th section of the statute 1 Rev. Code, ch. 75, p. 266. "that no exceptions against any juror, on account of this estate, or age, or other legal disability, shall be allowed after he is sworn." 3. That the motion for a new trial ought to have been sustained: that the strange and improper conduct of Miller, and his association with the rest of the jury afterwards, threw suspicion over the verdict, and vitiated it.

717 **\*PER CURIAM.** The decision of chief justice Marshall in Aaron Burr's case, "that there was no necessity for delivering the jurymen, who had been or should be sworn, into the custody of the marshal, until the whole number had been impaneled and sworn," 1 Burr's trial p. 382, and the opinion of this court in Martin's case, 2 Leigh 745, are decisive authorities against the prisoner's application.

CLOPTON, J., dissented, upon the authority of M'Caul's case, 1 Virg. Ca. 271, 303-6.

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3. If the proof offered by the plaintiff be such as to sustain the count of insimul computassent, it is of no importance whether there be any account filed or not; for this count does so describe the plaintiff's demand, as to give the defendant sufficient notice of the character thereof. S. C., 471

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4. The plaintiff in assumpsit files with his declaration an account commencing in these words, "1888, Jan'y 1. To balance due per account rendered, \$1406.07," which account he produces at the trial, and a witness is introduced to prove, that, at the date of this item, the plaintiff delivered to the defendant a full bill or account to the amount of 1406 dollars 7 cents, and that the defendant acknowledged the same, and promised to pay it: HELD, such proof may be received under the insimul computassent count. S. C., 471

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Commonwealth v. Semmes, 665

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Commonwealth v. Semmes, 665

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22. What trust or limitation of personality is invalid as to creditors of party in possession. See Fraudulent alienations No. 3, 4, 5, and London v. Turner, 403  
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24. What bond is usurious. See Usury No. 3, and Campbells v. Patterson, 113  
25. Measure of relief in equity against usurious contract. See Usury No. 1, 2, and S. C., 113

26. What purchase by agent from principal will be set aside. See Principal and agent No. 2, and Segar v. Edwards and wife, 313

### IV. Discharge.

27. Defence to action on covenant to procure a proper conveyance. See Covenant No. 2, and Fairfax's adm'r v. Lewis, 233  
28. What is no discharge of bond to convey land. See Covenant No. 3, and Wilson v. Spencer, 261

### V. Measure of damages.

29. Measure of damages for breach of executory contract to convey land. See Vendor and vendee No. 7, and Wilson v. Spencer, 261  
30. Measure of damages for breach of warranty in mortgage of land. See Heirs No. 2, and Haffey's heirs v. Birchetts &c., 83

### VI. Specific execution and vendor's lien.

31. Specific execution, and lien of vendor, on contract for sale of land and chattels for a sum in gross. See Vendor and vendee No. 5, and Clarke & another v. Curtis, 559

### CONVEYANCE.

See references under title Contract.

### CORPORATION.

See Branch banks. Canal and rail road companies. Franchise. Ferries and bridges.

### COUNTERFEITING.

See Forging and uttering, and Mowbray v. Commonwealth, 643

### COUNTY AND CORPORATION COURTS.

The general court has no jurisdiction to award a writ of error to a judgment of an inferior court. Abrahams v. Commonwealth, 675

### COVENANT.

#### I. Covenant not to sue one of two sureties.

1. Effect of covenant not to sue one of two sureties, in making him a competent witness for creditor. See Witness No. 4, and Waggener v. Dyer, 384

#### II. Defence to action on covenant to procure a proper conveyance.

2. By agreement under a seal between three parties, A. B. and C., A. assumes to pay B. \$353 1/4 dollars in land, at two dollars per acre, out of a tract which T. L. was bound to convey to him, and warrants the land to be clear of all claims for taxes; B. binds himself to procure a proper conveyance of the said quantity of the tract to C. from T. L.; and A. engages to procure from T. L. a conveyance of the whole tract to C. To declaration by C. against B. assigning breach of B's covenant aforesaid, defendant pleads, that the plaintiff took on himself to procure, and did procure from A. an order on T. L. for a conveyance of the whole tract to the plaintiff, under which order the plaintiff procured a conveyance to himself to be made and delivered by T. L. of the whole tract; plaintiff replies, that T. L.'s wife was living at the time of the said conveyance, and she survived him, and never relinquished to the plaintiff her dower interest in the land, nor did T. L. ever execute to the plaintiff any deed containing any covenant that the land was free from all claims for taxes, nor did the plaintiff ever accept from T. L. any conveyance of the land in satisfaction of defendant's covenant; on general demurrer to the replication, HELD (dissentiente Tucker, P.) the plea is sufficient, and the replication naught.

Fairfax's adm'r v. Lewis, 233

#### III. What is no discharge of covenant to convey land.

3. In an action against a surety, on a \*bond with condition that the principal should convey a tract of land to the plaintiff, the defendant pleaded, that the principal had conveyed the land to B. W. and the defendant, and the plaintiff afterwards agreed with said B. W. and the defendant, that if they would convey to J. S. the said land (subject to a certain deed of trust given by the principal) he the plaintiff would accept of such conveyance as a full discharge of the bond; and the plea averred that the said B. W. and the defendant did afterwards convey to J. S. the said land, and the plaintiff received and accepted the said conveyance as a full discharge of the bond: HELD, the plea is naught.

Wilson v. Spencer, 261

#### IV. Warranty in mortgage of land.

4. Concerning breach of warranty in mortgage of

land, and measure of damages therefor, see *Heirs No. 2*, and  
*Haffey's heirs v. Birchett's &c.*, 83

## COVERTURE.

See Husband and wife.

## CRIMINAL JURISDICTION AND PROCEEDINGS.

## I. Indictment.

1. What indictment is not warranted by record of examining court. See *Forging and uttering*, and *Mowbray v. Commonwealth*, 648

2. Indictment lies upon the statute of 1822-3, ch. 34, against a free person for wilfully and without lawful authority injuring, by assaulting and beating, the slave of another.

*Commonwealth v. Moward*, 631

## II. Bail.

3. Concerning the letting to bail in cases of felony, see *Bail in criminal cases*, and *Commonwealth v. Semmes*, 665  
*Green v. Commonwealth*, 677

## III. Constitution and behaviour of juries.

4. Discretion of court as to allowing jury de medietate lingue. See *Jury No. 1, 2*, and *Richards v. Commonwealth*, 690  
*Brown v. Commonwealth*, 711

5. What opinion as to guilt or innocence of accused will disqualify to act as a juror. See *Jury No. 3, 4, 5*, and

*Armistead v. Commonwealth*, 657

6. When jurors in a case of felony need not be kept together. See *Jury No. 6*, and

*Tooele v. Commonwealth*, 714

7. What separation and discharge of a juror in a case of felony is no ground to set aside verdict of conviction. See *Jury No. 7, 8*, and

*McCarter v. Commonwealth*, 633  
*Tooele v. Commonwealth*, 714

## IV. Evidence.

8. What is a sale of a free negro amounting to felony. See *Free negroes No. 2*, and *Commonwealth v. Nix*, 636

9. What will warrant a conviction of murder in the second degree. See *Murder*, and *Slaughter v. Commonwealth*, 661

## V. General verdict of guilty.

10. The rule of practice in criminal cases, that if an indictment contain several counts, some good and others faulty, and a general verdict of guilty be found, the bad counts will not affect the validity of the good, and judgment will be given on those which are good, is not applicable to cases of penitentiary crimes in Virginia, where the jury is to ascertain the term of imprisonment, since the evidence on the bad counts may aggravate the punishment imposed by the verdict.

*Mowbray v. Commonwealth*, 643

## VI. Jurisdiction of general court.

11. What question may be adjourned by circuit court to general court. See *Adjournment of questions*, and

*Commonwealth v. Nix*, 636

12. In what cases general court has no jurisdiction to award writ of error. See *General court No. 4, 5*, and

*Abrahams v. Commonwealth*, 675

## DAMAGES.

1. Measure of recovery against sheriff for false return of nulla bona. See *Sheriffs No. 1*, and *Gibson v. Stewart's adm'r*, 728

\*2. Measure of damages for breach of executory contract to convey land. See *Vendor and vendee No. 7*, and

*Wilson v. Spencer*, 261

3. Measure of damages for breach of warranty in mortgage of land. See *Heirs No. 2*, and

*Haffey's heirs v. Birchett's &c.*, 83

## DEBT.

1. Limitation of debt against administrator on judgment against decedent, and duty of administrator to plead the statute. See *Executors and administrators No. 3, 4*, and

*Tunstall & al. v. Pollard's adm'r*, 2

2. What recital in trust deed does not create a debt by specialty. See *Specialty No. 2*, and

*Powell's ex'ors v. White and others*, 309

3. What surety will be held entitled to rank as a specialty creditor of principal's estate. See *Estoppel No. 2*, *Heirs No. 2*, *Principal and surety No. 3*, and

*Dupuy and others v. Southgates*, 92

*Haffey's heirs v. Birchett's &c.*, 83

*Powell's ex'ors v. White and others*, 309

4. Dignity of debt due from deceased executor to his testator's estate. See *Executors and administrators No. 7, 8*, and

*Tunstall & al. v. Pollard's adm'r*, 1

## DEBTOR AND CREDITOR.

Application of payments. See *Payment*, and *Smith v. Loyd*, 512

## DECEDENTS' ESTATES.

See *Executors and administrators*.

## DEED.

See *references under the title Contract*.

## DELINQUENT LANDS.

In what case patent for such land is not admitted as evidence of title. See *Patent*, and *Taylor & c. v. Burdett &c.*, 334

## DE MEDIETATE LINGUÆ.

Discretion of court as to allowing jury de medietate lingue for trial of an alien. See *Jury No. 1, 2*, and

*Richards v. Commonwealth*, 690

*Brown v. Commonwealth*, 711

## DEMURRER.

## I. To pleading.

1. Concerning the sufficiency of pleadings, see *Assignment*, *Covenant*, *Glebelands*, *Surprise*.

II. When demurrer to evidence may be set aside.

2. In covenant, issue being joined on the plea of covenants performed, and a demurrer to the evidence being filed by the plaintiff, judgment thereon is given for the defendant, which is reversed by this court, on the ground that the evidence does not shew performance by the defendant, though the facts shewn, if properly pleaded, may amount to a substantial defence to the action; and this court proceeds to enter judgment that the plaintiff recover his damages sustained by occasion of the breach assigned in the declaration, and remands the cause for a writ of enquiry of those damages to be executed: *Held*, notwithstanding such judgment of this court, it was competent, and in this case it was proper, for the court below to set aside the demurrer to evidence, and allow the defendant to file additional pleas.

*Fairfax's adm'r v. Lewis*, 233

## DEPOSITIONS.

Sufficiency of notice for taking them.

A notice is given by plaintiff to defendant, for taking the depositions of several witnesses at a specified place in Missouri, on six successive days, between certain hours of each day: *Held*, considering the distance of the place appointed for taking the depositions, and the uncertainty of the precise time at which the party would be enabled to have things in readiness for taking them, the notice is sufficiently definite.

*Kincheloe v. Kincheloe*, 393

## DETINUE.

## I. Parties.

1. What is a misjoinder of plaintiffs in detinue. See *Fraudulent alienations No. 8*, and *Charlton and others v. Gardner*, 281

## II. When limitation begins to run.

2. Testator lends three slaves to his daughter during her natural life and to her heirs lawfully begotten of her body; but should his daughter or her husband dispose of, convey out of the way, conceal, or attempt to alienate the slaves, then her title to cease, and he directs his executors to take them into possession, and after her decease they and their increase to be divided among her children; the daughter's husband sells one of the slaves; the testator's executors are apprized of the sale, but fail to take the slaves sold into their possession, or to bring any action to recover the same; the daughter dies; and long after the lapse of five years from the date of the sale, but within five years after the daughter's death, her children bring detinue for the slave; and the only question being from what time the statute of limitations began to run, *Held*, the right of the children accrued upon the death of their mother, and so the statute began to run against them only from the time of her death.

Note, the question whether the daughter did not take an absolute estate, exempt from the condition that she should not alien as being repugnant and void, was not presented by the record, and therefore not decided by the court.

*Duncan & wife & others v. Wright*, 542

## DEVASTAVIT.

Duty of personal representative to plead the statute of limitations. See Executors and administrators No. 3, 4, and

Tunstall & al. v. Pollard's adm'r. 2

## DEVISAVIT VEL NON.

Concerning the effect of answer to bill for setting aside a will, as evidence on trial of issue devisavit vel non, see Will No. 6, and

Kincheloe v. Kincheloe, 393

## DEVISE.

See Will.

## DIGNITY OF DEBTS.

1. What recital in trust deed does not create a specialty debt. See Specialty No. 2, and  
Powell's ex'ors v. White and others, 309

2. What surety will be held entitled to rank as a specialty creditor of principal's estate. See Estoppel No. 2. Heirs No. 2. Principal and surety No. 3, and

Dupuy and others v. Southgates, 92

Haffey's heirs v. Birchetts &c., 83

Powell's ex'ors v. White and others, 309

3. Dignity of debt due from deceased executor to his testator's estate. See Executors and administrators No. 7, 8, and

Tunstall & al. v. Pollard's adm'r, 1

## DISCHARGE.

1. Concerning discharge of covenant to procure a proper conveyance of land, see Covenant No. 2, and  
Fairfax's adm'r v. Lewis, 233

2. What is no discharge of bond to convey land. See Covenant No. 3, and

Wilson v. Spencer, 261

## DISCOVERY.

1. What party may introduce answers to interrogatories filed at law. See Interrogatories, and  
Vaughn & co. v. Garland, 251

2. What bill by borrower against lender is not within third section of statute against usury. See Usury No. 1, 2, and

Campbell v. Patterson, 118

## DISTRESS.

What sale and conveyance of land belonging to surety of federal officer, under warrant of distress, is invalid. See United States officers, and

Grove &c. v. Little &c., 180

## DISTRIBUTE.

Concerning the competency of distributee as witness for administrator, see Witness No. 2, 3, and  
Reynolds's, adm'r v. Stephenson's adm'r, 399

Parrish v. Parrish, 626

## DONOR AND DONEE.

See titles Gift and Fraudulent alienations.

## DRAWER AND ENDORSER.

What recital in trust deed of drawer will not entitle endorser to rank as specialty creditor. See Specialty No. 2, and Powell's ex'ors v. White and others, 309

730 \*EMANCIPATION.

What issue of freedwoman is entitled to freedom.

Testator bequeaths the raising of infant negroes to his son N. but not to be moved out of the state, or so far as to deprive them of their freedom, and to other sons the labour and raising of other infant negroes, with a like restriction; and then mentioning that four other negroes are in hands of other sons, bequeaths, that they and all the others shall, after his own and his wife's death, be free at their ages of twenty-one; and there is no other bequest of slaves in the will, though there was a general bequest of the residuum of his estate: the testator's wife dies; among the negroes of whom the raising was bequeathed to the son N. was a female infant at testator's death, who had two children born before she was twenty-one: HELD, these two children are entitled to freedom at their ages of twenty-one.

Anderson's ex'ors v. Anderson, 616

## ENDORSER.

What recital in trust deed of drawer will not entitle endorser to rank as specialty creditor. See Specialty No. 2, and

Powell's ex'ors v. White and others, 309

## EPISCOPAL CHURCH.

What sale of glebe land by overseers of poor is valid. See Glebe lands, and

Selden and others v. Overseers of poor, 127

## EQUITABLE JURISDICTION.

See references under title Chancery jurisdiction.

## ERROR.

See Appellate jurisdiction.

## ESCAPE.

When escape warrant does not lie.

The statute, 1 Rev. Code, ch. 136, § 1, which, "for the more effectual retaking and securing persons who escape out of prison," enacts that "if any person committed, rendered or charged in custody, in execution or upon mesne process, to any county or corporation prison, or to the jail of any district, shall thence escape," a justice of the peace may issue an escape warrant, does not authorize such warrant in the case of a person who escapes out of the custody of a sheriff, before being committed to prison; and if a person be taken and detained in custody under an escape warrant which shows on its face that the escape was not from any prison, but merely from the custody of the sheriff, he may be discharged by writ of habeas corpus.

McClintic v. Lockridge, 253

## ESTOPPEL.

By accepting confession of judgment when assets.

1. A creditor of a decedent accepting from the administrator a confession of judgment when assets, is thereby estopped at law from alleging that the administrator at the time of the judgment had assets applicable to the demand.

Dupuy and others v. Southgates, 92

2. A creditor of a decedent, by specialty, after accepting from the administrator a confession of judgment when assets, files a bill in equity against the administrator for a discovery and account; and upon taking the account it appears, that at the time of the judgment there were assets in the hands of the administrator, which he afterwards applied in discharge of another specialty, on which he was bound as the indorser or assignor thereof: HELD, under such circumstances, the technical estoppel will avail in equity as a defence against the creditor's claim. Accord. Orcutt v. Orms, 3 Paige 469.

S. C., 93

## EVICTION.

What is an eviction of mortgaged land, and measure of damages therefor. See Heirs No. 2, and  
Haffey's heirs v. Birchetts &c., 83

## EVIDENCE.

I. Competency of witness.

1. What release will make distributee a competent witness for administrator. See Witness No. 2, 3, and

Reynolds's adm'r v. Stephenson's adm'r, 399

Parrish v. Parrish, 626

2. Competency of one of two sureties as witness for creditor who has covenanted not to sue him. See Witness No. 4, and

Waggener v. Dyer, 384

II. Parol evidence.

3. Admissibility of parol agreement for assigning policy of insurance, as a defence to suit by vendor of the insured premises against vendee for specific execution. See Insurance, and  
Wheeling insurance company v. Morrison, 354

4. Parol evidence not admitted to contradict justices' certificate of privy examination. See Privy examination, and

Harkins v. Forsyth and others, 294

III. Declaration of trust.

5. What declaration of trust is invalid as to creditors and purchasers of party in possession. See Fraudulent alienations No. 3, 4, and

London v. Turner, 403

6. What declaration of trust is inoperative as to creditors of donee's husband. See Fraudulent alienations No. 5, and

S. C., 403

IV. Answers.

7. What party may introduce answers to interrogatories filed at law. See Interrogatories, and  
Vaughn & co. v. Garland, 251

8. Concerning the competency and effect of answer to bill for setting aside a will, as evidence on trial of issue devisavit vel non, see Will No. 6, and

Kincheloe v. Kincheloe, 393

## V. Patent.

9. In what case grant of commonwealth is not to be received as evidence of title to land. See Patent, and

Taylor &c. v. Burdett &c., 334

VI. Usurious bond.

10. When usurious bond is to be taken as evidence of amount advanced. See Usury No. 3, and  
Campbell v. Patterson, 118

VII. Administration account.

11. What settlement by administrator is not evidence against heirs of intestate. See Executors and administrators No. 17, 18, and Street's heirs v. Street. 498

VIII. Proof under insimul computassent.

12. What proof may be received under count in assumpsit on an insimul computassent. See Assumpsit No. 4, and Fitch v. Leitch. 471

IX. Notice for taking depositions.

13. What notice for taking depositions is sufficiently definite. See Depositions, and Kincheloe v. Kincheloe. 393

X. Rejection of evidence in support of bad plea.

14. Where the court below has rejected evidence offered in support of a plea which it had received, if an appellate court shall regard the plea as naught, it will, on this ground alone, hold that there was no error in rejecting the evidence, without considering the other objections to it. Wilson v. Spencer. 261

XI. Sufficiency of evidence.

15. Proof of affirmation of conditional sale. See Free negroes No. 2, and Commonwealth v. Nix. 636
16. What is no proof of executor's assent to a legacy. See Legacy and legatee No. 5, 6, and Burchard and wife v. Wright &c.. 463
17. What evidence will warrant a conviction of murder in the second degree. See Murder, and Slaughter v. Commonwealth. 681

XII. Setting aside demurrer to evidence.

18. When demurrer to evidence may be set aside after judgment of appellate court thereon. See Demurrer No. 2, and Fairfax's adm'r v. Lewis. 233

EXAMINING COURT.

- What indictment is not warranted by record of examining court. See Forging and uttering, and Mowbray v. Commonwealth. 643

EXCESS IN RECOVERY.

- When not cured by statute of Jeoffails; and practice on reversing judgment therefor. See Sheriffs No. 3, 8, and Gibson v. Stewart's adm'r. 600

EXCUSE.

1. For not performing covenant to procure 732 "a proper conveyance of land. See Covenant No. 2, and Fairfax's adm'r v. Lewis. 233
2. What is no excuse for nonperformance of covenant to convey land. See Covenant No. 3, and Wilson v. Spencer. 261

EXECUTION.

- What recovery is excessive, and effect of such excess, in action against sheriff for false return of nulla bona. See Sheriffs, and Gibson v. Stewart's adm'r. 600

EXECUTORS AND ADMINISTRATORS.

I. What ex'or is liable to suit.

1. An executor having taken probat of testator's will and letters testamentary in England, and collected the assets of testator's estate there, and brought them with him to Virginia, but having never qualified as ex'or in Virginia, is liable to be sued by the legatees in the court of chancery of Virginia, for an account of his administration, and for the legacies that remain unpaid. Tunstall & al. v. Pollard's adm'r. 1

2. Concerning donee's liability as executor de son tort. See Gift No. 1, 2, 3, and Huston's adm'r v. Cantrill and others. 137

II. Limitation of debt or scire facias against ex'or on judgment; and duty of ex'or to plead the statute.

3. The 17th section of the statute of limitations, providing that debt or scire facias on judgments, against decedents in their lifetime, shall not be brought against their representatives after the expiration of five years from the qualification of a representative, and that such judgments shall, after the expiration of five years, be deemed to be paid and discharged, is a bar to debt or scire facias on such judgments against an adm'r of the deceased debtor, though no assets of the debtor's estate came to the hands of the representative within five years after his qualification; and the adm'r is bound to plead the statute to actions of the judgment creditors, in favour of other creditors prosecuting claims to which the limitation does not apply. Tunstall & al. v. Pollard's adm'r. 2

4. And it seems, the representative is bound to plead that statute in all cases to which it applies to protect the decedent's estate, for the benefit of other creditors, or of legatees or distributees, of the decedent. S. C., 2

III. Right of retainer, and dignity of debts.

5. Right of retainer by administrator. See Estoppel No. 2, and Dupuy and others v. Southgates. 92

6. Concerning retainer on behalf of deceased administrator's estate, see Retainer No. 2, and Powell's ex'ors v. White and others. 309

7. An english ex'or collects the assets of testator's estate in England, brings them with him to Virginia, and dies here in 1807, indebted to testator's estate, without having qualified in Virginia; the debt he owed his testator's estate is entitled, in the administration of his own estate, to priority over all his other debts. Tunstall & al. v. Pollard's adm'r. 1

8. The statute of 1705, ch. 33, § 13, giving preference to debts due from deceased ex'ors to their testator's estates, in the administration of the estates of such ex'ors, was not repealed by the statute of 1748, ch. 4, § 13, notwithstanding the general repealing clause therein contained, or by the statute of 1785, ch. 61, § 50, or by the revised statute of 1792, in pari materia: those statutes subsequent to that of 1705, containing nothing inconsistent with it, and being only cumulative. S. C., 1

9. What sureties will rank as specialty creditors of principal's estate. See Estoppel No. 2. Heirs No. 2. Principal and surety No. 3, and Dupuy and others v. Southgates. 92

10. Haffey's heirs v. Birchetts &c.. 83
- Powell's ex'ors v. White and others. 309

IV. Judgment when assets.

10. Estoppel to creditor by accepting confession of judgment when assets. See Estoppel, and Dupuy and others v. Southgates. 92

V. Suits by legatees for account.

11. Bill by legatees against administrator for account and distribution. See Legacy and legatee No. 2, and Anderson v. Thompson. 439

12. Bill by legatees, after great lapse of time, to resettle executor's account. 733

- \*See Legacy and legatee No. 3, and Aylett's ex'or v. King &c.. 466

13. An administrator's account of administration having been audited by commissioners of a county court, and the account being controverted in a court of chancery, and referred to a commissioner of that court, the administrator's vouchers, being ostensible must be produced if required, and submitted to the examination, not of the commissioner only, but of all parties interested. Street's heirs v. Street. 498

14. Order of responsibility to legatees, as between sureties of executor, and his distributees and personal representative and the sureties of the latter. See Legacy and legatee No. 4, and Aylett's ex'or v. King &c.. 466

VI. Evidence for administrator.

15. What will render distributee a competent witness for administrator. See Witness No. 3, and Parrish v. Parrish. 626

16. What release will not make distributee a competent witness for administrator. See Witness No. 2, and Reynolds's adm'r v. Stephenson's adm'r. 369

17. An administrator's account settled ex parte by auditors, reported and recorded, shews that the personal assets have been exhausted, and that the administrator has paid out of his own funds debts of his intestate due by specialties binding his heirs; upon a bill in chancery by the administrator against the heirs, to be reimbursed the amount of such specialty debts so paid by him out of his intestate's real estate: H&L.D. the audited account is not evidence at all against the intestate's heirs.

18. And though some of the heirs acknowledged in writing that the audited account was just, such acknowledgment will not suffice to establish it against the others; and if such an account be not established as against all the heirs, it cannot avail as to any. Street's heirs v. Street. 498

VII. Assent to legacy.

19. What is no proof of executor's assent to legacy. See Legacy and legatee No. 5, 6, and Burchard and wife v. Wright &c.. 463

VIII. Discovery against lender's representative.

20. Whether the third section of the statute against usury applies to a bill filed by borrower against personal representative of lender? See Usury No. 2, and Campbells v. Patterson. 113

IX. Sale by executors of trustee.

21. What sale of land by executors of trustee will not be set aside. See Mortgages and trusts No. 11, and

Hughes v. Caldwell, 342

FALSE RETURN.

What recovery is excessive, and effect of such excess, in action against sheriff for false return of nulla bona. See Sheriffs, and

Gibson v. Stewart's adm'r, 600

FATHER AND CHILD.

1. What gift by father to child is void and passes nothing. See Gift No. 5, and

Anderson v. Thompson, 439

2. What gift by father to child is valid as to creditors of donor. See Gift No. 1, and

Huston's adm'r v. Cantrill and others, 137

3. What property given by father to daughter is liable to her husband's debts. See Fraudulent alienations No. 5, and

London v. Turner, 403

FELONY.

1. What indictment is not warranted by record of examining court. See Forging and uttering, and

Mowbray v. Commonwealth, 643

2. Concerning the letting to bail in cases of felony, see Bail in criminal cases, and

Commonwealth v. Semmes, 665

3. What opinion as to prisoner's guilt or innocence will disqualify to act as juror. See Jury No. 3, 4, 5, and

Armistead v. Commonwealth, 657

4. What separation and discharge of jurors is no ground to set aside verdict of conviction. See Jury No. 6, 7, 8, and

McCarter v. Commonwealth, 633

5. What is a sale of a free negro amounting to felony. See Free negroes No. 2, and

Commonwealth v. Nix, 636

6. General verdict of guilty on indictment containing good and bad counts. See Criminal jurisdiction and proceedings No. 10, and

Mowbray v. Commonwealth, 643

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\*FEME COVERT.

See Husband and wife.

FERRIES AND BRIDGES.

I. Effect of non-user of public ferry.

1. If a public ferry has been disused for more than three years, though the franchise of the ferry owner has not been declared forfeited on quo warranto or other like proceeding, he is not entitled to the aid of a court of equity, to prevent others from invading the franchise, which he has abandoned by such non-user under the statute, 2 Rev. Code, ch. 237, § 23, 24.

Trent and others v. Cartersville bridge company, 521

2. And it seems, he cannot maintain an action at law to vindicate such a franchise so abandoned by non-user. S. C., 521

II. What is no nuisance to owner of ferry or bridge.

3. The owner of a public ferry cannot maintain any action against persons, who use their own boats for passage or transportation of themselves, their families and property only, not for the accommodation of the public generally. S. C., 521

4. A charter is granted to an incorporated company to build a toll bridge across a river, over which there is at the time an ancient ferry near by; but no exclusive privilege is granted to the bridge company for the transportation of persons of property; and other persons of their own will, establish a ferry at or near the same place, for the use of themselves only, not for the use of the public generally: HELD, the bridge company have no just cause of complaint against such persons establishing such ferry for such purpose, though it may reduce the profits of the bridge. S. C., 521

III. Remedy for invasion of ferry owner's franchise.

5. Quere, whether the establishment of a free ferry, or of any ferry, without authority of law, for all comers and goers, at or near a public ferry established by authority of law, is an invasion of the rights of the owner of the public ferry for which an action for damages will lie, under the statute law of Virginia? or whether the owner of the public ferry can recover more than the penalty of \$20, given by the statute? S. C., 521

FIERI FACIAS.

What recovery is excessive, and effect of such

excess, in action against sheriff for false return of nulla bona. See Sheriffs, and

Gibson v. Stewart's adm'r, 600

FORECLOSURE.

Concerning mortgagee's right to foreclose, and time allowed for redemption, see Mortgages and trusts No. 8, 9, 10, and

Harkins v. Forsyth and others, 294

FORGING AND UTTERING.

What indictment is not warranted by the examination.

1. A person examined in county court on a charge of forging an order, and committed by that court for trial in circuit superior court for the forgery only, cannot be tried there for uttering and publishing the order.

2. Therefore, if the indictment against the prisoner contains counts for the forgery, and counts for uttering and publishing, the circuit superior court ought to quash these latter counts.

Mowbray v. Commonwealth, 643

FRANCHISE.

I. What is no grant of a monopoly.

1. A monopoly cannot be implied from the mere grant of a charter to a company to construct a work of public improvement, and to take the profits; to give such monopoly, there must be an express provision in the charter, whereby the legislature restrains itself from granting charters for rival and competing works.

Tuckahoe canal co. v. Tuckahoe rail road co., 42

2. Therefore, where the legislature granted a charter to a company to construct a navigable canal along the valley of a stream, and in consideration of the work to take the profits, without any provision against the exercise of power to charter other and rival companies, the legislature was not restrained from chartering a company to construct a railroad along the same valley, though the railroad shall afford the same public accommodation as the canal, and may in effect impair or annihilate its profits. S. C., 42

735

II. Canal and rail road companies.

3. Concerning the respective rights of elder canal company, and junior and competing rail road company, see Canal and rail road companies, and

S. C., 42

III. Ferries and bridges.

4. Concerning the rights of owners of public ferries and bridges, see Ferries and bridges, and

Trent and others v. Cartersville bridge co., 521

IV. Freedom.

5. Concerning title to freedom by emancipation in futuro, and suit for protection thereof, see Emancipation, Freedom, and

Anderson's ex'ors v. Anderson, 616

FRAUDULENT ALIENATIONS.

I. Fraud by agent from principal.

1. What purchase by agent from principal will be set aside as fraudulent. See Principal and agent No. 2, and

Segar v. Edwards and wife, 313

II. Fraud on creditors of grantor.

2. What settlement by husband on wife in pursuance of contract between them is fraudulent as to his creditors. See Husband and wife No. 2, and

Harrison & c. v. Carroll & c., 476

III. What trust or limitation of chattels is invalid as to creditors and purchasers of party in possession.

3. Although, where personal property is given to one upon a trust by parol for another, the declaration of trust by parol may be valid as between the donee and the cestui que trust, yet as between the cestui que trust and the creditors of the donee the case is essentially different.

London v. Turner, 403

4. Where any reservation or limitation is pretended to have been made of a use of property, by way of condition, reversion, remainder or otherwise, in goods and chattels the possession whereof shall have remained in another for five years, the same, as to the creditors and purchasers of the person so remaining in possession, is, under the act to prevent frauds and perjuries, taken to be fraudulent, and the absolute property to be with the possession, unless such reservation or limitation were declared by will or by deed in writing, proved and recorded. S. C., 403

5. A father, upon the marriage of his daughter, makes her a gift of slaves, and the possession thereof remains in the daughter's husband five

years. While the husband is in possession, the father makes his will, confirming the gift, and declaring that the same is "to her in trust for the sole and only purpose of her immediate use and comfort in life, and after her decease the title and fee simple interest to be vested forever in the children or issue lawfully begotten of her body, free from the claim, control or direction of any other person whatever." Although this will is made and recorded within five years from the time of the gift, yet HELD that the slaves are liable to be taken in execution by the creditors of the husband.

S. C., 408

IV. What conveyance providing for debts is valid as to other creditors of grantor.

6. The members of a mercantile partnership, in failing circumstances, make a deed conveying to A. their storehouse, all their stock of goods therein, and all debts due or to become due to the firm, subject to the following conditions and agreements: 1. that A. should (and he thereby bound himself so to do) pay certain debts of the firm, specified in a schedule annexed to the deed, within twelve months next succeeding; 2. that the grantors should be, and they were thereby, appointed the joint agents of A. to remain in the store, to sell the stock of goods until the whole should be disposed of, and to collect all the debts due and to become due to the firm; 3. that if the proceeds of the property conveyed should be more than sufficient to pay the debts specified, A. should apply the surplus to the ratable payment of such other debts as were then due from the firm. The deed is executed as well by A. as the grantors; but being mislaid or kept back by one of the grantors, in whose possession it was left on his undertaking to have it recorded, A. procures the grantors to execute another deed for his indemnity; which, reciting that the grantors are justly indebted to A. in the sum of 3000 dollars, and also "to various other creditors," conveys to a trustee "all the goods, bonds, debts and accounts, and all the property of every kind now in their possession" (without other description), and stipulates that they shall be permitted to remain in quiet possession of the goods, and sell the same, or such part as can be sold for ready money, paying over to the trustee from time to time the proceeds of such sales; and at the expiration of three months it is made the trustee's duty to sell the whole residue of the property at public auction, and pay 3000 dollars of the proceeds to A. and the residue to the other creditors in ratable proportions. This second deed is duly recorded; and a few days afterwards the first deed being found and surrendered to A. is also recorded. A pays the debts specified in the schedule annexed to the first deed, but not until the twelve months have expired. The debts assumed and paid by A. are just debts of the grantors, and as to him the whole transaction is fair in point of fact. On a bill filed by other creditors of the grantors, who obtained judgments after the execution and registry of the deeds, though for debts contracted before, insisting that the deeds are void, and praying that they may be set aside, HELD, A. is entitled to full indemnity out of the property thereby conveyed, for the liabilities assumed and paid by him.

Janney &c. v. Barnes and others,

100

V. What gift or voluntary settlement is valid as to creditors of grantor.

7. Under what circumstances a voluntary conveyance of personalty is valid against creditors of the grantor. See Gift No. 1, 2, 3, and

Huston's adm'r v. Cantril and others,

137

8. A father, in consideration of natural love and affection, makes a deed, which is duly recorded, conveying slaves and other property to three infant children, upon the condition understood and reserved, that the slaves are to remain in the donor's possession during his life, and if his wife should survive him, that she shall have the use of one third of the slaves and their increase, during her life. At the time of executing the deed, the father is indebted by two bonds, on which judgments are afterwards obtained, and the executions returned satisfied. Subsequent to the deed, he becomes appearance bail, and a judgment being obtained against him as such, the execution thereon is levied upon the slaves so conveyed, which are still in his possession, and they are sold by the sheriff. After the father's death, an action of detinue is brought against the purchaser by the widow and children jointly, and another action is brought by the children alone; in each of which cases there is a special verdict finding the facts before mentioned. HELD, 1. the action in which the widow is joined cannot be maintained, but that by the children alone is well brought; 2. the facts found do not constitute fraud per se; 3. so far as the fraud is matter of fact, the

jury not having found it, the court cannot infer it. Charlton and others v. Gardner,

281

VI. Fraudulent resale by vendor.

9. Measure of damages where vendor, in fraud of his contract, alienates the land to another. See Vendor and vendee No. 7, and Wilson v. Spencer,

261

FREEDOM.

1. What issue of slave emancipated in futuro is entitled to freedom. See Emancipation, and Anderson's ex'ors v. Anderson,

616

Suit to protect the prospective freedom of infants. 2. Two infant negroes being entitled to freedom on their attainment to age of twenty one, under a bequest in a will to which the executors have not assented; upon a bill in chancery filed by their mother, a free negro, shewing their prospective rights to freedom, and that the holders of them claim and intend to sell them as absolute slaves, whereby their freedom may be jeopardized, and praying an injunction to restrain the holders from selling or disposing of them so as to impair their prospective rights, and security for their enjoyment of their freedom when it shall accrue: HELD, 1. the court of chancery has jurisdiction to give such relief; and 2. the mother may maintain such suit, in her own name, for the protection of her infant children.

Anderson's ex'ors v. Anderson,

616

737

\*FREE NEGROES.

1. See Emancipation, Freedom, and Anderson's ex'ors v. Anderson,

616

What is a sale of free negro amounting to felony.

2. Upon an indictment on statute 1 Rev. Code, ch. 111, § 28, for selling a free negro for a slave, the evidence of the sale is a written agreement, importing that prisoner sold the negro to vendee, for which he was to deliver and pay goods and money to vendor, but vendee was to take the negro on trial for a month, and if at end thereof vendee likes him, vendee is to pay the price, and vendor to give a bill of sale; vendee pays a small part of purchase money; within the month negro runs away; and upon suspicion that he was a free negro, or had been stolen by the prisoner, the prisoner is apprehended within the month; HELD, 1. that the sale of a free negro, to constitute the felony within the statute, must be an absolute sale; 2. that the contract in this case was in its terms a conditional sale, to be affirmed or annulled, at vendee's option, within a month but if affirmed by him, the sale then became absolute, and the felony was complete; and 3. that such affirmation of the sale by the vendee may be proved, either by positive act of vendee, or by mere lapse of time without any act of vendee affirming or annulling the sale.

Commonwealth v. Nix,

636

GENERAL COURT.

1. Jurisdiction to admit to bail in criminal cases. See Bail in criminal cases No. 1, and

Commonwealth v. Semmes,

665

2. When habeas corpus to bring applicant for bail before the court will be dispensed with. See Bail in criminal cases No. 5, and

S. C., 665

3. What questions may be adjourned to general court. See Adjournment of questions, and

Commonwealth v. Nix,

636

4. The general court has no jurisdiction to award a writ of error to a refusal of a judge of a circuit superior court, in vacation, to award a writ of error to a judgment of an inferior court.

Abrahams v. Commonwealth,

675

5. Nor has the general court jurisdiction to award a writ of error to a judgment of an inferior court.

S. C., 675

GIFT.

I. What gift is valid against donor's creditors.

1. A father, owing a debt at the time, makes a deed of gift of personal chattels to his infant daughter, which is duly recorded; the daughter marries; and after the father's death, the creditor files a bill against the daughter and her husband, impeaching the deed as fraudulent, and seeking to subject the property to the payment of his demand; HELD, whatever might have been the character of the conveyance in its origin, it was rendered good and available against creditors upon the marriage of the daughter, who thereupon was to be considered a purchaser by relation for valuable consideration: dissentiente Stanard, J.

Huston's adm'r v. Cantril & al.,

137

2. Questions as to the effect of long possession of personal chattels by a voluntary donee, in protecting the property, after the donor's death, against

the claims of his creditors, discussed by some of the judges, but not decided by the court. S. C., 137

3. Quere, whether a voluntary conveyance is fraudulent as to existing creditors of the grantor, if he retain other property amply sufficient at the time to pay all his debts? S. C., 137

4. What settlement on wife and children is valid. See fraudulent alienations No. 8, and Charlton and others v. Gardner. 281

II. What gift passes nothing.

5. A father delivers a slave to his infant son residing with him, and calls upon persons present to take notice that he gives that slave to the son, but says at the same time, that he claims an estate in the slaves for his own life: HELD, nothing passes to the son by such parol gift. Anderson v. Thompson, 439

III. Invalid declaration of trust.

6. What declaration of trust of personal property is inoperative against creditors and purchasers of party in possession. See Fraudulent alienations \*No. 3, 4, 5, and London v. Turner. 403

GLEBE LANDS.

What sale by overseers of poor is valid.

In 1778, a tract of land in L. county, purchased with money contributed by the members and parishioners of the church and parish of S. is conveyed to two persons, churchwardens of that parish, and their successors, "for the use and behoof of the present incumbent of the said parish, minister of the church of England, and his successors, incumbents of the said parish, forever." In September 1827, the overseers of the poor of L. county enter upon the land and make sale of it, under authority of the act concerning glebe lands, 1 Rev. Code, ch. 32 b. Whereupon a bill in chancery is filed against the overseers, the purchaser from them (who is in possession, but has not paid the purchase money), and the heirs of the original grantor, by W. S. and others, claiming to be the vestry and churchwardens, and T. J. claiming to be the minister and incumbent, elected and inducted in August 1827, of the said parish and the protestant episcopal church thereof, (the said W. S. and others suing also as individual members and parishioners, and on behalf of all the other members and parishioners); setting forth the facts abovesated; insisting that the overseers of the poor acted without legal authority, and that so far as the said act concerning glebe lands assumed to confer such authority, it was contrary to the constitution of the United States, and void; and praying that the overseers and the purchaser from them be restrained from all further interference with the land, that the latter be decreed to surrender the same, and account for its profits to the plaintiff T. J. and that the heirs of the grantor be decreed to convey the said land, by a more effectual deed, to trustees for the benefit of the plaintiffs. On a demurrer to the bill, as not shewing any title of the plaintiff to relief, the chancellor sustains the demurrer and dismisses the bill; and the court of appeals, following the decisions in Turpin et al. v. Locket et al., 6 Call 113, affirm the decree.

Seiden and others v. Overseers of poor, 137

GUARDIAN AND WARD.

I. Appointment and qualification of testamentary guardians.

1. Testator bequeaths \$15000 to his infant son, to be vested in bank stock or such other stock as his executors shall think more profitable, and from the proceeds or dividends to educate him in the best manner under the direction of his executors, and the surplus if any to be vested in like manner; and appoints two executors: HELD, this was not an appointment of the executors testamentary guardians of the infant son.

Kevan v. Waller, 414

2. If two persons be appointed testamentary guardians, the office is joint and several, and either may qualify without the other, and without summoning the other to accept or renounce the guardianship. S. C., 414

II. Guardian's disbursements.

3. A guardian shall not be allowed, for his disbursements for the maintenance and education of the ward, more than the profits of the ward's estate; and those profits shall be taken exclusive of the increase of slaves belonging to the ward. Anderson v. Thompson, 439

HABEAS CORPUS.

1. When party arrested under escape warrant may be discharged on habeas corpus. See Escape, and M'Clinic v. Lockridge, 253

2. When habeas corpus to bring applicant for bail before the general court will be dispensed with. See Bail in criminal cases No. 5, and Commonwealth v. Semmes, 665

HEIRS.

I. What specialty does not bind heirs.

1. In the obligation of a bond, the obligors acknowledge themselves (not naming their heirs) to be held and firmly bound to the obligee, his heirs, executors &c. in a penal sum; the condition provides, that if the obligors or either, or any of their heirs, executors or administrators, shall pay a less sum specified, on or before a given day, then the obligation is to be void: HELD, the heirs of the obligors are not bound by the instrument.

Huston's adm'r v. Cantril and others, 136

II. Subrogation to remedy against heirs on warranty of ancestor.

2. In order to secure the accommodation indorsers of a note due at bank, the maker conveys land to trustees by a deed in which he covenants for himself and his heirs, with the trustees and the bank respectively, that he is possessed of an absolute estate of inheritance in the premises, and that he will warrant and defend the same against all persons. After the death of the grantor, the indorsers pay the debt to the bank, and the trust property having been sold to satisfy a debt secured by a prior deed of trust thereon, they file a bill to be subrogated to the rights of the bank under the second trust deed, and to have satisfaction out of other lands of the grantor descended to his heirs. HELD, 1. The covenant in the second deed was broken by the sale under the first; 2. The complainants are entitled to come into equity for satisfaction out of the real assets in the hands of the heirs, to the extent of the damages accruing from the breach of the ancestor's covenant; 3. The amount of those damages being the sum paid in discharge of the first incumbrance, and so fixed and certain, an issue for the purpose of assessing them is unnecessary. Haffey's heirs v. Birchetts &c., 83

III. Sale under ancestor's trust deed.

3. What sale under trust deed of ancestor, though irregularly made, will not be disturbed in favour of heirs. See Mortgages and trusts No. 11, and Hughes v. Caldwell, 342

IV. Decree for sale of lands descended.

4. Decree requiring lands descended to heirs to be sold for cash, to satisfy a debt due from ancestor, reversed, and sale directed to be made upon a credit of six, twelve and eighteen months. Haffey's heirs v. Birchetts &c., 83

V. Settlement of administration account.

5. What settlement of administration account is no evidence against heirs of intestate. See Executors and administrators No. 17, 18, and Street's heirs v. Street, 498

HOMICIDE.

See Murder, and Slaughter v. Commonwealth, 661

HUSBAND AND WIFE.

I. Settlement on feme covert.

1. Effect of grant by husband to children upon condition that the wife shall have the use of part. See Fraudulent alienations No. 8, and Charlton and others v. Gardner, 281

2. Husband and wife agree by parol, that the husband shall settle personal property to separate use of the wife, and that the wife shall relinquish her contingent right of dower in certain lands of the husband, which he proposes to convey for the benefit of creditors. The settlement upon the wife is executed accordingly. Afterwards a creditor of the husband obtains judgment against him, sues out a fieri facias thereon, and delivers it to the sheriff. And then the wife, in pursuance of her agreement, joins her husband in a deed conveying the lands. HELD, the property settled on the wife is liable to the execution of the judgment creditor, and equity will not restrain him from proceeding to make his debt out of the same. Harrison &c. v. Carroll &c., 476

3. What property given to a feme covert is liable to creditors of husband. See Fraudulent alienations No. 5, and London v. Turner, 403

II. Effect of donee's marriage.

4. Effect of donee's marriage in rendering the gift valid against creditors of donor. See Gift No. 1, and Huston's adm'r v. Cantril and others, 137



III. What sale and conveyance are binding on feme covert.

5. What sale under trust deed of ancestor, though irregularly made, will not be disturbed in favour of feme covert heir. See Mortgages and trusts No. 11, and  
 Hughes v. Caldwell. 342  
 6. Conclusiveness of a certificate by justices, that feme covert, party to conveyance, "was privily examined and acknowledged the same. See Privy examination, and  
 Harkins v. Forsyth and others. 294

IMPROVEMENT COMPANIES.

See Canal and rail road companies. Franchise. Ferries and bridges, and  
 Tuckahoe canal co. v. Tuckahoe rail road co. 42  
 Trent and others v. Cartersville bridge company. 521

INDEBITATUS ASSUMPSIT.

1. When account must be filed with declaration. See Assumpsit No. 2, 3, and  
 Fitch v. Leitch. 471  
 2. What proof may be received under insimul computassent. See Assumpsit No. 4, and  
 S. C., 471

INDICTMENTS.

See Criminal jurisdiction and proceedings.

INFANT.

1. See Guardian and ward, and  
 Kevan v. Waller. 414  
 Anderson v. Thompson. 439  
 2. Chancery suit by freedwoman to protect the prospective right of her infant children to freedom. See Freedom No. 2, and  
 Anderson's ex'ors v. Anderson. 616  
 3. What sale under trust deed of ancestor, though irregularly made, will not be disturbed in favour of infant heir. See Mortgages and trusts No. 11, and  
 Hughes v. Caldwell. 342  
 4. An infant prisoner being admitted to bail, his sureties were required to enter into the recognizance of bail, without his joining therein himself. Commonwealth v. Semmes. 606

INJUNCTION.

1. When proceeding of rail road company cannot be enjoined. See Canal and rail road companies No. 4, and  
 Tuckahoe canal co. v. Tuckahoe rail road co. 42  
 2. When chancery will not aid owner of disused ferry. See Ferries and bridges No. 1, and  
 Trent and others v. Cartersville bridge co. 521  
 3. Injunction to protect a prospective right to freedom. See Freedom No. 2, and  
 Anderson's ex'ors v. Anderson. 616  
 4. Injunction to protect vendor's lien upon land and chattels sold for a sum in gross. See Vendor and vendee No. 5, and  
 Clarke & another v. Curtis. 569  
 5. Injunction to judgment obtained by surprise. See Surprise, and  
 Mason v. Nelson. 227

INQUISITION.

What inquisition on application for leave to build a mill is sufficient. See Mills, and  
 Smith v. Waddill. 583

INSIMUL COMPUTASSENT.

1. Account need not be filed with declaration on insimul computassent. See Assumpsit No. 3, and  
 Fitch v. Leitch. 471  
 2. What proof may be received under such declaration. See Assumpsit No. 4, and  
 S. C., 471

INSOLVENT.

Action by second assignor, after taking oath of insolvency, against the first. See Assignment No. 1, and  
 Dunn v. Price. 208

INSURANCE.

Who may maintain action on policy.

A house is insured against fire, by a policy containing a provision that it is to have no effect if assigned, unless the assignment be allowed by the insurance company. The owner and assured makes a written contract, by which he agrees to sell to A. the house with the lot on which it stands, and A. agrees to procure and assign to the vendor the bond of a third person for the purchase money, and to execute a mortgage on the property for securing the payment; the contract to be fulfilled on A.'s part within the month. A. fails to perform his contract within the month; and five days afterwards, and while it is still unperformed, the house is consumed by fire. The contract is subsequently

carried into effect by the parties. In an action by the vendor against the insurance company to recover the value of the "house, the parties to the suit, in addition to the foregoing facts, agree, that both before and after the execution of the written contract for the sale of the premises, it was agreed by parol between the vendor and vendee, that the former should assign the policy of assurance to the latter; reserving however the question of law, whether the said parol agreement can be admitted, either as a district contract, or for the purpose of affecting the terms of the written contract of sale. HELD, the plaintiff is entitled to recover, notwithstanding the contract of sale, and the subsequent performance of it; 1. because the purchaser, if sued in equity for specific execution, might have set up the parol agreement to assign the policy, and thereby entitled himself to an abatement for the loss of the house; 2. because, by the stipulation for a mortgage, the plaintiff retained an insurable interest in the premises, which gave him an immediate right of action against the insurance company upon the happening of the loss. Wheeling insurance co. v. Morrison. 354

INTEREST OF WITNESS.

See Witness No. 2, 3, 4, and  
 Reynolds's adm'r v. Stephenson's adm'r. 399  
 Parrish v. Parrish. 626  
 Waggener v. Dyer. 384

INTEREST ON DAMAGES.

1. Continuing interest not allowed on damages recovered against sheriff for false return of nulla bona. See Sheriffs No. 1, and  
 Gibson v. Stewart's adm'r. 600  
 2. Allowance of interest on damages for breach of executory contract to convey land. See Vendor and vendee No. 7, and  
 Wilson v. Spencer. 261

INTERROGATORIES.

Who may introduce answers as evidence.  
 A plaintiff in an action at law, wishing a discovery from the defendant, files written interrogatories under the statute, to which answers are given. At the trial, the defendant offers to read to the jury, as evidence, the interrogatories and answers, to which the plaintiff objects. Nevertheless the circuit court permits the same to be read, and a verdict and judgment are rendered for the defendant. The court of appeals, approving the decision in M'Farland v. Hunter, 8 Leigh 489, reverses the judgment of the circuit court, and awards a new trial, with direction that the answers to the interrogatories are not to be read, unless introduced on the part of the plaintiff. Vaughn & co. v. Garland. 251

ISSUE OUT OF CHANCERY.

1. When unnecessary for assessment of damages. See Heirs No. 2, and  
 Haffey's heirs v. Birchetts &c.. 83  
 2. Concerning effect of answer to bill for setting aside a will, as evidence on trial of issue devisavit vel non, see Will No. 6, and  
 Kincheloe v. Kincheloe. 308

JEOPAILS.

When error of excess in recovery is not cured by verdict under statute of jeopails. See Sheriffs No. 2, and  
 Gibson v. Stewart's adm'r. 600

JOINT ACTION.

1. What is a misjoinder of plaintiffs in detinue. See Fraudulent alienations No. 8, and  
 Charlton and others v. Gardner. 281  
 2. In an action against several defendants on a joint contract, plaintiff must be entitled to joint judgment against all, else he cannot have judgment against any.  
 Baber v. Cook & others. 606

JOINT AND SEVERAL OBLIGATION.

I. What bond is joint as to some obligors and several as to another.  
 1. In debt on bond for money payable twelve months after date against four obligors, declaration counts against them as joint obligors; but it appears, by defendants' pleas and plaintiff's replications, as well as by evidence at the trial, that in fact the bond was first sealed and delivered by three of the obligors, of whom one was principal and the other two sureties; and that the fourth obligor "sealed and delivered it some time after the debt fell due, with a view in so doing to substitute himself as surety in place of one of the original sureties; and this was done with the assent of the obligee, of the principal obligor, and of the surety for whom the fourth obligor was to be



substituted, but without the consent or knowledge of the other original surety: *Held*, the original obligation was the joint contract of the three obligors, but the obligation of the fourth obligor was his several contract, and therefore plaintiff cannot recover joint judgment against the four obligors. *Baber v. Cook & others*, 606

II. Remedy on such bond.

2. Quere, whether the plaintiff has any, and if any, what remedy against the three original obligors on the original obligation? and any, and what, remedy on the several obligation of the last obligor? S. C., 606

III. When joint judgment is necessary.

3. See Joint action No. 2, and S. C., 606

JUDGMENT.

1. In joint action on contract against several defendants. See Joint action No. 2, and *Baber v. Cook & others*, 606

2. What judgment on bond with collateral condition will not be reversed. See Bond No. 4, and *Wilson v. Spencer*, 261

3. Judgment reversing order of circuit court which quashed inquisition on application for leave to build mill. See *Mills*, and *Smith v. Waddill*, 532

4. Judgment for defendant reversed as to one count and affirmed as to another. See Appellate jurisdiction No. 8, and *Dunn v. Price*, 208

5. Estoppel to creditor of decedent by accepting confession of judgment when assets. See *Estoppel*, and *Dupny and others v. Southgate*, 92

6. Relief in equity against judgment obtained by surprise. See *Surprise*, and *Mason v. Nelson*, 227

7. Limitation of debt or scire facias against personal representative on judgment against decedent, and duty of representative to plead the statute. See *Executors and administrators No. 3, 4*, and *Tunstall & al. v. Pollard's adm'r*, 2

JURISDICTION.

See Appellate jurisdiction. Chancery jurisdiction. Criminal jurisdiction and proceedings.

JURY—In criminal cases.

I. Discretion of court in allowing jury de medietate lingue.

1. The statute 1 Rev. Code, ch. 75, § 13, that "juries de medietate lingue may be directed by the courts respectively," is not imperative that the courts shall direct such a jury in cases, even of a criminal nature, in which aliens are parties, but confers a discretionary power on the courts to direct such jury, if to them it appear proper. *Richards v. Commonwealth*, 690

2. The courts having a discretionary power to direct juries de medietate lingue, or not to do so, in cases where aliens are parties: in a prosecution for murder, the mere circumstance of the prisoner being an alien and ignorant of the language, is not sufficient to require the court, in the exercise of a sound discretion, to direct such a jury. *Brown v. Commonwealth*, 711

II. What juror is not indifferent.

3. Upon a question whether one called as a juror in a case of felony, and challenged for cause, stands indifferent or not, the general rule is, That one who has formed a decided opinion that the prisoner is guilty or innocent, whether that opinion be formed on the evidence of witnesses whose testimony he has heard on a former trial, or conversation with witnesses, or common report, is not an indifferent juror. And it is immaterial whether such opinion has been expressed or not. *Armistead v. Commonwealth*, 657

4. And if the person called as a juror has been so inconsiderate and unjust as, upon insufficient or no evidence, to have prejudged the prisoner's cause, much more is he unfit to be trusted with it as a juror. S. C., 657

5. A person called as a juror, stated that he had had a conversation with the prosecutor shortly after the alleged offence committed, and heard from him a general statement of the facts, though he did not know whether that statement mentioned all the facts; on that statement he had formed and expressed a decided opinion that the prisoner was guilty; he knew the prosecutor, and had entire confidence in his veracity; he had forgotten some of the circumstances by him related; and the opinion he had formed was not such but that it would yield to evidence; he would try the prisoner's cause by the evidence alone, and had no doubt he could give him a fair trial; he had no

prejudice against him: Upon a challenge for cause. *Held*, this person was not indifferent, and the challenge should have been sustained. S. C., 657

III. When jurors need not be kept together.

6. In impanelling a jury for trial of an indictment of felony, there is no necessity to keep jurymen who have been elected and sworn together and separate from other persons, under charge of the sheriff, until the whole number shall be elected and sworn. *Tooe v. Commonwealth*, 714

IV. What separation and discharge of jurors is no ground for new trial.

7. Upon trial of indictment for murder, the jury, not agreeing on a verdict, are, after dark, adjourned over till next morning, and committed to two sheriffs to be enclosed in a room to be prepared for them; in conducting them from the courthouse to their room, one juror separates from his fellows, gets 25 yards from them and the sheriffs having them in charge, tells a servant whom he meets with to take care of his horse, says nothing else to any one, and no one speaks to him; he is immediately pursued by one of the sheriffs, and brought back to the rest of the jury; his separation from his fellows does not exceed a minute, and he was a yet shorter time out of sight of the sheriffs; next morning, jury finds prisoner guilty of murder in the first degree, and court passes sentence of death: *Held*, such separation of the juror from his fellows is no cause for setting aside the verdict. *M'Carver v. Commonwealth*, 633

8. In impanelling a jury for trial of an indictment of felony, eight are elected and sworn, and three elected but not sworn; one who had been sworn separates from the rest, goes some miles off, and stays some hours; the other ten are put in charge of sheriff, to be kept together and separate from other persons, till ensuing morning; upon attachment against the absconding jurymen, he is taken the same night, and put and kept in the same room with the other jurymen till next morning, but there appears to have been no conversation, the subject of the prosecution; next morning, by allowance of the court, this jurymen is challenged by the prisoner for cause, and set aside; the jury is then completed, and find the prisoner guilty: *Held*, 1. the separation of the absconding jurymen from his fellows, and his subsequent association with them, though he was afterwards struck from the panel, does not vitiate the verdict, and is no good reason for a new trial. 2. After a jurymen has been elected and sworn, the court may, in its discretion, allow the prisoner to challenge him for cause, and strike him from the panel. *Tooe v. Commonwealth*, 714

JUSTICES OF PEACE.

Conclusiveness of their certificate of privy examination. See *Privy examination*, and *Harkins v. Forsyth and others*, 294

LACHES.

See *Surprise*. Mortgages and trusts No. 11. Legacy and legatee No. 3, and *Mason v. Nelson*, 227  
*Hughes v. Caldwell*, 342  
*Aylett's ex'or v. King &c.*, 486

LAPSE OF TIME.

1. Questions as to the effect of long possession of personal chattels by a voluntary donee, in protecting the property, after the donor's death, against the claims of his creditors, discussed by some of the judges but not decided by the court. *Huston's adm'r v. Cantril and others*, 137

2. Effect in giving validity to irregular sale under trust deed. See *Mortgages and trusts No. 11*, and *Hughes v. Caldwell*, 342

3. Bill by legatees, after great lapse of time, to resettle executor's account. See *Legacy and legatee No. 3*, and *Aylett's ex'or v. King &c.*, 486

\*LEGACY AND LEGATEE.

I. Suit by legatees against ex'or for account. 1. What executor is liable to suit by legatees. See *Executors and administrators No. 1*, and *Tunstall & al. v. Pollard's adm'r*, 1

2. Bill filed by two legatees against another legatee and the administrator, for a settlement of the administration account, and distribution of the estate; and question whether, upon the pleadings and proofs in the cause, the administrator should be held liable to his codefendant for his share of certain slaves, claimed and forcibly taken from

the administrator by the plaintiffs, under an alleged parol gift by the decedent in his lifetime.

Anderson v. Thompson. 489

3. Bill filed by legatees in 1834, after decease of executor, of his executor, and of all the sureties of both, to resettle account of first executor's administration, settled by second executor in 1818: one of the plaintiffs having attained full age in 1821, the other in 1823: and bill sustained upon the other circumstances of the case, notwithstanding the lapse of time, and death of executors and their sureties. Aylett's ex'or v. King &c., 486

II. Who are responsible to legatees, and in what order.

4. An executor dies indebted to his testator's estate, but leaving assets sufficient to discharge the debt, which are received by his executor, who, instead of making payment to the legatees of the first testator, distributes the assets among the legatees of his own testator: HELD, 1. the surety of the first executor is responsible for the amount due to the first testator's legatees; but 2. equity will not subject him to the payment thereof, until the legatees of the first executor, who received the assets of his estate, and the sureties of the second executor, have been brought before the court, and an effort to collect from them the amount due has proved unavailing.

Aylett's ex'or v. King &c., 486

III. What is no proof of executor's assent to legacy.

5. A testator having a leasehold estate producing a yearly rent, bequeaths to his father \$50 per annum during his life, to be paid out of the rent, and to his wife one half, and to his daughter the other half, of the rent remaining after paying the legacy to his father. The wife is appointed executrix, and qualifies as such. Afterwards she sells the leasehold estate, and makes a deed in her individual name (not calling herself executrix) transferring to the purchaser all her right, title, interest and property in the premises. On a bill by the daughter against the purchaser, HELD, the execution of the deed by the executrix in her individual name does not prove that the act was done in the character of legatee, and she must be considered as holding as executrix at the time of the deed, unless there be evidence establishing that she had previously taken as legatee. Accord. Doe v. Hayes v. Sturges, 7 Taunt. 217, 2 Eng. Com. Law Rep. 77.

Burchard and wife v. Wright &c., 463

6. It appears, that before the deed to the purchaser, a payment had been made to the father on account of his legacy, and a receipt given, stating that the money paid "was passed to the credit of Mrs. L. W. executrix of D. W. deceased:" HELD, such payment does not shew an assent by the executrix to her own or the daughter's legacy.

S. C., 463

## LEGISLATURE.

Constitutionality of statute. See Franchise No. 1.  
2. Glebe lands. Patent No. 1, and  
Tuckahoe canal co. v. Tuckahoe rail road co., 42  
Selden and others v. Overseers of poor, 127  
Taylor &c. v. Burdett &c., 344

## LETTER OF ATTORNEY.

See Power of attorney, and  
Huston's adm'r v. Cantril and others, 186

## LIEN.

Of vendor for purchase money, on sale of land and chattels for a sum in gross. See Vendor and vendee No. 5, and

Clarke & another v. Curtis, 559

## LIMITATION OF SUITS.

745 1. Limitation of debt or scire facias \*against personal representative on judgment against decedent, and duty of representative to plead the statute. See Executors and administrators No. 3, 4, and

Tunstall & al. v. Pollard's adm'r., 2

2. Questions as to the effect of long possession of personal chattels by a voluntary donee, in protecting the property, after the donor's death, against the claims of his creditors, discussed by some of the judges but not decided by the court.

Huston's adm'r v. Cantril and others, 187

3. When statute begins to run against plaintiffs in detinue claiming by way of remainder. See Detinue No. 2, and

Duncan & wife & others v. Wright, 542

## LOAN.

When absolute property is taken to be with the possession. See Fraudulent alienations No. 4, and  
London v. Turner, 408

## MARRIAGE.

Effect of donee's marriage in rendering the gift valid against creditors of donor. See Gift No. 1, and  
Huston's adm'r v. Cantril and others, 187

## MILLS.

What inquisition ad quod damnum is sufficient: and judgment reversing order of circuit court which quashed the same.

S. applies to the county court for leave to build a water grist mill and dam: upon an ad quod damnum, the inquisition found, "that the health of the neighbours would be less or as little annoyed as it was possible it should be by the erection of any dam:" upon return of the inquisition, W. opposed the grant of leave, objecting that the inquisition was insufficient and defective in regard to the effect upon health, and intimating that if that objection should be overruled, he should offer testimony on that point: the county court overruled the objection to the inquisition, and then refused to hear W.'s testimony, and gave S. leave to build the mill and dam: W. appealed to the circuit superior court, which heard the testimony he had to offer, but, without deciding upon it, held that the inquisition was insufficient and defective, reversed the order, directed that the inquisition should be quashed, and remanded the cause to the county court: upon appeal taken by S. to this court, HELD, 1. That the inquisition was sufficient, and the circuit superior court erred in quashing it, but the county court also erred in refusing to hear the testimony offered by W. and so the orders of both courts were erroneous. 2. That the order of the circuit superior court should be reversed with costs, and the cause remanded to that court, to be there heard and decided upon the evidence and the merits: dissente Tucker, P., who held, that the cause should be remanded to the circuit superior court, to be thence remanded to the county court for further proceedings to be there had.

Smith v. Waddill, 532

## MISDEMEANOUR.

Indictment for wilfully injuring the slave of another. See Trespass, and  
Commonwealth v. Howard, 631

## MISJOINDER.

What is a misjoinder of plaintiffs in detinue. See Fraudulent alienations No. 8, and  
Charlton and others v. Gardner, 281

## MONOPOLY.

What is no grant of a monopoly. See Franchise No. 1, 2, and

Tuckahoe canal co. v. Tuckahoe rail road co., 42

## MORTGAGES AND TRUSTS.

### I. Construction.

1. What is a mere power of attorney revocable by grantor's death, and not an equitable mortgage. See Power of attorney, and

Huston's adm'r v. Cantril and others, 189

2. What recital in trust deed will not create a specialty debt. See Specialty No. 2, and

Powell's ex'ors v. White and others, 309

3. What is a breach of warranty in mortgage of land, and what the measure of damages. See Heirs No. 2, and

Haffey's heirs v. Birchetts &c., 83

### II. Validity.

4. What conveyance to secure a debt is \*unaffected by the statute against conveying or taking pretended titles. See Pretensed title, and

Waggener v. Dyer, 384

5. What conveyance providing for payment of debts is valid against other creditors of grantor. See Fraudulent alienations No. 6, and  
Janney &c. v. Barnes and others, 100

III. Adjustment of amount to be raised by sale under trust deed.

6. Deed of trust conveys property to a trustee, in order to secure payment of a debt "not then ascertained but supposed to be about 2000 dollars," and of another debt "not then ascertained but supposed to be about 1800 dollars:" and by a subsequent deed of trust, part of the same trust subject is conveyed to another trustee, to secure payment of the same debts, stating the one to be "about 2000 dollars," and the other "about 1800 dollars," with power to the trustee to sell the trust subject, and pay the debts out of the proceeds: HELD, the trustee under the last deed cannot proceed to sell the trust subject till the amounts of the debts actually due are ascertained by proper settlements.

Wilkins v. Gordon & wife & others, 547

7. Where a debt secured by a deed of trust appears by the deed to be of unascertained amount, either party may resort to a court of chancery to have the amount ascertained by accounts taken under its direction, and all accounts affecting the amount of the debt ought to be directed; and the trustee cannot proceed to sell the trust subject until the debts are settled and ascertained. S. C., 547

#### IV. Right of mortgagee to foreclose.

8. A deed of mortgage containing a clause which provides that, after default, the mortgagees may enter upon the property and receive the rents, issues and profits thereof for their indemnity. It is contended that no sale should be decreed unless the profits are inadequate for such indemnity; though there is in the deed an absolute conveyance of the fee, with a defeazance, as usual, in case of payment. HELD, the right of the mortgagees to have a foreclosure and sale is not impaired by the clause before mentioned.

Harkins v. Forsyth and others. 294

#### V. Allowance of time for redemption.

9. When a foreclosure is decreed, the court is to exercise a sound discretion in relation to the period of redemption, and fix it according to the circumstances of the case. The usual time is six months; but less may be allowed.

Harkins v. Forsyth and others. 294

10. Though the time allowed for redemption be only thirty days, an appellate court will nevertheless presume that the discretion of the court below has been properly exercised, if no application appears to have been made to that court for an extension of time. S. C., 294

#### VI. What sale under trust deed will not be set aside.

11. The trustee in a deed conveying land to secure payment of a debt, by his will devises the land to his executors, and expressly directs and empowers them to sell the same in execution of the trust. The executors accordingly sell the land, their sale being fairly made, and for a price which is the full value at the time. This sale is made in 1818, after the death of the grantor in the deed; whose heirs are two daughters, both married, and one of them absent from the commonwealth when the sale takes place. The husband of the other is present at the sale, assents to it, and receives the surplus proceeds after payment of the debt, one moiety as the share of his wife, the other as the share of the absent daughter, for whom he undertakes to act. The husband of the latter having died, she returns to Virginia in 1820, and thenceforth resides with her brother in law and sister, in the same town in which the land is situated. The purchaser makes valuable improvements on the property; and no claim whatever is made or intimated by any of the parties, until 1835, when a bill is filed by the husband and wife and the widowed daughter, seeking a redemption or resale, on the ground that the executors of the trustee had no authority to sell. The wife dying pending the suit, the same is revived in the names of her children and heirs: HELD, 1. the devise by the trustee passed the title to his executors; 2. the executors had however, no authority to act in execution of the trust; but 3. under the circumstances \*of the case, the sale shall not be disturbed, even in favour of the heirs of the party whose coverture continued from the time of the sale until the institution of the suit.

Hughes v. Caldwell. 343

#### VII. Mortgagee's interest insurable.

12. That a mortgagee has an insurable interest in the property mortgaged, see Insurance, and Wheeling insurance co. v. Morrison, 354

#### MURDER.

What will warrant a conviction of murder in the second degree.

1. Question whether, on the circumstances of the case, homicide was murder in the second degree or manslaughter?

Slaughter v. Commonwealth. 681

2. S. having conceived and declared design to kill P. the parties met afterwards in front of S.'s own house, and a quarrel ensued, in which S. gave the first offence: P. proposed a fight; upon which S. retired for a very brief time into his house, armed himself with a loaded pistol which he concealed in his pocket, and instantly returned so armed to the scene of quarrel; then P. threw a brick bat at S. which did not hit him; but falling short of him broke, and a small fragment struck S.'s child, standing within his own door, who cried out; and S. hearing his child cry out, but without looking to see whether he was hurt or not, exclaimed, "he has killed my child and I will kill him." advanced towards P., deliberately aimed and fired the pistol at him then retreating with his face towards S. and

the shot took effect and killed P. Upon trial of indictment against S., verdict guilty of murder in the second degree: HELD, the jury might well impute the killing to the previous malice, and not to the sudden provocation of P.'s assault, and therefore the verdict was right. S. C., 681

3. Two persons quarrel, and one throws a brick bat at the other, who has privately armed himself with a deadly weapon, and keeps it concealed, in expectation of the affray, and on such assault being made upon him, immediately draws forth the weapon and with it kills the assailant though then retreating: jury finds this killing murder in the second degree: HELD, upon these circumstances, even without proof of any previous malice, the verdict could not be disapproved. S. C., 681

#### NEW TRIAL.

1. Preclusion of the new trial by release of excess in judgment recovered. See Sheriffs No. 3, and Gibson v. Stewart's adm'r. 600

2. New trial in felony for admission of a juror not indifferent. See Jury No. 3, 4, 5, and Armistead v. Commonwealth. 657

3. When refusal to direct a jury de medietate linguae in a case of felony is no ground of a new trial. See Jury No. 1, 2, and

Richards v. Commonwealth. 690

Brown v. Commonwealth. 711

4. What separation and discharge of jurors in case of felony is no ground of new trial. See Jury No. 6, 7, 8, and

MCarter v. Commonwealth. 633

Toole v. Commonwealth. 714

#### NONUSER.

Effect of nonuser of a public ferry. See Ferries, and bridges No. 1, 2, and Trent and others v. Cartersville bridge co., 521

#### NOTICE.

What notice for taking depositions is sufficiently definite. See Depositions, and Kincheloe v. Kincheloe. 393

#### NUISANCE.

What is no nuisance to franchise. See Canal and rail road companies No. 2, 3, 4. Ferries and bridges No. 3, 4, and

Tuckahoe canal co. v. Tuckahoe rail road co., 42  
Trent and others v. Cartersville bridge co., 521

#### OFFICERS.

Concerning distress warrant against officers of the United States and their sureties, see United States officers, and

Grove & c. v. Little & c., 180

#### OVERSEERS OF POOR.

748 What sale of glebe land by overseers \*of poor is valid. See Glebe lands, and Selden and others v. Overseers of poor. 127

#### PAROL EVIDENCE.

1. That a parol contract to assign policy of insurance may be set up by vendee of insured premises sued for specific execution, see Insurance, and

Wheeling Insurance co. v. Morrison. 354

2. Effect of a parol declaration of trust of personal property. See Fraudulent alienations No. 3, 4, and London v. Turner. 408

3. What settlement in pursuance of parol contract between husband and wife is not valid against creditors of husband. See Husband and wife No. 2, and

Harrison & c. v. Carroll & c., 476

4. Parol evidence not received to contradict justices, certificate of privy examination. See Privy examination, and

Harkins v. Forsyth and others. 294

#### PARTICULARS.

When bill of particulars must be filed with declaration. See Assumpsit No. 2, 3, and Fitch v. Leitch. 471

#### PARTIES TO SUITS.

1. What is a misjoinder of plaintiffs in detinue. See Fraudulent alienations No. 3, and Charlton and others v. Gardner. 281

2. Chancery suits by freed woman to protect the prospective freedom of her infant children. See Freedom No. 2, and

Anderson's ex'ors v. Anderson. 616

3. Want of proper parties to bill for setting aside will is no ground to reverse decree of dismissal right on the merits. See Will No. 7, and Kincheloe v. Kincheloe. 393

PATENT.

When not allowed to be given in evidence.

1. The act of April 1, 1831 declared, that in a suit for the recovery of land lying west of Alleghany, against a person bona fide claiming such land under a grant from the commonwealth issued previously to the act, who has had the land duly entered, and has paid all the taxes chargeable upon it, his adversary shall not be allowed to give his grant in evidence, unless he shall shew that he too has had the land duly entered and charged with taxes according to law, and has actually paid the taxes charged and justly chargeable upon it. Per Tucker, P. this act is constitutional.

Taylor &c. v. Burdett &c., 334

2. In a suit against a defendant holding land lying west of the Alleghany, under a grant from the commonwealth issued previously to the act of 1831, it appearing that he had had his land duly entered, and had paid all the taxes chargeable upon it, the circuit court refused to allow his adversary to give his grant in evidence; but the court of appeals, being of opinion that he too had shewn that he had had the land duly entered and charged with taxes, and had paid the taxes chargeable upon it, reversed the judgment. S. C., 334

PAUPER SUITS.

See Freedom No. 2, and  
Anderson's ex'ors v. Anderson, 616

PAYMENT.

Application of payments.

1. Where one is indebted to another for several debts, and the debtor makes payments, without directing to which of the debts they shall be applied, and the creditor makes no particular application of the payments when received; there is no settled rule that the payments shall be applied either according to the presumed intention of the creditor, or according to the presumed intention of the debtor, or that the payments shall be applied in the manner most beneficial to the one, or to the other; but it devolves on the court to apply the payments according to the justice of the particular case, with a view to all its circumstances.

Smith v. Loyd, 512

2. In general, where several debts are due and payments are made without specific application by either debtor or creditor at the time, the payments ought to be applied to extinguish the debts according to priority of time. S. C., 512

PENITENTIARY.

749 General verdict of conviction for \*penitentiary crimes on indictment containing good and bad counts. See Criminal jurisdiction and proceedings No. 10, and  
Mowbray v. Commonwealth, 436

PERSONALTY.

1. What gift is void and passes nothing. See Gift No. 5, and  
Anderson v. Thompson, 439

See also

London v. Turner, 412

2. Concerning the validity of alienations of personal property as to creditors of alienor, see Fraudulent alienations No. 6, 8. Gift No. 1, 2, 3, and  
Janney &c. v. Barnes and others, 100  
Charlton and others v. Gardner, 281  
Huston's adm'r v. Cantril and others, 137

3. Concerning the liability of personal property to creditors of the party in possession, see Fraudulent alienations No. 3, 4, 5, and  
London v. Turner, 403

4. Specific execution, and lien of vendor, on sale of real and personal property for a sum in gross. See Vendor and vendee No. 5, and  
Clarke & another v. Curtis, 550

PLEADING.

I. Sufficiency of plea and replication.

1. What pleas of assignment by plaintiff are bad on demurrer. See Assignment No. 1, and  
Dunn v. Price, 203

2. What plea to action on bond for conveyance of land is insufficient. See Covenant No. 3, and  
Wilson v. Spencer, 261

3. In action on covenant to procure a proper conveyance of land, what plea is sufficient and what replication naught. See Covenant No. 2, and  
Fairfax's adm'r v. Lewis, 233

II. Evidence applicable to bad plea.

4. That the rejection of evidence in support of a bad plea is no ground to reverse judgment, see Appellate jurisdiction No. 4, and  
Wilson v. Spencer, 261

III. Filing additional pleas.

5. When additional pleas may be filed after judgment of appellate court on demurrer to evidence. See Demurrer No. 2, and

Fairfax's adm'r v. Lewis, 233

IV. Bill in chancery.

6. What bill filed by borrower against lender is not within the third section of the statute against usury. See Usury No. 1, and

Campbells v. Patterson, 113

7. Concerning the sufficiency of bill in chancery, see Glebe lands. Surprise, and  
Selden and others v. Overseers of poor, 127  
Mason v. Nelson, 227

POSSESSION.

1. Questions as to the effect of long possession of personal chattels by a voluntary donee, in protecting the property, after the donor's death, against the claims of his creditors, discussed by some of the judges but not decided by the court.

Huston's adm'r v. Cantril and others, 137

2. When the absolute property of chattels is taken to be with the possession. See Fraudulent alienations No. 3, 4, 5, and  
London v. Turner, 403

POWER OF ATTORNEY.

What is not an equitable mortgage, but a mere power.

A principal debtor executes an instrument under his hand and seal, by which he constitutes the surety his attorney, for the special purpose of making sale of a certain tract of land, and applying the proceeds to the payment of the debt; but it is provided that the land is not to be sold for a less price than one dollar per acre; and the principal binds himself, his heirs &c. to warrant and defend the land to any person or persons to whom the surety may sell as aforesaid. The land is not sold during the life of the principal; and after his death, the surety pays the debt, and then files a bill against the administrator and heirs of the principal, insisting that the instrument created a lien in equity on the land for his indemnity, and praying that in default of satisfaction out of the personal assets, he may be authorized to sell the land and apply the proceeds to his reimbursement. H.E.D. the instrument had not the effect of an equitable mortgage or charge upon the land; but the power therein contained, not having been carried into effect 750 in the grantor's lifetime, \*was utterly revoked by his death.

Huston's adm'r v. Cantril and others, 136

PRACTICE IN CIVIL PROCEEDINGS AT LAW.

1. When summons will be presumed the proper process to commence action. See Summons No. 1, 2, and

Wynn v. Wyatt's adm'r, 584

2. What service of summons to answer action is insufficient. See Summons No. 3, and S. C., 554

3. What is not an appearance to the action. See Appearance, and S. C., 585

4. What party may introduce answers to interrogatories as evidence. See Interrogatories, and  
Vaughn & co. v. Garland, 251

5. Rejection of evidence in support of a bad plea is no ground of reversal. See Appellate jurisdiction No. 4, and

Wilson v. Spencer, 261

6. When demurrer to evidence may be set aside additional pleas received. See Demurrer No. 2, and  
Fairfax's adm'r v. Lewis, 233

7. Judgment in action on a contract against several defendants. See Joint action No. 2, and  
Baber v. Cook & others, 606

8. What judgment on bond with collateral condition will not be reversed. See Bond No. 4, and  
Wilson v. Spencer, 261

9. Judgment for defendant reversed as to one count and affirmed as to another. See Appellate jurisdiction No. 8, and  
Dunn v. Price, 203

10. Practice on reversing judgment for error of excess in recovery. See Sheriffs No. 3, and  
Gibson v. Stewart's adm'r, 600

11. Judgment reversing order of circuit court which quashed inquisition on application for leave to build mill. See Mills, and  
Smith v. Waddill, 532

12. Rehearing in court of appeals after judgment has been reversed and cause remanded. See Rehearing, and  
Wynn v. Wyatt's adm'r, 584

PRACTICE IN CRIMINAL CASES.

See Criminal jurisdiction and proceedings.

PRACTICE IN SUITS IN EQUITY.

1. Suit by freed woman to protect the prospective

freedom of her infant children. See Freedom No. 2, and

- Anderson's ex'ors v. Anderson. 616  
2. When issue to ascertain damages in unnecessary. See Heirs No. 2, and  
Haffey's heirs v. Birchetts &c., 83  
3. Effect of answer to bill for setting aside a will, as evidence on trial of issue devisavit vel non. See Will No. 6, and

Kincheloe v. Kincheloe, 398  
4. Time allowed for redemption by decree foreclosing mortgage. See Mortgages and trusts No. 9, 10, and

- Harkins v. Forsyth and others, 294  
5. Decree for sale of land descended, to satisfy debt of ancestor. See Heirs No. 4, and  
Haffey's heirs v. Birchetts &c., 83  
6. Effect of appeal from decree dismissing supplemental bill. See Appellate jurisdiction No. 1, and  
Huston's adm'r v. Cantril and others, 137  
7. In what case appellate court will take cognizance of questions between appellees. See Appellate jurisdiction No. 2, 3, and  
Powell's ex'ors v. White and others, 309  
8. Want of proper parties to bill for setting aside a will is no ground to reverse decree of dismissal right on the merits. See Will No. 7, and  
Kincheloe v. Kincheloe, 398

#### PRETENSED TITLE.

What conveyance is unaffected by statute against conveying or taking pretended titles.

Land sold under a trust deed made to secure the payment of a debt is purchased by and conveyed to the creditor and cestui que trust, and he is in possession thereof, but under circumstances which entitle the debtor to redeem: another creditor procures from the debtor a conveyance of the land, absolute in form, but intended as a mortgage: HELD, the last conveyance is not affected by the statute against buying and selling pretended titles, and the creditor who claims under it shall be entertained in equity, in a suit to set aside the sale under the trust deed, and to have a resale of the land.

Waggener v. Dyer, 384

#### PRINCIPAL AND AGENT.

##### I. Power of attorney.

1. What is not an equitable mortgage, but a mere power of attorney, revoked by death of grantor. 751  
See \*Power of attorney, and

Huston's adm'r v. Cantril and others, 136

##### II. Fraudulent purchase by agent from principal.

2. A claim to the land bounty to which a pilot in the revolutionary war was entitled, being established by his heirs, they employ an agent to do the best he can with the warrant, and write to him, stating that a far better price than 75 cents per acre was expected, but as it had been left to him, he must act for them. A sale is afterwards made, through the agent, at 75 cents per acre, and a conveyance is made to T. G. as the purchaser. On a bill filed by the heirs against the agent and T. G. it appears that T. G. had authorized the same agent to purchase warrants, and agreed to allow him, for his trouble, one half of any profit that might be made after refunding the purchase money and interest; that the agent had informed T. G. that a pilot warrant was offered at 75 cents per acre, and enquired whether that price should be given; and that T. G. did not know whose warrant was the subject of the treaty till after the purchase had been concluded. The circuit court, holding that the agent ought not to have been concerned in the purchase, decreed against him for so much of the profit resulting therefrom as he had received; and the court of appeals affirmed the decree.

Segar v. Edwards and wife, 213

#### PRINCIPAL AND SURETY.

1. Subrogation of surety to creditor's remedy against heirs of principal. See Heirs No. 2, and  
Haffey's heirs v. Birchetts &c., 83

2. What surety is not entitled to rank as a specialty creditor of deceased principal. See Specialty No. 2, and

Powell's ex'or v. White and others, 309  
3. Sureties in a bond, who pay it off after the death of the principal, are entitled to rank as specialty creditors of the principal, and if they be administrators of his estate, may retain whatever they pay on account of such suretyship, out of the assets that come to their hands as administrators, against other specialty creditors. The cases of Copis v. Middleton, 1 Turn. & Russ. 224, and Jones v. Davids, 4 Russ. 277, so far as they conflict with this doctrine, disapproved. S. C., 309

See also

- Dupuy and others v. Southgates, 92  
4. What sale and conveyance of land belonging to

surety of federal officer, under warranty of distress, is invalid. See United States officers, and

Grove &c. v. Little &c., 180

5. Order of responsibility to legatees, as between sureties of executor, and his distributees and personal representative and the sureties of the latter. See Legacy and legatee No. 4, and

Aylett's ex'or v. King &c., 486

6. Competency of one of two sureties as witness for creditor who has covenanted not to sue him. See Witness No. 4, and  
Waggener v. Dyer, 384

#### PRIORITY.

1. Of debt due to deceased administrator from estate of his intestate. See Retainer No. 2, and  
Powell's ex'ors v. White and others, 309

2. Of debt due from deceased executor to estate of his testator. See Executors and administrators No. 7, 8, and

Tunstall & al. v. Pollard's adm'r, 1

3. Of debt due to sureties of decedent. See Estoppel No. 2. Principal and surety No. 3. Specialty No. 2, and

Dupuy and others v. Southgates, 92

Powell's ex'ors v. White and others, 309

#### PRISON.

What is not an escape out of prison for which an escape warrant may issue. See Escape, and  
M'CIntic v. Lockridge, 253

#### PRIVY EXAMINATION.

Conclusiveness of justices' certificate.

After husband and wife have signed, sealed and delivered a deed of mortgage, two justices of the peace certify, in the form prescribed by the statute, that she personally appeared before them, and being examined privily and apart from her husband, and having the deed fully explained to her, she acknowledged the same to be her act and deed, and declared she had willingly signed, sealed and delivered the same, and wished not to retract it. In a suit in equity afterwards brought to foreclose the mortgage, it is contended that the deed is void as to the wife, for want of such explanation of its nature as the statute requires; and the depositions of the justices are taken to prove the fact that the deed was not fully explained to the wife: HELD, as the privy examination, acknowledgment and declaration of the wife are certified by the justices pursuant to the directions of the statute, the deed is effectual to pass all her right, title and interest.

Harkins v. Forsyth and others, 294

#### PROBAT.

Effect of sentence admitting will to probat generally.

1. A will devising or charging lands is admitted to full probat, without proof appearing in the sentence of probat, that it was duly attested by witnesses, or that it was wholly written by the testator: HELD, that according to our laws and course of judicial decisions, the will cannot be controverted as a will of lands after the lapse of seven years from such full probat:

2. But if the sentence of probat distinctly shews that the will was not duly executed to pass real estate, quere whether the sentence of probat, though general, ought not, in such case, to be understood in the restricted sense of declaring the instrument a good will of personality only?

Street's heirs v. Street, 496

#### PROCESS.

1. When summons to answer action will be presumed the proper process; and what service is insufficient. See Summons, and

Wynn v. Wyatt's adm'r, 584

2. What is not an appearance to the action dispensing with further process. See Appearances, and S. C., 565

#### PROTESTANT EPISCOPAL CHURCH.

What sale of glebe land by overseers of poor is valid. See Glebe lands, and

Selden and others v. Overseers of poor, 127

#### RAIL ROAD COMPANY.

See Canal and rail road companies No. 2, 3, 4, Franchise No. 1, 2, and

Tuckahoe canal co. v. Tuckahoe rail road co., 42

#### RECITAL.

What recital in trust deed does not create a specialty debt. See Specialty No. 2, and

Powell's ex'ors v. White and others, 309

REDEMPTION.

Time allowed for redemption by decree of foreclosure. See Mortgages and trust No. 9, 10, and Harkins v. Forsyth and others, 294

REHEARING.

After this court had reversed a judgment and remanded case to court below for further proceedings there, and certificate of that judgment had been sent by the clerk to the court below, a rehearing was, on motion of defendant in error, directed here: whereupon this court revoked the certificate of its former judgment, and directed court below to surcease proceedings till further order: and plaintiff in error being now a nonresident, ordered, that service of this order on the counsel who appeared for him on the former argument, should be sufficient service. Wynn v. Wyatt's adm'r, 584

RELEASE.

1. Of excess in recovery. See Sheriffs No. 3, and Gibson v. Stewart's adm'r, 600  
2. What release will not make distributee a competent witness for administrator. See Witness No. 2, and Reynolds's adm'r v. Stephenson's adm'r, 369  
3. What release will make distributee a competent witness for administrator. See Witness No. 3, and Parrish v. Parrish, 626  
4. Competency of one of two sureties as witness for creditor who has covenanted not to sue him. See Witness No. 4, and Waggener v. Dyer, 384

REMAINDER.

1. What gift in remainder is void. See Gift No. 5, and Anderson v. Thompson, 439  
London v. Turner, 412  
753 \*2. When statute of limitations begins to run against plaintiffs in detinue claiming by way of remainder. See Detinue No. 2, and Duncar & wife & others v. Wright, 543

REPLICATION.

What is insufficient. See Covenant No. 2, and Fairfax's adm'r v. Lewis, 233

RETAINER.

1. By surety administrator of principal. See Estoppel No. 2. Principal and surety No. 3, and Dupuy and others v. Southgates, 92  
Powell's ex'ors v. White and others, 309  
2. The opinion of Parker, J., in the court below, that after the death of an administrator, a debt due to him from the decedent should be paid out of assets collected by the administrator de bonis non, in preference to claims of other creditors of equal dignity, examined by Tucker, P., and disapproved. Powell's ex'ors v. White and others, 309

REVERSAL.

1. Practice on reversing judgment for error of excess in recovery. See Sheriffs No. 3, and Gibson v. Stewart's adm'r, 600  
2. Judgment for defendant reversed as to one count and affirmed as to another. See Appellate jurisdiction No. 8, and Dunn v. Price, 203  
3. Judgment reversing order of circuit court which quashed inquisition on application for leave to build mill. See Mills, and Smith v. Waddill, 583

RULES IN CLERK'S OFFICE.

Construction of the statute 1 Rev. Code, ch. 128, § 69, which provides that the rules in the clerk's office "shall be holden on the first monday in every month, and may be continued from day to day, not exceeding six days." Botts v. Pollard, 433

SALE.

1. What sale is conditional, and how affirmation thereof may be proved. See Free negroes No. 2, and Commonwealth v. Nix, 636  
2. What sale of land by executors of trustee will not be set aside. See Mortgages and trusts No. 11, and Hughes v. Caldwell, 343  
3. What sale of land belonging to surety of federal officer, under warrant of distress, is invalid. See United States officers, and Grove & c. v. Little & c., 180  
4. Sale of land descended, to satisfy ancestor's debt. See Heirs No. 4, and Haffey's heirs v. Birchett's & c., 83

SATISFACTION.

See Covenant No. 2, 3, and Fairfax's adm'r v. Lewis, 233  
Wilson v. Spencer, 261

SCIRE FACIAS.

Limitations of scire facias against administrator on judgment against decedent, and duty of administrator to plead the statute. See Executors and administrators No. 3, 4, and Tunstall & al. v. Pollard's adm'r, 2

SETTLEMENT.

See Fraudulent alienations. Gift. Husband and wife.

SHERIFFS.

I. Measure of liability for false return of nulla bona.  
1. In debt upon a sheriff's official bond to recover damages sustained by the relator by reason of a false return of nulla bona on a f. fa. sued out by the relator, the measure of recovery is the amount which was due on the execution at the return day; which ought to be found in damages, and no continuing interest ought to be allowed on such damages. Gibson v. Stewart's adm'r, 600

II. Effect of excess in recovery.

2. And where the relator in his declaration shews and claims the precise amount he is entitled to recover by reason of the wrong complained of, a verdict and judgment for more than the claim in the declaration warrants, are erroneous; and the error is not cured by the verdict, under the statute of jeofails. S. C., 600  
3. But the court reversing the judgment 754 \*for such error, will not direct a new trial, if the relator will release the excess of damages recovered beyond the just amount, but upon such release of the excess, will direct judgment to be entered for the just amount of damages. S. C., 600

SLAVES.

1. What gift of slaves to a feme covert makes them liable to creditors of husband. See Fraudulent alienations No. 5, and London v. Turner, 403  
2. A guardian shall not be allowed, for his disbursements for the maintenance and education of the ward, more than the profits of the ward's estate: and those profits shall be taken exclusive of the increase of slaves belonging to the ward. Anderson v. Thompson, 439  
3. Indictment for wilfully injuring the slave of another. See Trespass, and Commonwealth v. Howard, 631  
4. See Emancipation. Freedom No. 2, and Anderson's ex'ors v. Anderson, 616

SPECIALTY.

1. What does not bind heirs of obligor. See Heirs No. 1, and Huston's adm'r v. Cantrill and others, 136  
2. A mere recital in a deed of trust, that the cestuqs que trust are liable as indorsers for the maker of the deed, and that he is willing and desirous to indemnify and secure them from all loss and damage in consequence of their becoming indorsers, by conveying property for the purpose, will not entitle the indorsers, after the death of the maker, to rank as specialty creditors in the administration of his personal assets. Accord. Jackson v. Sackett, 7 Wend. 94.  
Powell's ex'ors v. White and others, 309

SPECIAL VERDICT.

Court cannot infer other facts from those found. See Fraudulent alienations No. 8, and Charlton and others v. Gardner, 281

SPECIFIC EXECUTION.

1. Of contract for sale of land and chattels for a sum in gross. See Vendor and vendee No. 5, and Clarke & another v. Curtis, 550  
2. That a vendee of insured premises, sued for specific execution, may set up a parol agreement of vendor to assign the policy of insurance, see Insurance, and Wheeling insurance co. v. Morrison, 354

STATUTES—Constitutionality of.

See Franchise No. 1, 2. Glebe lands, Patent No. 1 and Tuckahoe canal co. v. Tuckahoe rail road co., 42  
Selden and others v. Overseers of poor, 127  
Taylor & c. v. Burdett & c., 334

STATUTES OF VIRGINIA, OF A GENERAL NATURE, CITED AND CONSTRUED.

I. Republication of laws.	
1. Ch. 1. § 9, p. 16 of 1 R. C. repealing acts of a general nature not republished in the code of 1819, cited.	
Tunstall & al. v. Pollard's adm'r.	14
II. Glebe lands.	
2. Ch. 32 b. p. 79 of 1 R. C. concerning the glebe lands within the commonwealth, cited.	
Selden &c. Overseers of poor,	127
III. Common law and general statutes of England.	
3. Ch. 38, p. 136 of 1 R. C. (ordinance of convention of 1776) declaring that the common law of England, and general statutes made in aid thereof prior to the fourth year of James I. shall be the rule of decision in Virginia, cited.	
Richards v. Commonwealth.	692
IV. Jurisdiction of general court.	
4. Ch. 67, § 6, p. 221 of 1 R. C. defining the jurisdiction of the general court, cited.	
Commonwealth v. Semmes.	668
5. Ch. 60, § 14, p. 232 of 1 R. C. allowing questions in criminal cases to be adjourned by circuit courts to general court, construed.	
Commonwealth v. Nix,	636
cited in note.	S. C., 638
V. Juries.	
6. Ch. 75, § 12, p. 266 of 1 R. C. providing that no exceptions against a juror shall be allowed after he is sworn, construed.	
Tooe v. Commonwealth,	714
cited.	S. C., 716
755 67. Same chapter, § 13, p. 266, (Rev. Code of 1792, Pleasants's ed. of 1803, ch. 73 § 13,) providing that juries de medietate linguæ may be directed by the courts respectively, construed.	
Richards v. Commonwealth,	690
Brown v. Commonwealth,	711
8. Statute of 1788, ch. 67, 12 Hen. stat. at large p. 746, providing that juries de medietate linguæ might be directed by the district courts, cited.	
Richards v. Commonwealth,	690
VI. Sheriffs and coroners.	
9. Ch. 78, § 12, 13, p. 378, 9 of 1 R. C. prescribing the form of sheriff's official bond, and giving actions thereon, cited.	
Gibson v. Stewart's adm'r,	600
10. Ch. 81, § 33, p. 293 of 1 R. C. providing that the coroner shall execute writs in case of a just exception to the sheriff, cited in note.	
Wynn v. Wyatt's adm'r,	585
VII. Statute of frauds.	
11. Ch. 101, § 2, p. 373 of 1 R. C. declaring in what cases the absolute property of goods and chattels shall be taken to be with the possession, cited.	
London v. Turner,	403, 411
VIII. Relief against usury.	
12. Ch. 102, § 3, p. 374 of 1 R. C. giving relief in equity to borrower at usurious interest against lender, construed—and quere as to farther construction?	
Campbells v. Patterson,	113
IX. Pretensed titles.	
13. Ch. 103, p. 375 of 1 R. C. against conveying or taking pretended titles, construed.	
Waggener v. Dyer,	384
X. Ex'ors and adm'rs.	
14. Ch. 104, § 36, p. 384 of 1 R. C. providing that the mispleading or false pleading of ex'ors and adm'rs shall not render them or their sureties chargeable beyond the assets, cited.	
Powell's ex'ors v. White & others,	333
15. Same chapter, § 60, p. 389, giving preference, in the administration of estates of deceased executors, to debts due from them to their testators' estates, construed.	
Tunstall & al. v. Pollard's adm'r,	2
cited.	S. C., 12
16. Statute of 1706, ch. 33, § 13, 3 Hen. stat. at large p. 375, to same effect, construed.	
cited.	S. C., 13
17. Statute of 1748, ch. 4, § 13, 5 Hen. stat. at large p. 453, to same effect, construed.	
cited.	S. C., 12
18. Statute of 1785, ch. 61, § 50, 12 Hen. stat. at large p. 152, to same effect, construed.	
cited.	S. C., 2
19. Statute of 1792 (1 Rev. Code of 1792, ch. 90, § 53,) to same effect, construed.	
cited.	S. C., 13
XI. Guardians and wards.	
20. Ch. 108, § 1, 2, 3, p. 406, 6 of 1 R. C. concerning appointment of testamentary guardians, and their acceptance or refusal of the office, construed.	
Kevan v. Waller,	414
cited.	S. C., 416, 17

21. Same chapter, § 9, p. 407, concerning the payment of balances due the guardian, and the disposition of balances due the ward, cited.	S. C., 425
22. Same chapter, § 25, p. 410, providing that orphans shall in certain cases be bound as apprentices, cited.	
Anderson v. Thompson,	458
23. Same chapter, § 26, p. 410, prescribing in what case the principal of an orphan's estate may be taken for his support, cited.	
Kevan v. Waller,	425
XII. Gifts of slaves.	
24. Ch. 111, § 51, p. 432 of 1 R. C. concerning gifts of slaves, cited.	
London v. Turner,	410
XII. Replevin bonds for rent.	
25. Ch. 113, § 2, p. 447 of 1 R. C. giving motion on replevin bonds taken under distress for rent, cited.	
Grove &c. v. Little &c.,	192
XIV. Sureties.	
26. Ch. 116, § 6, p. 461 of 1 R. C. giving to sureties in certain cases, the right to require creditor to commence action, cited.	
Baber v. Cook & others,	607
XV. Branch banks.	
27. Acts of 1831-2, ch. 75, p. 68, Suppl. to R. C. ch. 311, p. 381, concerning suits growing out of transactions with branch banks, construed.	
Tompkins v. Branch bank,	372
cited.	S. C., 376
XVI. Assignments, and bills of exchange.	
756 28. Ch. 125, § 6, p. 484 of 1 R. C. giving action to assignee against any previous assignor, cited.	
Dunn v. Price,	208, 9
29. Statute of 1792 (1 Rev. Code of 1792, ch. 77, Pleasants's ed. p. 113,) concerning bills of exchange, cited.	
Tunstall & al. v. Pollard's adm'r,	17
30. Statute of 1748, ch. 33, 5 Hen. stat. at large p. 85, concerning bills of exchange, cited.	S. C., 17
XVII. Limitation of actions.	
31. Ch. 128, § 4, p. 488 of 1 R. C. limiting action of detinue, construed.	
Duncan & wife & others v. Wright,	542
32. Same chapter, § 17, p. 492, limiting debt or scire facias against personal representative on judgment against decedent, construed.	
Tunstall & al. v. Pollard's adm'r,	2
cited.	S. C., 14
XVIII. Process and proceedings in civil actions.	
33. Ch. 128, § 61, p. 504, 5 of 1 R. C. giving attachment against estate of defendant, to force an appearance, construed.	
Wynn v. Wyatt's adm'r,	584
34. Same chapter, § 68, p. 506, prescribing in what cases a summons shall issue instead of a capias ad respondendum, and the mode of serving the same, construed—and quere as to farther construction?	
cited in note.	S. C., 584
35. Same chapter, § 69, p. 506, providing that rules shall be holden in the clerk's office on the first monday in every month, construed.	S. C., 585
Botts v. Pollard,	433
cited in note.	
Wynn v. Wyatt's adm'r,	585
36. Same chapter, § 74, p. 507, providing that rules to declare, plead &c. shall be given from month to month, cited.	
Botts v. Pollard,	437
37. Acts of 1830-31, ch. 11, § 68, p. 65, Suppl. to R. C. ch. 109, p. 161, allowing interrogatories to be filed in action at law, construed.	
Vaughn & co. v. Garland,	251
38. Ch. 128, § 80, p. 506 of 1 R. C. concerning allowance of interest in actions founded on contracts, cited.	
Gibson v. Stewart's adm'r,	603
39. Same chapter, § 86, p. 510, requiring account to be filed with declaration in indebitatus assumpsit, construed.	
Fitch v. Leitch,	471
40. Acts of 1830, ch. 65, p. 42, regulating the proceedings against joint defendants, cited.	
Baber v. Cook & others,	611
XIX. Jeofails.	
41. Ch. 128, § 103, p. 511, 13 of 1 R. C. declaring what defects shall be cured by verdict, construed.	
Gibson v. Stewart's adm'r,	600
42. Same section, p. 512, declaring what defects shall be cured in case of judgment by nil dicit, cited.	
Wynn v. Wyatt's adm'r,	590
XX. Insolvents.	
43. Ch. 134, § 31, p. 536 of 1 R. C. for the relief of insolvent debtors taken or charged in execution, cited.	
McClintic v. Lockridge,	254



44. Same chapter, § 31, 2, 3, 4, 5, concerning insolvent debtors, cited.

Tunstall & al. v. Pollard's adm'r, 41

45. 1 Rev. Code of 1792, ch. 151, § 29, 40, 41, 42, p. 303 of Pleasants's edl. concerning insolvent debtors, cited. S. C., 41

### XXI. Escapes.

46. Ch. 136, § 1, p. 548 of 1 R. C. giving warrant to retake persons charged in custody, in execution or upon mesne process, who escape from prison, construed.

M'Clintic v. Lockridge, 253  
cited in note. S. C., 254

47. Statute of 1748, ch. 10, § 12, 5 Hen. stat. at large p. 520, on same subject, cited. S. C., 254, 5

48. Same chapter, § 11, p. 519, declaring for what escapes the sheriff shall be liable, cited. S. C., 254, 5

### XXII. Crimes, prosecutions and punishments.

49. Ch. 111, § 28, p. 427 of 1 R. C. prescribing the punishment for selling a free person for a slave, construed.

Commonwealth v. Nix, 636

50. Same chapter, § 30, p. 428, making it felony to carry away a slave without owner's consent and with intention to defraud him of the slave, and prescribing the punishment of such offence, cited.

Toole v. Commonwealth, 714

51. Same chapter, § 31, p. 442, subjecting owners of slaves to a fine for permitting them to go at large and hire themselves out, cited.

Abrahams v. Commonwealth, 675

52. Acts of 1822-3, ch. 34, Suppl. to R. C. ch. 226, p. 280, declaring certain "wilful trespasses to be misdemeanours, construed.

Commonwealth v. Howard, 631

53. Act of February 1820, Suppl. to R. C. ch. 223, § 2, p. 278, providing that bank officers guilty of embezzlement, their aiders, abettors and counsellors, shall be adjudged felons, and punished by imprisonment in the penitentiary, cited.

Green v. Commonwealth, 678

54. Ch. 148, § 1, p. 571 of 1 R. C. prescribing the punishment of perjury, cited.

Richards v. Commonwealth, 691

55. Ch. 154, § 4, p. 579 of 1 R. C. prescribing punishment of free persons for forging and uttering, cited.

Mowbray v. Commonwealth, 645

56. Act of March 1826, Suppl. to R. C. ch. 237, § 1, p. 299, on same subject, cited. S. C., 645

57. Ch. 165, p. 595 of 1 R. C. concerning prison breakers, cited.

M'Clintic v. Lockridge, 254, 260

58. Ch. 167, § 1, p. 595-6 of 1 R. C. concerning the jurisdiction of the general court to admit to bail in criminal cases, construed.

Commonwealth v. Semmes, 666

59. Ch. 169, § 8, p. 601 of 1 R. C. requiring that persons charged with treason or felony shall be examined by county or corporation court before trial in circuit court, construed.

Mowbray v. Commonwealth, 643

60. Same chapter, § 9, p. 601, directing the clerk of examining court to issue venire facias where prisoner has been sent on for trial, cited.

Brown v. Commonwealth, 711

61. Ch. 171, § 12, p. 619 of 1 R. C. directing that term of imprisonment in penitentiary shall be ascertained by jury which convicts, cited.

Mowbray v. Commonwealth, 645

### XXIII. Delinquent lands.

62. Ch. 183, § 87, p. 38 of 2 R. C. allowing owner of lands delinquent for the nonpayment of taxes to pay the taxes and damages into the treasury, cited.

Taylor & c. v. Burdett & c., 539

63. Acts of 1830-31, ch. 28, § 17, Suppl. to R. C. ch. 287, p. 352, prescribing the conditions upon which grants of the commonwealth may be given in evidence in suits to recover lands west of the Alleghany, construed. S. C., 534

64. Acts of 1831-2, ch. 72, § 2, Suppl. to R. C. ch. 290, p. 357, relinquishing, in certain cases, the taxes and damages chargeable on lands west of the Alleghany, cited. S. C., 539

### XXIV. Turnpike and rail road companies.

65. Ch. 234, § 17, p. 218 of 2 R. C. prescribing when turnpike companies may begin to demand tolls, cited.

Tuckahoe canal co. v. Tuckahoe rail road co., 47

66. Same chapter, § 29, p. 223, for regulating the profits of turnpike companies, cited. S. C., 48

67. Acts of 1836-7, ch. 118, § 9, 10, 11, 12, p. 104, 5, 6, authorizing rail road companies to enter upon lands and acquire the same by contract or condemnation, construed. S. C., 43

cited. S. C., 50, 51

68. Same chapter, § 13, p. 107, concerning injunctions to stay proceedings of rail road company, construed. S. C., 42

cited. S. C., 51

69. Same chapter, § 16, p. 108, authorizing rail road company to cross or change any established road or way, cited. S. C., 51

### XXV. Mills.

70. Ch. 235, § 1, 2, 3, 4, 5, p. 225, 6, 7 of 2 R. C. prescribing the proceedings on application for leave to build a mill, cited.

Smith v. Waddill, 534, 5

71. Same chapter, § 2, 5, concerning the inquest of the jury on such application, construed. S. C., 532

72. Act of 1785, ch. 82, § 1, 12 Hen. stat. at large p. 188, concerning the inquest on application for leave to build a water grist mill, cited. S. C., 536

73. Act of 1748, ch. 26, 6 Hen. stat. at large p. 55, concerning water mills, cited. S. C., 536

74. Act of 1705, ch. 41, 3 Hen. stat. at large p. 401, for encouragement of building water mills, cited. S. C., 536

### XXVI. Ferries.

75. Ch. 237, § 21, p. 260 of 2 R. C. prescribing penalty for invading a right of ferry—quare as to construction?

Trent and others v. Cartersville bridge co., 521  
cited. S. C., 528

76. Same chapter, § 23, 24, p. 260, concerning the discontinuance of ferries by nonuser, construed. S. C., 521

cited. S. C., 524

758 \*STATUTORY PRIVILEGE.

See Franchise, Canal and rail road companies, Ferries and bridges, and

Tuckahoe canal co. v. Tuckahoe rail road co., 42

Trent and others v. Cartersville bridge co., 521

### SUBROGATION.

1. Of surety to creditor's remedy against heirs of principal on his warranty. See Heirs No. 2, and

Haffney's heirs v. Birchetts & c., 83

2. Of surety to creditor's rank in administration of principal's estate. See Estoppel No. 2. Principal and surety No. 3, and

Dupuy and others v. Southgates, 92

Powell's ex'ors v. White and others, 309

### SUMMONS.

I. When presumed proper process to commence action.

1. Plaintiff having sued out a summons against defendant to answer her action, and judgment being entered by default: it does not expressly appear of record, that defendant was a person against whom the summons was the proper process under the statute 1 Rev. Code, ch. 128, § 68, but defendant appeared in term to have proceedings at rules corrected, and did not object to the summons as improper process: HELD, the court will presume it was the proper process.

Wynn v. Wyatt's adm'r, 584

2. Quere, whether, if defendant had never appeared for any purpose, the summons could be presumed proper process? S. C., 584

### II. What service is insufficient.

3. Upon a summons sued out against defendant to answer plaintiff's action, the officer returns "not found, and copy left &c." without shewing when the copy was left: HELD, upon that return it did not appear that the summons was duly served; and that plaintiff should then have sued out alias summons, and not an attachment against defendant's goods to compel appearance, upon the construction of the statute, Ibid. § 61, 68. S. C., 584

### SURETY.

See Principal and surety.

### SURPRISE.

Relief against judgment obtained by surprise.

A. & B. execute their joint bond for 200 dollars to C. & D. who endorse that the whole amount is to be paid to C. and to him it is accordingly paid by A. who takes his receipt therefor, but does not get in the bond. A. individually executes another bond to C. for 163 dollars. A writ of capias ad respondendum in debt on bond for 200 dollars, being sued out in the names of C. & D. against A. (without mentioning his co-obligor B. who is then dead) is served upon A. who suffers judgment in the action to pass against him by default. Afterwards a suit in equity, for relief against the judgment, is brought by A. against C. and a third person, M. to whom the bond for 200 dollars had been transferred, and for whose benefit the action had been prosecuted: in which suit A. shews that his payment of that bond to C. was made without notice of its transfer to M.; alleges that C.



at the time of such payment, promised to deliver up or destroy the bond; and, for failing to make defence at law, assigns the excuse, that he was led by the circumstances of the case to believe, and did believe until after the judgment, that the action was founded on the bond for 163 dollars, which was justly due. On appeal by M. from decree perpetuating injunction to the judgment, **Held**, (dissentiente Brooke, J., the case made by the appellee entitles him to relief in equity; but M. will be entitled to receive the amount of the bond for 163 dollars, and the injunction must be dissolved as to that amount and the costs of the action at law (but without damages) unless the appellee shall establish that the said bond has been paid by him to C. before notice of M.'s interest in the transaction, or assigned by C. to some third person having title superior to that of M.

Mason v. Nelson,

227

**TAXES.**

When payment of taxes must be proved in suit to recover land. See Patent, and Taylor & v. Burdett &c.,

334

750 **\*TRESPASS**

Indictment lies upon the statute of 1822-3, ch. 34, against a free person for wilfully and without lawful authority injuring, by assaulting and beating, the slave of another.

Commonwealth v. Howard,

681

**TRUSTS AND TRUSTEES.**

1. Construction of bequest to trustee for separate use of testator's daughter for life. See Will No. 2, and

Ware and wife v. M'Candlish,

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2. What declaration of trust of personality is invalid as to creditors and purchasers of party in possession. See Fraudulent alienations No. 3, 4, 5, and

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3. What purchase by agent from principal will be deemed fraudulent. See Principal and agent No. 2, and

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4. See Mortgages and trusts.

**TUCKAHOE CANAL AND RAIL ROAD.**

See Canal and rail road companies. Franchise and

Tuckahoe canal co. v. Tuckahoe rail road co.,

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**UNITED STATES OFFICERS.**

Distress and sale of land belonging to surety of such officer.

1. Under the act of congress approved May 15, 1820, allowing a warrant of distress against a delinquent officer and his sureties, the lands of a surety are only to be sold in the event of there not being goods and chattels of such officer or his sureties sufficient to satisfy the warrant; and they must be advertised for at least three weeks prior to the time of sale, in not less than three public places in the county or district where the lands are situate.

180

Grove &c. v. Little &c.,

2. If the marshal, instead of levying and collecting the sum due by distress and sale of goods and chattels (when there are such) belonging to a surety, shall proceed to sell the lands of a cosurety; or if the lands of a surety be sold without being duly advertised, the conveyance of the marshal will not give a valid title to the purchaser, and a bill will not lie for such a purchaser to set aside a prior conveyance by the surety whose lands were sold, upon the ground of its being fraudulent as to creditors.

S. C., 180

**USURY.**

I. When borrower must pay principal and legal interest.

1. The obligor in a bond secured by a deed of trust, files a bill in equity against the obligee and the trustee, alleging that the bond was given for money borrowed at usurious interest, and that such interest (some of it compounded) was included therein; calling for a discovery of the amount of money advanced, and the rate of interest reserved; and praying an injunction to stay all proceedings on the trust deed, and the collection of the debt, until the matter can be fully heard in equity; that all compound, illegal and usurious interest may be expunged; that the plaintiff may have such farther relief as his case may require and justice dictate; and that all persons be released from all penalties of the statute against usury: **Held**, the bill is not within the third section of the statute against usury, 1 Rev. Code, ch. 102, and the plaintiff is only entitled to relief upon the terms of paying the principal money borrowed, with legal interest thereon.

Campbells v. Patterson,

113

2. Quære, whether the third section of the statute against usury, 1 Rev. Code, ch. 102, applied to the case of a bill not filed against the lender himself in his lifetime, but against his personal representative after his death? And per Tucker, P., it seems that it does not.

S. C., 113

II. When usurious bond is evidence of amount loaned.

3. A bond is given to close a series of transactions between the obligee and obligor, consisting of loans on the one side and payments from time to time on the other, and when the bond is executed, all the written evidences of the previous transactions are surrendered to the obligor; after the death of the obligee, the obligor files a bill in equity against his administrator, alleging usury in the bond, and setting forth the rate of interest reserved, but not the amount of moneys advanced, of 700 \*which a discovery is called for from the administrator, who answers that he has no information enabling him to make such discovery; this court is of opinion that the transactions were in fact usurious, and that the bond, though containing no usurious interest in it, yet having been given for money loaned on usury, is within the statute and void as a security for money: **Held** nevertheless, under the circumstances of this case, the bond should be received as evidence of the amount advanced.

S. C., 113

**VARIANCE.**

Between indictment and record of examining court. See Forging and uttering, and Mowbray v. Commonwealth,

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**VENDOR AND VENDEE.**

I. Construction of contract.

1. What is a discharge of covenant to procure a proper conveyance of land. See Covenant No. 2, and

Fairfax's adm'r v. Lewis,

233

2. What is no discharge of bond to convey land. See Covenant No. 3, and

Wilson v. Spencer,

261

3. What is a breach of warranty in mortgage of land. See Heirs No. 2, and

Haffey's heirs v. Birchetts &c.,

83

4. Upon an agreement to sell to three joint purchasers land and certain personal chattels then upon it, for a sum in gross, to be paid when the vendor shall have made a deed of the land and a bill of sale of the personal effects, and that the purchase money shall be paid in equal instalments at future days appointed, vendor, without making such conveyances, delivers possession of both the real and personal subject to the vendees: **Held**, the making the conveyances by vendor is not a condition precedent to his right to demand the purchase money.

Clarke & another v. Curtis,

550

II. Specific execution, and lien of vendor, on sale of land and chattels for a sum in gross.

5. About the time when first instalment falls due, two of the joint purchasers, by agreement of the other and of vendor, are discharged from the contract; and by new agreement between vendor and the third purchaser, he becomes sole purchaser of same subject for same price, with no other variance but that vendor gives further indulgence for the first instalment; and then vendor agrees to make conveyances of the property to the now sole purchaser whenever he shall make such payments as they shall agree upon; two months further indulgence is given for the payment of first instalment; purchaser continues in possession of the real and personal property; but vendor makes no conveyance: **Held**, 1. A bill in equity lies for vendor against vendee for specific execution of the whole contract, in respect as well of the personal as of the real part of the subject sold. 2. As between vendor and vendee, the agreement in respect to the sale of the personal subject was not executed by delivery of possession thereof to vendee, but yet remained executory; and vendor retains a lien on the personal as well as real property, for the purchase money of the whole; dissentiente Stanard, J., as to the lien on the personality. 3. To preserve the security of that lien unimpaired to vendor, the court may properly enjoin the purchaser, and his agent, from committing waste on the land and from selling or removing the personal property. 4. And court may properly decree sale of the whole property, real and personal, for payment of the purchase money, unless purchaser shall pay it within a reasonable time given him by the decree. 5. But it is erroneous to order sale of the personality on motion of plaintiff, before the hearing; and if it be in fact sold under such irregular order, vendor shall give credit for the proceeds, whether collected or not, in part of the purchase money. 6. And it is erroneous to decree payment of purchase money

against the purchaser, or a sale of the land by commissioners, without providing that vendor shall make a proper deed of the land ready to be delivered to purchaser, in case he pays the purchase money, or to purchasers under the decree, if the land be sold under it. 7. In executing the second contract, the first agreement is to be resorted to for ascertaining the date from which the first instalment is to bear interest.

Clarke & another v. Curtis, 560  
761 \*III. Parol agreement to assign policy of insurance.

6. That a vendee of insured premises, sued for specific execution, may set up a parol agreement of vendor to assign the policy, see Insurance, and Wheeling Insurance Co. v. Morrison, 354

IV. Measure of damages for breach of contract.  
7. Though in general for the breach of an executory contract to convey land, the vendee is not entitled to more damages than the purchase money he has actually paid and interest thereon, (Thompson's ex'or v. Guthrie's adm'r, 9 Leigh 101,) yet this rule will not be applied where the fraudulent conduct of the vendor makes it unreasonable to limit the vendee to that measure of damages. If, for example, a vendor who has the title in him at the time of sale, shall, after his contract, disable himself to perform it by conveying the land to another, he will be held liable for the value at the time of the breach; and interest may be allowed on such value from that time.

Wilson v. Spencer, 261  
8. Measure of damages for breach of warranty in mortgage of land. See Heirs No. 2, and Haffey's heirs v. Birchetts &c., 83

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#### WILL.

##### I. Sentence of probat.

1. Effect of sentence admitting will to probat in general terms. See Probat, and Street's heirs v. Street, 498

##### II. Construction and effect of will.

2. Testator bequeaths to a trustee one slave by name, and one-fourth of residuum of his estate, in trust for his daughter M. and at her death in trust for her children, if any then living, if none, then for his surviving daughters, and makes similar bequests for the use of other daughters; and then declares his wish, that the husbands of his daughters shall have no control over the property devised to them; the daughter M. marries during her infancy: HELD, 1. though she is entitled to

762 \*only a life interest in the subject, she is entitled, not merely to enough of the profits for her support, but to the absolute property and enjoyment of the whole profits of the subject accruing during her life, and no part of the profits ought to be converted into capital wherein she should have only a life interest; 2. that the surplus profits beyond her support should be paid to her or her order, if she be of full age; but if she be yet an infant, then the same should be paid to her when she comes of age, and if she die under age, to her representatives.

Ware and wife v. M'Candlish, 595  
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#### III. Answer to bill for setting aside will.

6. The question as to the admissibility and effect of the defendant's answer to a bill filed to set aside a will, as evidence on the trial of the issue devisavit vel non, considered by Cabell and Stanard, J.

Kincheloe v. Kincheloe, 393

#### IV. Dismission of bill for setting aside will.

7. A decree dismissing a bill filed to set aside a will, if correct on the merits as between the plaintiff and defendant, will be affirmed, though some of the heirs of the testator were not, and the plaintiff was not required to make them parties to the suit: dissentiente Tucker, P., who held, that in such case no decree could properly be made, except a decree dismissing the bill for the failure of the plaintiff to make the proper parties, after being ruled to do so.

Kincheloe v. Kincheloe, 393

#### WITNESS.

##### I. Notice for taking deposition.

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II. Competency of distributee as witness for administrator.

2. In an action against an administrator, a distributee being offered as a witness for the defendant and objected to by the plaintiff, a deed is produced from the distributee to the administrator, releasing his interest in the benefit of any judgment which might be rendered in favour of the administrator in that action, so far as such recovery might increase the distributable surplus, and also releasing his interest in the decedent's estate, so far as the distributable surplus might be increased by the failure of the plaintiff to recover. HELD, the objection to the witness was not removed by this release.

Reynold's adm'r v. Stephenson's adm'r, 369

3. In trespass for taking and carrying away a slave, defendant claiming the slave as part of his father's estate, of which he is administrator, to prove that title, offers his brother as a witness; and to obviate objection to his competency, on the ground that he was interested as a distributee, shews a deed of the witness, whereby he conveyed to defendant for valuable consideration, all his the witness's right, title and interest in the father's estate, and warranted the same free from the claims of all persons: HELD, that as the witness had parted with all his interest in his father's estate whatever that was, and had not warranted that the particular slave in question was part of that estate, he had no interest in the controversy, and was competent.

Parrish v. Parrish, 626

III. Competency of surety as witness for creditor.

4. One of two sureties in a joint and several obligation for the payment of money, having received from the creditor a covenant that he shall never be sued thereon, is a competent witness for such creditor, in a suit brought by him as mortgagee of the debtor's land, to set aside a sale and conveyance of the land to third persons, under a prior deed of trust executed by the debtor.

Waggener v. Dyer, 384

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Abrahams v. Commonwealth, 675

3. Nor has the general court jurisdiction to award a writ of error to a judgment of an inferior court.

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# REPORTS OF CASES

ARGUED AND DETERMINED  
IN THE

COURT OF APPEALS,

OF

VIRGINIA.

---

By BENJAMIN WATKINS LEIGH.

VOLUME XII.

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Entered according to the act of congress, this twenty-sixth day of November  
eighteen hundred and forty-four, for the commonwealth of Virginia, in  
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**JUDGES**  
**OF THE**  
**COURT OF APPEALS**

**DURING THE TIME OF THESE REPORTS.**

---

**HENRY SAINT GEORGE TUCKER,\* PRESIDENT.**  
**FRANCIS T. BROOKE.**                      **WILLIAM H. CABELL.\***  
**ROBERT STANARD.**                      **JOHN J. ALLEN.**  
**BRISCOE G. BALDWIN.\***

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*Attorney General:* **SIDNEY S. BAXTER.**

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\*In the summer of 1841, Judge TUCKER resigned his seat on the bench of the court of appeals, having accepted the appointment of professor of law in the University of Virginia. On the 18th of January 1842, Judge CABELL was appointed president of the court, in the room of Judge TUCKER. And on the 29th of January 1842, BRISCOE G. BALDWIN was appointed a judge of the court, to supply the vacancy thus created.

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# CASES

ARGUED AND DETERMINED IN THE

## Supreme Court of Appeals of Virginia.

### Moore v. Hilton and Others.

February, 1841, Richmond.

(Absent BROOKS, J.)

#### Interlocutory Decree—Introduction of New Evidence.\*—

Upon the construction of the statute of March 1826, Supp. to Rev. Code, ch. 103, § 9, HELD, that after an interlocutory decree upon a hearing, deciding the questions of fact in issue between the parties, neither party has an absolute right to introduce new evidence touching the questions so decided; the introduction of such evidence depends on the sound discretion of the court and its judgment on the sufficiency of the excuse offered for the failure to have it before the court when the cause was heard and the interlocutory decree pronounced; and such excuse may be offered, either on motion upon notice, or upon a petition, for a rehearing of the cause.

**Same—Same.**—But new evidence may be introduced before a commissioner touching any matter of account directed by the interlocutory decree, or before the court touching any matter of account which the court ought by the decree to have referred to a commissioner.

#### 2 \*Advancement—Direction to Deduct from Shares of Children Advanced—Case at Bar.—

Testator having real and personal estate, by will, after mentioning advancements made to two of his children, directs that the same shall be deducted from their shares of his estate when a division thereof shall be made among all his children, and then directs his land to be sold, and after taking of the principal, a fund for education of younger children, an equal division among all his children; and by codicil, desires that the proceeds of sale of his land shall be equally divided among all his (seven) children; and afterwards, states an account on his books, of an additional advancement made to a daughter before advanced, and subjoins a direction that the whole amount advanced to that child shall be deducted from her share of his estate: HELD, that the whole amount of advancements, as well those mentioned in the will as that made subsequent to the codicil, should be deducted from the shares of the children advanced, of the whole

#### \*Interlocutory Decree—Introduction of New Evidence.

—The principal case is cited in *Bartlett v. Bartlett*, 37 W. Va. 240, 16 S. E. Rep. 452; *Richardson v. Duble*, 33 Gratt. 739.

**Same—Same—Effect of Statutes.**—But statutes, which were adopted, no doubt, as JUDGE STAPLES observes in *Richardson v. Duble*, 33 Gratt. 739, with a view to remove a difficulty and some uncertainty in the practice growing out of the decisions in the principal case, and *Dunbar v. Woodcock*, 10 Leigh 628, now provide, that in a suit in equity a deposition may be read if returned before the hearing of the cause, or though after an interlocutory decree, if it be as to a matter not thereby adjudged, and be returned before a final decree. Va. Code 1887, ch. 164, § 3302; W. Va. Code, ch. 130, § 38.

**Same—Same—Discretion of Court.**—There is no rule of practice or of law which precludes the party

estate real and personal without discrimination. **Same—When Satisfaction of Legacy.**†—An advancement to a child made subsequent to a will, is to be taken as a satisfaction of a legacy to that child, pro toto or pro tanto, according to its amount. **Executors and Administrators—Sale of Realty—Purchase by Executor at His Own Sale.**‡—Testator directs, that his land shall be sold on such credit as his ex'ors shall think best for the interest of his children, to whom he bequeaths the proceeds; ex'or advertises land for sale at auction in 1825, without specifying the terms of sale; offers it for sale, and at the sale requires near one-half of purchase money to be paid in cash, and residue in two equal annual instalments; and purchases at his own sale; HELD, the ex'or's sale and purchase was not a due performance of his trust; and he may, at election of cestuis que trust, be rightly required to keep the land, and pay the purchase money for which he bought it, and as much more as the land would have sold for, if it had been offered for sale on the usual terms of one, two and three years credit.

**Same—Same—Reference to Commissioner.**—But

from taking new evidence after an interlocutory decree, even before a rehearing is obtained. The introduction of such evidence depends on the sound discretion of the court and all the circumstances of the particular case. *Summers v. Darne*, 31 Gratt. 805, citing *Dunbar v. Woodcock*, 10 Leigh 628; *Moore v. Hilton*, 12 Leigh 1. The principal case is cited in *Kendrick v. Whitney*, 28 Gratt. 653.

†**Advancements.**—See monographic note on "Advancements" appended to *Watkins v. Young*, 31 Gratt. 84. The principal case is cited in *Strother v. Mitchell*, 90 Va. 153.

‡**Fiduciaries—Purchase of Trust Property by.**—A purchase of trust property by a fiduciary, while he occupies the fiduciary or confidential relation, is voidable at the pleasure of the cestui que trust, or person occupying his position, though it may have been made at a fair and adequate price, and the purchase may in all respects appear fair and reasonable, and the conduct of the purchaser just and candid. The principal case is cited, in support of this proposition, in *Newcomb v. Brooks*, 16 W. Va. 62; *Lewis v. Broun*, 36 W. Va. 7, 14 S. E. Rep. 446. See the principal case cited in *Harvey v. Steptoe*, 17 Gratt. 303.

**Same—Same—Executors—Case Overruled.**—In *Newcomb v. Brooks*, 16 W. Va. 64, the court said: "CHANCELLOR TAYLOR of the superior court of chancery of the Richmond District in *McKey executor of Fuqua v. Young*, 4 Hen. & M. 430, held that a purchase by an executor of land at a public sale made by himself was not voidable, when the sale was fair and correct. But this decision has been overruled by the Virginia Court of Appeals in *Moore v. Hilton*, 12 Leigh 2-28; and *Bailey v. Robinsons*, 1 Gratt. 4-9." See foot-note to *Bailey v. Robinsons*, 1 Gratt. 4; *Buckles v. Lafferty*, 2 Rob. 202, and monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

the difference between the price the land would have brought on a sale on such credit in 1825, and that which it brought on the terms on which it was then sold and purchased, should rather be referred to a commissioner to be by him ascertained, than to a jury upon an issue directed for the purpose.

John Hilton, by his last will and testament, dated April 1817, after directing that his wife's dower should be "allowed" agreeably to the laws of Virginia, devised and bequeathed as follows—"As I have given to my son William £233. also to my daughter Elizabeth £186. it is my desire, that the above sums shall be deducted from

3 their parts of my estate when a division shall take place among all my children that I may have at my decease. It is my will and desire that my negroes be divided among my children. My land I desire should be sold on such credit as my executors hereafter named shall think best for the interest of my children. It is my express will and desire, that all the children I may have at my decease that are not raised and educated, that my executors shall take of the principal as much as they shall think sufficient to do it, and then divide equally among the whole of them." And by a codicil, dated September 7, 1820, after some provisions immaterial to the present controversy, he added—"It is my wish and desire, that the money arising from the sales of my land be equally divided among my children, William, Elizabeth Dogan, Robert, Anne, Henry, George and Susan, and that Henry, George and Susan's part thereof be put out on interest, and so secured that they shall receive it when they come to lawful age." The testator died not long after the codicil was made; and Reuben Moore, one of the executors named in the will, proved the will and codicil in the county court of Culpeper at December term 1820, and took upon him the execution thereof.

The testator's daughter Elizabeth Dogan was the wife of Henry Dogan. And upon the testator's books there was an account stated of the several articles of property he had advanced to that daughter which made up the sum of £186. mentioned in the will as having been advanced to her; and then there was charged to her, under date October 6, 1820, a further advancement of property to the amount of £150. which was added to the former advancement of £186. making the whole amount advanced £336. And to this account of advancements, the testator subjoined—"The above articles I have given to my daughter Elizabeth; which £336. I wish to be deducted from her part of my estate at my decease, when a division will take place among

4 all my \*children." But this account of advancements and the writing thereto subjoined, was not proved as testamentary paper, along with the will and codicil before mentioned.

There was a division made of the testator's personal estate by commissioners under an order of the county court of Culpeper. The commissioners estimated the whole net amount of the personal estate (including the advancement of £233. to the

testator's son William, and the advancement of £336. to his daughter Elizabeth) at 7305 dollars 77 cents; of which they allow the widow her thirds, and then divided the residue, 4870 dollars 51 cents, among the testator's seven children and legatees, giving each a share of 695 dollars 77 cents. Deducting this sum of 695 dollars 77 cents from 1120 dollars, the amount advanced to Elizabeth Dogan, it appeared she had received an excess above her share of 424 dollars 33 cents, which the commissioners reported to be due from her, "to bear interest" (they added) "until the money from the real estate should become due." And according to this division, the executor (as he alleged) paid all the legatees to whom money was due on account of the personal estate, their full shares.

The testator's land was a parcel of 442 acres in the county of Culpeper; of which 147 acres was laid off and assigned to the widow for her dower, leaving 295 acres. The executor advertised the testator's land for sale, as early as January 1821, on a credit of one, two and three years; but (as he alleged) was then unable to effect a sale.

In 1822, two of the testator's sons, William and Robert, sold and conveyed to J. C. Gibson all their interests in their father's real estate (their reversionary interests in the 147 acres that had been assigned to their mother for her dower, and their present interests in the remaining 295 acres) for the nominal price of 1028

5 dollars, but the greater part of the purchase money was \*paid by a conveyance of Kentucky land, which, as it turned out, was estimated above its value. And in 1823, Gibson sold and conveyed to Moore, the testator's executor, the interests he had purchased of William and Robert Hilton in the 295 acres of land, but not their reversionary interests in the 147 acres of dower land: the price Moore paid him was 840 dollars; and he professed to make the purchase, in order that he might have the power of selling the whole parcel of land, altogether, as being more advantageous to the legatees than a sale thereof in parcels. He paid the purchase money out of the funds of the testator's estate; but he afterwards accounted to the legatees for the funds he had so applied, as part of his testator's personal estate, and so became entitled to, or claimed, his purchase of these interests on his own account.

The 295 acres of land (it seemed) was partly rented out by Moore, and partly cultivated by himself, till 1825. In that year, he published an advertisement, under date August 6, 1825, in these words—"For sale—The lands whereon the late John Hilton resided containing 442 acres within two miles of Culpeper courthouse, subject to the widow's dower, is now for sale. Any person wishing to purchase, may see the land and know the terms by applying to the subscriber, who will treat for the same by private contract; and if not sold before the 26th August, it will on that day be offered for sale on the premises to the highest bidder by Reuben Moore ex'or of John Hilton deceased." "The sale of the above property is postponed till the first

day of September Culpeper court, when it will take place before the courthouse door. (Signed) R. M."

The land was accordingly offered for sale on the first day of the September county court of Culpeper 1825, at the courthouse; and the terms of sale then and there announced, were, that 1386 dollars of the purchase money would be required in cash, and the balance, in instalments, in one, two and three years; and, upon those terms, the land was sold at auction. It was cried out to J. W. Marshall, as the highest bidder, at 6 dollars 75 cents per acre, upon an understanding, however, between Marshall and Moore, that Marshall might take the purchase to himself, at his option, or that Moore would take it off his hands: in fact, Moore, on the same day, agreed to take the purchase, and thenceforth regarded and treated the land as his own.

In November 1828, Henry Hilton and Henry Dogan and Elizabeth his wife exhibited a bill in the superior court of chancery of Fredericksburg, against Moore the executor of the testator John Hilton, James Garnett and Anne his wife, George and Susan Hilton, and Gibson who had purchased the interests of William and Robert Hilton, co-legatees of that testator—setting forth the will of John Hilton, and the direction therein contained, that his land should be sold on such credit as his executors should think best for the interests of his children, and the proceeds divided among them—and charging, that Moore had delayed and neglected, for more than five years after his qualification as executor, to make sale of the land, though he might easily have effected a sale upon advantageous terms, and had in fact rejected offers of prices which he ought to have accepted; prices much exceeding that at which he himself afterwards purchased, and now claim to hold the land; that Moore, disregarding the plain terms of his testator's will, which directed that the land should be sold on credit, and violating the trust and confidence reposed in him, at length advertised the land to be sold for ready money, at a time when real estate could not be sold for cash without great sacrifice, and purchased it himself for 6 dollars 75 cents per acre, much less than the land would have sold for, even at that unpropitious juncture, if offered for sale upon such credit as is usual, and as in the exercise of a sound discretion ought to

have been allowed; that though the land was cried out to Marshall as the highest bidder, he was only the agent of Moore, who had ever since continued to hold and enjoy it as proprietor, and now refused to settle with the plaintiffs upon any other principle but that of an unqualified transfer of their interests to him upon his payment to them of their respective shares of the proceeds of that illegal and fraudulent sale; that the plaintiffs were advised that the sale was invalid, and that they had a right to have a resale made according to the directions of their father's will, and to hold Moore personally responsible for the injury they had sustained by depreciation in the value of the land during

the time it remained unsold, owing to his unwarrantable delay and gross neglect, and for the profits of the property in the same interval. And the bill prayed, that the land should be resold and a proper distribution made of the proceeds, and that Moore should be held accountable for all loss and injury sustained by the parties concerned by reason of his official neglect or misconduct, and general relief.

Moore, in his answer, gave a history of his transactions in regard to the land of his testator, not materially variant, in substance, from the facts above stated, except in this, that he alleged, that instead of his having sold and purchased the whole parcel of 442 acres subject to the incumbrance of the widow's right of dower in 147 acres thereof, he had in fact sold only the 295 acres exclusive of the widow's dower land, and had purchased the 295 acres at 6 dollars 75 cents per acre, and that the plaintiffs nevertheless had insisted that he should account for and pay to them their shares of the proceeds of the whole 442 acres incumbered with the dower right, at the same price per acre. He claimed the interests of the legatees William and Robert Hilton, in the 295 acres, under his purchase from Gibson, who had purchased from them. He said, he had also purchased of

James Garnett and Anne his wife, all her interest in the land; and that he had settled with Garnett as guardian of the legatee Susan Hilton, and paid him all her share of the personal and of the proceeds of the real estate, except a small balance of the latter. And as to Dogan and wife, after advertising to his testator's will, directing that £186. should be deducted from Mrs. Dogan's share of his estate, he set forth the account stated in the testator's books of advancements made to her, shewing an additional advancement of £150. made to her subsequent to the codicil, and the testator's direction subjoined to the account, that the whole £336. should be deducted from her part of his estate; and then he insisted, that as, after giving Dogan and wife full credit for her share of the testator's personal estate, she had received by way of advancement an excess of 424 dollars, this sum ought to be deducted from her share of the proceeds of the real estate.

The defendant Gibson answered, and shewed the conveyance of William and Robert Hilton to him of all their interests in the real estate of their father, as well their present interests in the 295 acres of land as their reversionary interests in the 147 acres assigned to their mother for her dower, and his own sale and conveyance to Moore of the interests he had bought of those two legatees in the 295 acres; and that he was still entitled to their reversionary interests in the dower land.

None of the other defendants appeared; and as to them the bill was regularly taken pro confesso.

Many depositions were taken and filed by the plaintiffs and the defendant Moore, touching two questions of fact. The purpose of the evidence on the part of the plaintiffs, was to prove, 1. that Moore had sold and purchased the whole parcel of 442



acres subject to the incumbrance of the dower right of the widow in 147 acres, at 6 dollars and 75 cents per acre; and 2. that Moore intended, contrived and practised, an actual fraud in the sale of the land,

9 with a view to purchase it himself \*at a price below its real value, and below what, if he had acted in good faith, he might have obtained. And the purpose of Moore's evidence was to prove, that he had sold and purchased only the 295 acres at that price, exclusive of the 147 acres which had been assigned to the widow for her dower; and to vindicate himself from the charge of actual and wilful fraud imputed to him.

No proof was exhibited, of Moore's purchase from Garnett and wife of her interest in the real estate of her father, or of Moore's settlement with the guardian of Susan Hilton, and payment to him of that legatee's share of her father's estate, real as well as personal, as Moore alleged in his answer he had done.

Pending the suit Susan Hilton married Ambrose Jeffries and by consent, Jeffries and wife were made parties.

The cause having been transferred to the circuit superior court of Culpeper, that court, on hearing, at November term 1836, made an interlocutory decree, declaring, that Moore's sale of the land devised by his testator's will to be sold, was of the whole parcel of 442 acres subject to the widow's right of dower in the part thereof which had been assigned to her; and that the sale was irregular and illegal, both because it was made upon terms not authorized by his testator's will, and because Moore himself (the trustee) had become the purchaser at his own sale. And the court having put the plaintiffs to their election, either to have the sale set aside, and the land re-sold upon a proper credit as directed by the will, and to have an account of the profits of the land since the assignment of the widow's dower, or to compel Moore to take the whole 442 acres of land so purchased by him subject to the incumbrance of the widow's dower, and account for the purchase money at the rate of 6 dollars 75 cents per acre for the whole 442 acres, and such further sum, if any, as the same would have sold for on the first day of the

10 September county \*court of Culpeper 1825, if it had been then sold upon credit of one, two and three years, the purchaser giving his bonds for the annual instalments of the purchase money, with personal surety for the first instalment, and the title to be made when the first instalment should be paid, and the other instalments secured by a deed of trust mortgaging the land. And the plaintiffs electing the latter alternative; and it appearing, that no part of the purchase money of the land had been paid to them; and it being alleged, but not proved, by the defendant Moore, that he had purchased of Garnett and wife their interest in the land, and of Garnett as guardian of the legatee Susan Hilton her interest in the greater part of the same, and it not appearing whether any thing had been paid to the legatee George Hilton (who was an absent party) or whether his interest had been purchased by

Moore: therefore, the court decreed, that Moore should pay to the plaintiff Henry Hilton, and to the plaintiffs Henry Dogan and wife, each respectively, the sum of 451 dollars 48 cents with interest on 426 dollars 21 cents part thereof from the 21st September 1828 till paid; such being their shares of the purchase money for which Moore had bought the whole land, according to the principles declared by the court; and the court being of opinion, that the intention of the testator John Hilton, manifested by the codicil to his will, was, that the money arising from the sale of his land, should be equally divided among his seven children without regard to previous advancements. And the court referred it to a commissioner to enquire and report, what purchases if any, and what payments if any, had been made by Moore of or on account of the interests or shares of Garnett and wife, of Jeffries and wife, and of George Hilton, in the land aforesaid, or in the purchase money (at the rate of 6 dollars 75 cents per acre) of the whole parcel of 442 acres subject to the widow's right of dower. And the court ordered an

11 issue to be made \*up and tried at its own bar, to ascertain, whether more, and if so how much more, than 6 dollars 75 cents per acre, would have been obtained on the 21st September 1825, for the whole tract of 442 acres subject to the incumbrance of the widow's right of dower therein, if the same had been then offered for sale, on the terms of credit and for security of the purchase money before indicated in the decree, as the terms on which the land ought properly to have been sold: And that Moore should render an account of the rents and profits of the land from the date of the assignment of the widow's dower to the 21st September 1826 (when, if the sale had been made upon the proper terms of credit, the first instalment of the purchase money would have been due); and directed the commissioner to state and report the shares of the testator's seven devisees of the rents and profits, and how much of the same remained due and unpaid to them. And in order to enable the court to give the defendant Gibson a decree against the defendant Moore for his part of the purchase money of the land, on account of the reversionary interests of William and Robert Hilton in the part that had been assigned to the widow for her dower, which Gibson had purchased of those two legatees and was yet entitled to, the court directed the commissioner to enquire and report what rate per cent. upon the purchase money, would, on the 21st September 1825, have given Gibson the value of his said reserved reversionary interests, and how much of the purchase money should have been paid to him.

In June, 1837, before any thing had been done under the interlocutory decree, Moore presented a "petition for a rehearing" (so called in the record) wherein he complained, 1st, that even upon the evidence before the court at the time the decree was pronounced, the decree was erroneous in fact, in declaring, that Moore had sold and purchased the whole parcel of 442 acres of land subject to the incum-

brance of the widow's dower, at 6 dollars 75 cents per acre; whereas, he insisted, the just inference from the pleadings and the evidence should have been, that he sold and purchased, at that price, the 295 acres exclusive of the 147 acres that had been assigned to the widow for dower: And for the purpose of shewing that this was the just inference, the pleadings and the evidence before the court at the time of the decree, were stated. And then, the attention of the court was asked to new evidence touching the question, which had been taken and filed since the decree; and reasons were stated for the failure to adduce it earlier; but it was not alleged, that this new evidence had been discovered since the decree, nor had Moore obtained any special order of the court authorizing him to take and file it. 2ndly, He complained, that the interlocutory decree was erroneous in point of law, namely, in declaring, that it was the intention of the testator, John Hilton's will, manifested by the codicil, that the proceeds of the sale of his land should be equally divided among his seven children without regard to previous advancements; for that, taking the will and codicil together, the meaning and intent were apparent, that all advancements made to William Hilton and Elizabeth Dogan should be brought into hotchpot in the division of the whole estate, real and personal, among the seven children. And further to shew that this was the true construction, there was exhibited with the petition (what though pleaded in the answer, had not been exhibited before, because it was in possession of the testator's widow,) a copy of the account stated on the testator's books of the advancements to Mrs. Dogan to the amount of £336. and the testator's direction subjoined to the account, that that sum should be deducted "from her part of his estate," when a division should take place among all his children, with evidence (filed since the interlocutory decree) to prove that the original account of the advancements

13 \*to Mrs. Dogan, and the direction subjoined thereto, were on the testator's books, and all in his own handwriting. There was also exhibited a copy of the report of the division of the testator's personal estate (a proceeding to which Dogan and wife were parties) whereby it appeared, that this sum of £336. had been brought into the division, each of the seven children allowed their full share thereof as well as of the other personal estate, and the executor held accountable to them respectively for the same, and Dogan and wife, after being credited with their full portion, found debtors for a balance of 424 dollars 33 cents, "to bear interest until the money from the real estate should become due."

Evidence was exhibited with the petition, that Moore had given his bond to the guardian of Susan Hilton for the balance (it was a small one) due her as legatee of her father; that, pending this suit, he had accounted to and paid Henry Hilton his full share of the personal estate, and that he had settled with and paid George Hilton, his full share of the personal estate,

and purchased all his interest in the land, except his reversionary interest in the dower land.

It appeared that between the date of the interlocutory decree and the time of presenting the "petition for a rehearing," the testator's widow died, so that the reversion of the 147 acres of dower land had now fallen in.

The court refused the rehearing. And, thereupon, Moore applied, by petition to this court, for an appeal from the interlocutory decree, and from the order refusing the rehearing; which was allowed.

The cause was argued here, by Leigh for the appellant, and Patton for the appellees.

I. The questions of fact, whether Moore's sale and purchase were of the whole 442 acres of land subject to the incumbrance of the widow's dower in 147 acres, or only of the 295 acres exclusive of the dower 14 land? and \*whether any wilful or actual fraud was justly imputable to Moore? were debated at the bar, and the evidence touching both points minutely examined. This court concurred with the circuit superior court, that Moore sold and purchased the whole parcel of 442 acres subject to the widow's right of dower. And as to the imputation on Moore of wilful or actual fraud, neither the court below nor this court took any notice of the point.

II. As to the refusal of a rehearing, Leigh said, that, so far as the petition prayed the court to reconsider any question of fact determined by the interlocutory decree upon the evidence which was before the court at the time the decree was pronounced, or any question of law determined by the decree (and the question upon the construction and effect of the testator John Hilton's will and codicil as to the advancements, was a point of law), this was, properly, a petition for a rehearing, and was regular in practice, *Banks v. Anderson*, 2 Hen. & Munf. 20; *Attorney General v. Brooks*, 18 Ves. 319, 325; *Radley v. Shaver*, 1 Johns. Ch. Rep. 200; *Consequa v. Fanning*, 3 Id. 587; *Fanning v. Dunham*, 4 Id. 35, though, he said, a petition for a rehearing was not necessary, in such cases, nor usual in practice; for if a party could shew the court, or the court itself discovered, that it had committed an error in an interlocutory decree, either as to a matter of fact or of law, the court might and surely ought to correct the error, at any time before the final decree. In the English practice, the petition for a hearing was resorted to, when the decree though in its character final had not been enrolled: such petition was not necessary, where the decree was merely interlocutory. In our practice, there was no enrolment; all decrees were entered of record, eo instante they were pronounced. So far as the petition sought to bring new evidence into the cause, which had not been adduced when the interlocutory decree was pronounced, though it bore upon the questions put in issue by the pleadings, the

15 \*petition was, in effect, a bill in the nature of a bill of review, *Mitf. Plead.* 81-3, and so this court would consider it, though put in the form of a peti-

tion for a rehearing, Robert's adm'r v. Cocke ex'or, 1 Rand. 121. Regularly, according to the practice of the English chancery, a review of any decree, upon new evidence, could not be allowed, unless the new evidence had been discovered since the decree was pronounced. But (repeating the argument of the appellant's counsel on a similar point, in Dunbar's ex'or v. Woodcock's ex'ors, 10 Leigh 647, 8) he said, that "in our practice, there was no decree merely interlocutory, which might not be corrected upon new evidence adduced before final hearing, whether the new evidence was discovered before or after the interlocutory decree was pronounced. Formerly, by statutory regulation, after the commission for taking depositions was closed, and the cause set for hearing, new evidence might be introduced, in any stage of it, under a special order of the court, but not without such a special order. 1 Rev. Code, ch. 66, § 103, p. 216. And in the practice of the superior courts of chancery, handed down from the high court of chancery in Chancellor Wythe's time, the special order for taking new evidence was always made upon motion, if the evidence was material, unless it appeared to have been kept back for purposes of delay or chicane. The leave to take new evidence was almost a matter of course, when it was asked; and it was more frequent after than before an interlocutory decree. And it was only necessary to reflect upon the loose and unadvised manner in which depositions in chancery were taken, generally by the parties themselves in the country, to understand why the strictness of the English chancery practice had never prevailed, and how the liberal indulgence of our practice became indispensable to the ends of truth and justice. With knowledge of the existence of this practice, and aware that the opening of the cause for new

16 \*evidence had become matter of course upon motion for the purpose, the legislature, by the statute of March 1826, dispensed with the necessity of the motion and the special leave of court, by providing, that from the filing of the bill until the final hearing in any case, either party may, without any order of court, obtain general commissions and take depositions to be read therein; Supp. to Rev. Code, ch. 103, § 9, p. 132." The special court of appeals in Dunbar's ex'or v. Woodcock's ex'ors, did not determine the question of practice upon the construction and effect of the provision in the statute of March 1826. It remained now to be settled. The circumstance of the new evidence being introduced, in the present case, upon a petition for rehearing, could not render it less proper that the court should consider the new evidence, and correct the interlocutory decree in the particulars wherein that evidence shewed it to be erroneous.

Patton said, that the new evidence introduced with the "petition for a rehearing," ought not to have been admitted and considered by the court. And he repeated, and enforced, the argument of the appellee's counsel upon the point, in Dunbar's ex'or v. Woodcock's ex'ors: "It was the practice of our courts of chan-

cery, formerly, before the statute of March 1826, when the general commission to take depositions had been closed, to open the commission by special order, on motion, at any time before the hearing; but after the hearing, and an interlocutory decree deciding the questions of fact, the court never gave leave to take new depositions on a point decided, unless upon affidavit that the new evidence had been discovered since the decree. This was, perhaps, sometimes done informally, upon motion, and sometimes regularly upon supplemental bill in the nature of a bill of review of the interlocutory decree; but in whichever way it was done, the principle on which the new evidence was received

17 \*was the same, namely, that it had been newly discovered. And it was necessary that this principle should be observed; for otherwise, the litigation of questions of fact, however solemnly decided by the court on a full hearing, would have been perpetually renewed, and there would have been no end of it; and the admission of new evidence under such circumstances, would have been a temptation to carelessness and neglect, if not to subornation of evidence. The statute of March 1826 was designed to dispense with the motion for leave to take depositions and the special order for that purpose, in cases in which the former practice required them, but only in such cases; not to render the interlocutory decision of questions of fact nugatory, or to dispense with the supplemental bill in the nature of a bill of review of interlocutory decrees, or to abrogate the principle on which such bills of review could be allowed. Though the words of the statute were general, that from the filing of the bill until the final hearing in any case, depositions may be taken to be read therein, without any order of court; yet the final hearing there meant was such final hearing as had formerly concluded the questions of fact; and formerly the questions of fact might have been settled by an interlocutory decree as well as final one." In Dunbar's ex'or v. Woodcock's ex'ors, the special court of appeals held, that the interlocutory order there in question, was not a final decree within the meaning of the statute of March 1826, being only an opinion of the court, given in the progress of an account, upon exceptions to a report or instructions to the commissioner. In this case, there can be no doubt, that there was a full and final hearing of all questions of fact and of law, and these questions settled by the interlocutory decree; and this, he submitted, was such a final hearing as the statute of March 1826 had in contemplation.

III. Leigh said, the court below erred in the construction it put on the will 18 and codicil of John Hilton, \*namely, that it was the testator's intention, manifested by the codicil, that the money arising from his land should be equally divided among his seven children, without regard to previous advancements. The testator's general intent and purpose was very clear, to give equal portions to each and all his children: the provision for the education of his younger children, was

hardly an exception, since he had already educated the elder. This general intent could only be accomplished, by requiring those to whom he had made advancements, to bring them into hotchpot in the division of his estate; of his whole estate without discrimination; of the personal estate he left, and of the proceeds of his land, which he directed to be sold out and out, and thus converted into personalty. There was nothing in the words of the codicil, viewed with reference to the will (which was its context) that indicated a particular intent that the proceeds of the land should be equally divided among the seven children without regard to the advancements; and to shew this, he entered into a critical examination of the will and codicil. But, he said, if the words of the codicil, taken alone, might seem to indicate such a particular intent, the court would not sacrifice the plain general, to the very doubtful particular, intent: it would adopt the construction that would best effectuate the general intent. The function of the codicil was simply this: the testator, having by his will indicated the objects of his bounty by description, "his children living at his decease," thought proper, by the codicil, made shortly before his death, to bequeath it to them by name; an alteration very immaterial in its effect. Clearly, then, the £186, mentioned in the will as having been advanced to Mrs. Dogan, was to be brought into hotchpot in the division of the whole estate. The only doubt was as to the £150. advanced to her after the codicil was made. Now, that the testator made that additional advancement of £150. to her, and in-

19 tended \*that that as well as the former advancement of £186. should be brought into hotchpot in the division of his whole estate, appeared by the account stated on his books of his advancements to that daughter, and his direction subjoined thereto, that the whole £336. should be deducted from her part of his estate when a division should be made among all his children. The testator has thus given his own construction of his will and codicil, which surely the court must respect; and he himself had made an estimate of the amount of advancements to Mrs. Dogan which she was to bring into hotchpot. Again, the advancement of the £150. to Mrs. Dogan was a satisfaction of the legacy to her pro tanto. The testator certainly did not make a simple gift of that £150. to Mrs. Dogan: it was given to her with the intent, and upon condition, that it should be brought into hotchpot in the division of his estate, and if it should not be so brought into hotchpot, she would be debtor to the estate to that amount; and even in this view, it ought to be discounted from her share of the proceeds of the land. But, moreover, the whole amount of advancements to Mrs. Dogan [£336.] had been in fact brought into hotchpot, as part of the personal estate, in the division thereof; a proceeding to which Dogan and wife were parties: the executor was made accountable for six sevenths of that £336. to the other six legatees, and accounted to Dogan and wife for the other one seventh, who were found indebted in a balance of 424 dollars

over and above their share, which was left to be deducted, with interest, from her share of the proceeds of the land. And if it should not be so deducted, Dogan and wife would get exactly 424 dollars more than their share, and the executor would have to pay, if he had not already paid, that sum out of his own pocket to the other legatees.

Patton contended, that the codicil expounded the provisions of the will, and if it did not expound, it controlled

20 \*them. The codicil provided, in precise and plain words, "that the money arising from the sale of the testator's land should be equally divided among" his seven children therein named; that is, that it should, in all events, be so divided among them. This was probably his intention when he made his will, and he meant to explain that intention by the codicil; or, if it was not so, then he had changed his purpose, and made his codicil to declare his final intention. As to the account found in the testator's books of his advancements to Mrs. Dogan, and the direction subjoined that the £336. which had been advanced to her should be deducted from her part of his estate in the general division thereof among all his children, and the evidence adduced to prove that the account and the direction were in the testator's handwriting, the court could not, with propriety, take any notice of these facts; because, in the first place, the account and the direction thereto subjoined were, in their nature, a testamentary paper, and yet had never been duly proved as such, and without due probat was nugatory; and because, in the second place, all this was new matter brought into the cause after the interlocutory decree was pronounced, without pretence that it had been subsequently discovered. It was, indeed, pleaded in Moore's answer; and, if he intended to rely upon it, ought to have been exhibited with the answer. It was matter which, though Moore might have exhibited it before the hearing and the interlocutory decree, was only brought before the court with the "petition for a rehearing;" which, in this respect, was a bill in the nature of a bill of review of the decree, upon matter well known to the party, and within his power to adduce proof of, before the hearing: therefore, he could not avail himself of it to impeach the decree. He said, the same remarks were applicable to the report of the division; that must have been well known to the party before the hearing, yet it was suppressed till the interlocutory

21 \*decree was pronounced, and only brought before the court with the "petition for a rehearing." But, averting to the report, he said, that though it thereby appeared, that the £336. advanced to Mrs. Dogan was taken into account by the commissioners as part of the testator John Hilton's personal estate, and equal shares thereof allowed to each of the legatees, it nowise appeared that Moore, the executor, had paid the same to any of them. They might be interested in this question, Moore was not.

Leigh replied, that as to the doubt now suggested, whether Moore had paid the

legatees their shares of the personal estate including their share of the £336. advanced to Mrs. Dogan, the report of the division shewed that he was held accountable to them for the same; Moore alleged in his answer, that he had paid their full shares to all the legatees, except Henry, George, and Susan Hilton; the interlocutory decree took it for granted, that he had paid all the legatees their shares except those three, as to whose interests it directed the proper accounts; the others had not appealed from the decree; Dogan and wife had no right to complain of the decree, on behalf of their co-legatees; and Dogan and wife were the only parties interested to contest the question with the executor, whether the advancement of the £336. to Mrs. Dogan ought to be brought into hotchpot in the division of the proceeds of the land, for they were the only parties who were chargeable with a balance on account of advancements. There was evidence filed with the petition for a rehearing, that Moore had accounted for and paid to the legatees Henry, George and Susan, their full shares; and this evidence might certainly be laid before the commissioner, when he proceeded to state the accounts directed by the decree. He said, that the account of advancements to Mrs. Dogan found on the testator's books with the direction subjoined to it, all

22 in the testator's handwriting, \*was indeed a testamentary paper, and might have been proved as such. Yet it was proper evidence without a regular probat; or if a regular probat was necessary, it might even now be propounded for probat, and the court ought to have given leave and time to the party to make the probat; *Druce v. Denison*, 6 Ves. 385, 397. For the rest, supposing that the commission to take depositions touching questions of fact put in issue by the pleadings, could not be opened without special leave of the court after an interlocutory decree settling the questions of fact, and ought not to be opened unless it appeared that the new evidence had been discovered subsequently to the decree; yet it had never been doubted, in our practice, that exhibits, which ought to have been but had not been filed with the pleadings, and which had not been called for by the other party or by the court, might be filed after an interlocutory decree; especially when, as in this case, though they might vary the final result, they could nowise impede the execution of the decree.

IV. Leigh admitted, that Moore's sale and purchase of the land could not be supported, not only for the reasons stated in the decree, but because, as the advertisement of the sale gave no notice that any part of the purchase money would be required in cash, the requisition, at the time of sale, of 1386 dollars in cash, was calculated to prevent competition. But, he contended, the court erred in the mode and measure of relief. Either the sale should have been set aside, and a resale ordered upon such terms of credit as the court thought most advantageous, and Moore held accountable for the profits since his purchase: or he should have been held to the actual bargain he had made, and the plain-

tiffs allowed the full benefit of it; charging him with the price of the 295 acres of land exclusive of the widow's dower, or of the whole 442 acres subject to the incumbrance of the dower, (according as the one or 23 the other \*was found to have been the real subject sold and bought,) at 6 dollars 75 cents per acre, with interest on the purchase money. And the court might properly enough have given the plaintiffs choice of those alternatives. But, compelling Moore to take the land, it ought not to have gone further, and compelled him to pay not only the price at which he had bought it, but as much more as he ought to have given for it if the sale had been made upon the proper terms. A court of equity might set aside contracts for fraud, or for mistake as to facts; it might avoid a trustee's sale and purchase at his own sale, at the instance of the cestuis que trust, either for any unfairness or irregularity in the transaction, or because it was incompatible with the duty of his trust: but it could not, on the ground of fraud, unfairness, irregularity or breach of trust, make a new bargain for the purchaser, and decree specific execution of such bargain thus made for and forced upon him. And this was exactly what the court had done in this case: it held Moore accountable for the whole purchase money of the land, according to the terms of his actual purchase upon the most onerous construction thereof; and then required him to pay as much more purchase money as a jury should say the subject would have sold for, at the time he made the sale and purchase, if it had been then offered for sale on the terms of credit prescribed by the court. Equity never gave speculative damages, for breach of a contract of sale, or upon a rescission of such a contract for any cause, or for fraud or deceit in a bargain; especially, where the subject of the contract remained in statu quo, to be restored to the parties complaining, or disposed of by the court for their benefit. There were some precedents of issues quantum damnificatus directed by the court of chancery; but they were very rare, and the authority of those precedents had been questioned, even in cases where the court could no otherwise

24 give the party injured the benefit of his bargain or of his property. He cited, and examined, *Threlkeld's adm'r v. Fitzhugh's ex'x*, 2 Leigh 451; *Robertson v. Hogsheads*, 3 Id. 667; *Denton v. Stuart*, 1 Cox 158, 17 Ves. 276, in notes; *Greenway v. Adams*, 12 Ves. 395; *Gwillim v. Stone*, 14 Id. 128; *Todd v. Gee*, 17 Id. 273; *Sloman v. Walter*, 1 Bro. C. C. 418.

Patton maintained, that the decree was right as to the manner and the extent of the relief it gave. The testator directed that his land should be sold, on a credit, and the proceeds divided among his children: the duty of the trustee was to make the sale, on reasonable credit, as soon as he conveniently could; he neglected to sell it for some five or six years, and then committed a plain and gross breach of trust in making the sale. To give the cestuis que trust what the land would bring twelve years after (according to the trustee's own shewing) it ought to have been sold, thus

subjecting them to the risque of a depreciation of the property, and exempting him from it, making them bear the loss that might arise from his delay, neglect and misconduct, instead of holding him liable for it, would have been most unmerited favour to him, and to them most inadequate relief. The trustee had bought the shares of two of his cestuis que trust in 295 acres of the 442 acres of land, to enable him to sell the whole subject, because, as he himself declared, the sale of it in separate parcels, would be disadvantageous to the parties interested; indeed, he claimed to have acquired since the sale, the right of two other parties; and thus he had become entitled to four sevenths of the 295 acres. He would have a right to demand that four sevenths of the land itself should be laid off and allotted to him in severalty; or, if the court ordered the whole land to be sold on the proper terms of credit, no other purchaser could come into fair competition with him to whom so large a share of the proceeds of sale would be due. Therefore, it was impossible to restore to the plaintiffs the same benefit to which they

25 \*would have been entitled if their trustee had timely and fairly performed his trust, by directing a resale of the subject upon the proper and usual terms of credit and giving the plaintiffs their shares of the proceeds, or in any other way than that which the court had adopted in the decree. And there was abundant authority to shew the propriety of the decree. He cited, in the course of his argument, *Hedges v. Everard*, 1 Eq. Ca. Abr. p. 18, pl. 7; *Ive v. Ive*, 1 Atk. 429; *Bostock v. Blakeney*, 2 Bro. C. C. 653; *Fox v. Mackreth*, Id. 400; *Tebbs v. Carpenter*, 1 Madd. Rep. 290; *Ex parte Reynolds*, 5 Ves. 407; *Pocock v. Reddington*, Id. 794; *Ex parte Hughes*, 6 Ves. 617; *Lister v. Lister*, Id. 631; *Dawson v. Massie*, 1 Ball & Beat. 210; *Taylor v. Tabrum*, 6 Sim. 281, 9 Cond. Eng. Ch. Rep. 269; *Hart v. Ten Eyck*, 2 Johns. Ch. Ca. 62, 116; *Davoue v. Fanning*, Id. 252. In one view, indeed, Moore himself would be benefited by the mode of relief adopted by the decree; he was to be charged with the purchase money for which the jury should find that 442 acres of land would have sold, in 1825 subject to the then existing incumbrance of the widow's dower, if it had then been offered for sale upon the proper terms of credit; but the widow being now dead, he held the land relieved from that incumbrance; and if now sold over again, it would be sold clear of the incumbrance.

TUCKER, P. Much discussion having taken place at the bar on the subject of petitions for rehearing, I shall take occasion to state succinctly my views of the practice, and then apply them to the present case.

According to the English practice, a petition for rehearing is an application to the chancellor, before a decree has been signed and enrolled to rehear a cause, not upon new matter or new evidence, but upon the matter in issue and the evidence in the cause at the former hearing. If there

be new matter or new evidence in  
26 \*the power of the party, which would

have been the foundation of a bill of review if the decree had been enrolled, it must be made the subject of a supplemental bill in the nature of a bill of review, and its object cannot be attained by a petition to rehear. Mitf. Plead. 82; *Wiser v. Blackly &c.*, 2 Johns. Ch. Rep. 488. To this supplemental bill, the defendant answers as in other cases, traversing, if he so pleases, the alleged discovery of new matter or new evidence since the former hearing. It were well, I think, that this regular proceeding had been adhered to by our courts, yet I have no doubt they have fallen into the practice of entertaining petitions as substitutes for the supplemental bill; an instance of which is found in *Roberts's adm'r v. Cocke ex'or*, cited at the bar. It is plain, however, that every such petition must partake of the character of the supplemental bill, and be treated according to its analogy. Therefore as a supplemental bill filed for the purpose of bringing forward new matter or new evidence, must shew that it has been newly discovered, and could not, by due diligence, have been brought forward before, *Dale v. Roosevelt*, 6 Johns. Ch. Rep. 255, so also must a petition for rehearing, which is its substitute. As the supplemental bill calls upon the defendant to answer, and as he may accordingly traverse the alleged recent discovery, so in the case of a petition setting forth the discovery of new matter or new evidence, the adversary party may traverse the allegation; and to that end the necessary steps should be taken for calling upon him to answer. Unless this course be adopted, we must discard the proceeding by petition, and adhere to the supplemental bill; but so long as the substance is retained, I should incline to think a proceeding by petition, or even by motion or rule, might be without objection, and even preferable for its simplicity and expedition.

In this case, there was no foundation for a supplemental bill, and none of  
27 course for a petition bringing in \*new evidence. There is no allegation, that the evidence upon either point was newly discovered, or that the defendant could not by due diligence have had advantage of it before. I think, therefore, that the court ought not to have allowed the petition, or reheard the cause, unless our statute of March 1826 has otherwise provided. That statute provides, that "from the filing of the bill to the final hearing of the cause, either party may, without order of court, obtain commissions to take depositions to be read therein." What then is the meaning of the statute as to the final hearing? Are we to understand it in its strictest acceptation, or in a more limited sense? If the former, then although a decree shall have been pronounced upon the merits, after a full hearing of the cause, yet if accounts or any other supplementary proceedings are directed, which (as frequently happens) may occupy years, the decree, and all that has been founded upon it, may be set aside upon the production of a deposition subsequently taken, and a new hearing upon the merits and on the new testimony must be the consequence. Such

a construction would be pregnant with mischief. I think, therefore, that we should give to the statute a more limited construction, and confine it to what was obviously the design of the legislature. It was merely intended to remove the inconvenience of special applications for commissions after a cause is set for hearing; and it clearly was not intended to give to any party liberty to take testimony without a commission in any case, which even the allowance of a commission before could not make regular. If before this statute, it would have been error in a court after a full hearing upon the merits, to have awarded a commission to take evidence which was before known to the party and in his power, I should hold it to be clear, that the legislature did not design to legitimate such evidence without a commission. Therefore I am of opinion, that

it is not competent to a party, after  
28 a \*hearing of the cause and a decree settling the merits of the controversy, to take new testimony to matter that was fairly in issue and decided upon; but if the party has new matter to put in issue, or newly discovered evidence to the matter formerly in issue, he must resort to his supplemental bill of review, or to a petition for a rehearing in the nature of it, which must be governed by the principles which prevailed in relation to them before the statute in question.

Excluding the depositions taken after the hearing, we must consider the appellant as having purchased, according to his advertisement, the whole 442 acres of land subject to the widow's dower. This sale, it is admitted, cannot stand without the assent of the legatees; who, upon equitable principles, have a right either to have a resale or to insist upon that which has been made. They have elected the latter, but they demand that Moore shall be held to pay as much more than the contract price, as a sale upon proper terms of credit would have brought, instead of a sale for cash or one half cash. This seems but reasonable. Both parties acquiesce in the fairness of the price, considering it was a sale for a large portion in cash, and all that the case requires is a fair estimate of the probable difference between a cash and credit sale. The nature and circumstances of the case, which arise out of the appellant's own conduct, render this necessary. No other expedient can attain justice, or place the appellees in the situation they would have held, had the trust been faithfully executed. The falling in of the life estate of the widow, and the possible variance of prices, would render a sale at this time a very unfair means of adjusting the rights of the parties. The principle of the decree, then, appears to me to be right, though it would have been better to have referred it to a discreet commissioner, rather than to a jury, to ascertain the probable difference according to the general current of similar transactions, be-

29 tween a sale \*on the terms on which Moore bought, and a sale on such credit as would have been proper under his testator's will. This might safely be entrusted to a judicious man of business, fa-

miliarized to similar enquiries; but I would be unwilling to submit an estimate to the vague conjectures of a jury, of the price that might have been obtained for the land in 1825. In this respect, it would seem advisable to correct the decree.

We come, lastly, to the advances to Dogan and wife. I am of opinion, that the court erred in declaring that the testator intended by his codicil, that the proceeds of sale of his land should be divided without reference to advancements. I find nothing from which this inference can be drawn, particularly in relation to subsequent advances. Now, the advance to Mrs. Dogan mentioned in the will, is expressly directed to be taken out of her share of the estate. The additional advancement of £150, which it is claimed to deduct from her share of the realty, and which was subsequent to the date of the codicil, is alone in question. Now, an advancement to a child, made subsequent to a will, is to be taken as a satisfaction *pro toto* or *pro tanto*, according to its amount. *Jones v. Mason*, 5 Rand. 577; *Hoskins v. Hoskins*, Prec. in Ch. 263; *Trimmer v. Bayne*, 7 Ves. 508, 515; *Pye ex parte*, 18 Ves. 140, 151; *Monck v. Monck*, 1 Ball & Beat. 296, 304. This advancement, then, should have been charged to Dogan and wife in the division of the proceeds of the sale of the land. But it is said, no proof of the advancement was in the cause at the time of the decree. I think, however, that the defendant having set forth the advances in his answer, it was not necessary that the proof should have been taken, before a reference of the accounts to a commissioner, which, in the regular course of proceeding, ought to have taken place. But the court made no such reference; and, moreover, cut off at once, by the decree, all evidence as to the advancements claimed in the answer,

30 \*by declaring that they were not to be deducted. Laches, therefore, in exhibiting this evidence, should not be imputed to the appellant.

On the whole, I think the decree is erroneous, as it respects the advances to Dogan and wife, but that it is, in other respects, correct upon principle, though it would be advisable to modify it by referring the estimate of the difference between a cash and a credit sale to a commissioner instead of a jury.

STANARD, J., delivered the following as the opinion and decree of the court:

That after an interlocutory decree on a hearing deciding matters in issue between the litigant parties has been rendered, neither of the parties has the absolute right to introduce new evidence in respect to the matter so decided, but the right to introduce and use such evidence as ground for changing or setting aside such decree, depends on the sound judicial discretion of the court to which it is offered, and its judgment on the sufficiency of the excuse that may be urged for the failure to have had that testimony before the court when the cause was heard and the decree rendered; and such excuse may be offered to the court, either upon motion on notice to rehear the cause on the new evidence, or by petition for rehearing. That the de-



cree of the court below in this case, is right, so far as it decides that the sale at which the executor was purchaser, was of the whole land subject to the widow's dower, and not the two thirds thereof not covered by the dower; and such being the opinion of the majority of the court, whether the additional evidence which Moore sought, by his petition for a rehearing, to introduce in the case, be heard or excluded, therefore it is unnecessary to decide on the sufficiency of the excuse offered by him for failing to have that evidence in the case before the interlocutory decree was rendered: The decree

31 rightly made Moore chargeable on his purchase with the whole of the land at the rate of 6 dollars 75 cents per acre. That Moore did not conform to his duty in requiring so large a portion of the purchase as was required, to be paid in cash; that while as purchaser he may (as any other purchaser would) at the election of the cestuis que trust, be bound for the amount of the purchase money, he is further chargeable to the cestuis que trust for the injury arising from such an improvident sale; and that the measure of that injury is the difference in the price which the land would have commanded, tested by the dealings of prudent and judicious men, if sold on the usual credit of one, two and three years, in equal instalments, and the price it commanded at the sale that was made, assuming, that the price at which it was purchased was a fair and full price, having reference to the terms of that sale. That, while the court below was right so far as it held Moore accountable to the cestuis que trust for the said difference, that difference could be more conveniently and compendiously ascertained by an enquiry and report of a commissioner than by a trial before a jury; and that, that course should be taken on the return of the case to the circuit superior court. That the court below erred in decreeing a division of the proceeds of the sale of the land and thus separating that from the rest of the estate, without an account shewing the state of the administration of the estate, and of the advancements or payments to, and accountabilities of, legatees; that Moore was not in default in not producing previous to the decree, the document shewing, or purporting to shew, the division of the personal estate, and the responsibilities of the legatees to the estate or the executor, that being a document proper to be used before the commissioner who might take the accounts; that, in taking such accounts, it was competent to Moore, to introduce the evidence to shew the charge by the testator of 500 dollars the value of property delivered to Henry Dogan,

32 the husband of the testator's daughter Elizabeth, as an advancement for which she was to be accountable on the division of the estate, and if satisfactory evidence to that effect be introduced, it would be proper to bring that to the charge of the said daughter Elizabeth; and that on the account so to be taken, the decree should be in favour of the legatees respectively, or the balances that may be ascertained to be due, of the aggregate of

their respective shares of the real and personal estate. Therefore, the decree, so far as it conflicted with the principles here declared, was reversed, with costs &c. and in other respects approved and affirmed, and the cause remanded to the circuit superior court for further proceedings &c.

### Cunningham Ex'or &c. v. Smithson.

March, 1841, Richmond.

(Absent CABELL and STANARD, J.)

#### Partnership—Bill of Exchange—Individual Acceptance\*

—Liability of Firm—Case at Bar.—N. and J. Dick, A. Moore and W. Davidson are partners in house of Dicks, Moore & Co. carrying on business under that firm in Virginia, where three first named partners reside, the other W. D. residing at London, but partnership has no house established at London under any name; S. draws a bill on W. D. alone, but expressed in body of the bill, to be "on account of D. M. & Co." W. D. writes a general acceptance on this bill, in his own name, not in that of firm of D. M. & Co. and the bill is afterwards dishonoured, and returned to drawer: HELD,

1. This was W. D.'s individual acceptance; D. M. & Co. are not parties to the bill, and not liable to S. by force of the bill itself.
2. And though if S. had proved, that the money for which the bill was drawn, was due on a contract with D. M. & Co. they might be held liable upon such original contract, yet, failing to prove such original contract, he has no claim against them on any ground.

#### 33 \*Same—Same—Same—Decision on Appeal Where Acceptance Held Individual.—Plaintiff

In equity sets up claim against a mercantile house, and only question put in issue is, whether the house is liable, or only an individual member of it: plaintiff obtains a decree against the house; and, on appeal, decree reversed, because, in opinion of appellate court, there is no proof of the liability of the house, but only of the individual partner: the appellate court will not remand the cause as to all the parties, in order to give plaintiff opportunity to adduce further proof of liability of the house, but will dismiss the bill as to the partners held not liable, and remand the cause for proceedings against the partner only who is liable.

Same—Same—Same—Same.—Nor will the court retain the partners, so held not liable in the actual state of the case, still in court, for the purpose of having a settlement of the partnership accounts, and having any balance found due thereon to the partner who is liable, he being an absent defendant, applied to satisfaction of plaintiff's demand: the bill not having been framed with that view, and not having asked such settlement of the partnership accounts.

Absent Defendants—Order of Publication—Proof of—Objection in Appellate Court.—In a suit in chancery against absent defendants, the only proof of publication of order calling absentees before the court, was the certificate of the printer not verified by oath; but no exception was taken for want of proof of publication, and court declaring that plaintiff had proceeded regularly against the absent defendants, give him a decree: upon appeal from the decree, neither party can object, in the appellate court, to the want of proof of the publi-

\*The principal case is cited in 5 Va. Law Reg. 496. See monographic note on "Bills, Notes and Checks" appended to Archer v. Ward, 9 Gratt. 623.



cation; and especially the plaintiff, to whose fault the irregularity was imputable, cannot ask the reversal of his own decree on such ground.

**Partnership—Appeals—Death of One Partner before Hearing.**—Decree against surviving partners and executor of deceased partner of mercantile house, from which defendants appeal, and pending appeal one of the surviving partners dies; the death is not suggested, and the court proceeds to hear cause, reverses the decree, and dismisses plaintiff's bill as to the surviving partners: proof is afterwards offered of the death of one of them before the hearing, and appellee moves to set aside decree of reversal, for that cause: motion overruled, because there was still a surviving partner before the court, who represented the whole interest, and because appellee cannot complain of a decree in favor of the deceased party.

This was an appeal from a decree in chancery of the circuit superior court of Henrico.

The bill was exhibited by the appellee, Joshua Smithson, and alleged, that he, in the year 1817, at Halifax in England, sold sundry goods to the house of Dicks,

34 \*Moore & Co. the members of which were N. and J. Dick and A. Moore, who resided in Virginia, and W. Davidson who resided at London: that the goods were received by Davidson, and shipped to his partners in Virginia: that, on the 18th August 1817, Smithson drew a bill for £1073. 12. 0. sterling (the price of the goods) upon Davidson on account of Dicks, Moore & Co. payable two months after date, which was accepted by Davidson, but was not paid at maturity, the house having failed, and the bill was returned to Smithson, who was obliged to take it up: that though this failure occurred, as stated, in England, there was no dissolution of the partnership at the time; no commission of bankruptcy was taken out against Davidson; the partners in Virginia continued to transact business there, and for aught he knew, were able to fulfil all their engagements: that on the 12th February 1819, Smithson received from Dicks, Moore & Co. on account of the debt, a bill for £500. sterling, payable on the 13th April 1819, which was credited on the bill first mentioned; but no other payment had ever been received. That the partnership of Dicks, Moore & Co. was now dissolved; Davidson was notoriously insolvent; N. and J. Dick were no longer resident of Virginia; and the other partner, Moore, was dead: that Moore left a considerable estate real and personal; and by his will, charged his whole estate real as well as personal with his debts, and subject thereto, devised and bequeathed the same to his wife Maria Moore for life, remainder to the children of William Davidson of London who should be living at the time of her death; whether Davidson had any children, was not known, but as his children could take no vested interest under Moore's will till his widow's death, they were not proper parties to this suit: and that Edward Cunningham an executor named in Moore's will had duly qualified as such. That Davidson and N. and J. Dick were all non-residents of Virginia. That there had been dealings between

N. and J. Dick and Cunningham, 35 \*and Cunningham might have effects belonging to them in his hands. That, under these circumstances, Smithson apprehended he would not be able to obtain satisfaction of the debt due him otherwise than out of the effects of N. and J. Dick in the hands of Cunningham, if any such there should be, or out of the estate of Moore. Therefore, the bill made Davidson and N. and J. Dick, surviving partners of Dicks, Moore & Co., Cunningham as executor of Moore, and in his own right, and Maria Moore, the widow and devisee of Moore, parties defendants; and prayed a decree for satisfaction of the debt due to Smithson out of the estate of Moore, real as well as personal, and that if Cunningham had then, or should have during the progress of the suit, any effects or moneys of N. and J. Dick in his hands, the same might also be subjected to Smithson's claim.

The draft of Smithson on Davidson mentioned in the bill, was exhibited; the following is a copy of it:

"£1073. 12. Halifax, August 18, 1817.

"Two months after date, pay to order of J. W. & C. Rawson ten hundred and seventy-three pounds twelve shillings, on account of Messrs. Dicks, Moore & Co. Richmond, value received as advised.

Joshua Smithson.

"Mr. William Davidson, London."

The bill was accepted by Davidson by writing on the face of it. It appeared, that it was noted for non-payment at maturity, and was returned to Smithson the drawer; and there was indorsed on it an account of charges, interest &c. which added to the contents, made the debt due at the time £1080. 12. 5. And then a credit was also endorsed in these words:

"Received, 12th February 1819, a bill on Jones, Loyd & Co. for £500. on account of the within; say, on account of Dicks, Moore & Co. Due April 13, 1819—of Joshua Smithson.

"Thomas Praton junior."

36 \*The defendant Cunningham answered, that it was true, that in the years 1815-'16 and '17, there was a mercantile house at Richmond, trading under the firm of Dicks, Moore & Co. the members of which were N. and J. Dick, then of Richmond now of New Orleans, William Davidson of London, and his testator A. Moore of Petersburg. That the defendant knew nothing of any such sale of goods alleged in the bill to have been made by Smithson to Dicks, Moore & Co. and by him delivered to their partner Davidson at London, in the year 1817, nor did it appear by the books of Dicks, Moore & Co. that any such goods were received by them in that year; but it appeared by their books, that goods put up by Smithson were shipped by Davidson to Dicks, Moore & Co. in the year 1816, which goods amount to £1106. 15. 6. sterling, and were charged by Dicks, Moore & Co. to themselves, and to the credit of Davidson in account with him. That Davidson (as the defendant understood and believed) was doing business in London at the time, on his own separate account; business in which Dicks, Moore & Co. had

no concern. That the defendant had no knowledge whether the goods purchased of Smithson, were purchased by Davidson on his own individual account and credit, or on the account and credit of Dicks, Moore & Co. but he had reason to believe, that the goods were purchased by Davidson on his individual account and credit alone, according to the understanding of Dicks, Moore & Co. and that they denied that Smithson had any claim on them. That in 1816 when the goods were sold to Davidson, he was in good credit; but in 1817, when Smithson drew the bill on Davidson now exhibited, his circumstances might have become doubtful (he was now bankrupt); and that might have been the reason why Smithson was so careful to express on the face of the bill, that the money was due on account of Dicks, Moore & Co. but

37 if the credit was originally given to Davidson alone, the draft of the bill in that form, and Davidson's acceptance of it, was nothing but a contrivance to charge Dicks, Moore & Co. with Davidson's individual separate debt. And the defendant, as the executor of Moore, called for proof, that the goods were delivered by Smithson to the order, or in consequence of any order, of Dicks, Moore & Co. and not to Davidson on his separate individual account. The answer further stated, that the partnership of Dicks, Moore & Co. was dissolved in 1818, and Moore undertook to pay all the debts of that house. And then the answer (among other matters touching the defendant's administration of Moore's estate) stated, that Moore died indebted to William Davidson and Albert Garnett, trading under the firm of Davidson & Garnett at Liverpool, in the sum of £213. 7. 0. sterling, and to the same persons trading under the firm of W. Davidson & Co. at London, in the sum of £520. 8. 5. sterling, and these creditors had by letter of attorney, authorized Cunningham to collect the debts for them; and that Davidson & Garnett, and W. Davidson & Co. were indebted to Edward Cunningham & Co. (of whom the defendant was a partner) to a much larger amount, and being now insolvent, the defendant claimed a right to apply the money he was authorized to collect for them of Moore's estate to the satisfaction of their debt to E. Cunningham & Co. and to retain the same out of the assets of his testator Moore's estate. The answer set forth also the dealings and transactions between Cunningham and N. and J. Dick, shewing that he was concerned as a partner with them, in two successive mercantile houses established at New Orleans, the last of which (Dicks, Booker & Co.) was still continuing, but that on these accounts Cunningham was not at the time the process of attachment in this suit of Smithson was served on him, and had not been at any time since, debtor to N. and J. Dick, but on the contrary, they were and continued to be his debtors to a large amount.

38 \*The plaintiff put in a general replication to the answer of Cunningham.

Pending the suit the defendant Maria Moore married J. T. Robertson; process was sued out against them, and they

failing to appear, the bill was taken pro confesso as to them. The defendants Nathaniel and James Dick and William Davidson were proceeded against as absent defendants: an order of publication, in the usual form, was made to convent them before the court; and a certificate of the printer of the Virginia Times (a newspaper of the city of Richmond) that the order had been published in that paper for two months successively, was filed; but the certificate was not verified by affidavit, nor was there any other proof of the publication.

The only evidence adduced by the plaintiff Smithson, to prove his claim against Dicks, Moore & Co. was the bill drawn by him on Davidson of the 18th August 1817, for £1073. 12. 0. sterling, with Davidson's acceptance thereof, and the statements thereon indorsed, above set out at large.

The bill having been taken pro confesso as to the defendants Robertson & wife, and the plaintiff appearing (as the record stated,) "to have proceeded in the mode prescribed by law against the defendants N. and J. Dick, who were out of the country," the cause came on for hearing in June 1826, on the bill, the answer of the defendant Cunningham, and the exhibits; and the court ordered accounts of Cunningham's administration of the estate of his testator Moore, and of the real estate of Moore in the hands of his devisee, the defendant Mrs. Robertson. The commissioner reported the accounts.

Some controversy arose upon Cunningham's administration account, not only between the plaintiff and Cunningham, but between Robertson and his wife, the devisee of the real estate of Moore, and Cunningham, the executor. Of the disputed items, it is only necessary \*to mention one: Cunningham claimed to charge Moore's estate, with 3261 dollars with interest from 1821, on account of the two sterling debts due from Moore, of £213. 7. 0. to Davidson & Garnett, and £520. 8. 5. to W. Davidson & Co. mentioned in his answer: and Robertson and wife objected to the charge, on the ground, that Davidson was a partner of Dicks, Moore & Co. and should be required to settle his accounts with that house, and to pay Moore any balance he might owe, before he should be allowed to assert those two claims against Moore's estate.

Exceptions being taken to the commissioner's report, the same was recommitted. And then a long delay in the proceedings ensued, which there was nothing in the record to account for; it was probably owing to some inattention on the part of the plaintiff, or rather of his agents. At length, in April 1833, the commissioner returned a reformed report of Cunningham's administration account, and an account of the real estate of Moore in the hands of his devisee; by the former of which it appeared, that personal assets of Moore's estate amply sufficient to satisfy the plaintiff's demand, had come to the hands of the executor.

It also appeared by the report, that a compromise had been entered into between N. and J. Dick, Cunningham the executor of Moore, and Robertson and his wife the

devisee, of all differences which had arisen between those parties; whereby N. and J. Dick, on their part, covenanted to pay all debts due from the late partnership of Dicks, Moore & Co. and to clear and save harmless the estate and representatives of Moore from all responsibility for the same; Cunningham on his part, covenanted to pay and transfer all moneys and other assets of the estate of Moore in his hands, to Robertson and his wife, who having been named an executrix in Moore's will, had recently qualified as such; and Robertson and wife, on their part, covenanted to indemnify \*Cunningham from all claims against him as executor of Moore.

Meantime the cause had been transferred to the circuit superior court of Henrico. And there, at June term 1833, on the motion of the other defendants (as it seemed,) time was allowed them till the next term to take the deposition of the defendant Cunningham to be read in evidence in the cause, unless the plaintiff should consent, that Cunningham's answer should be considered as a deposition, subject to all exceptions which might be taken to the reading thereof in evidence, if the same were a deposition regularly taken upon notice. The plaintiff consented, that the answer of Cunningham should be considered as his deposition, subject to just exceptions to its competency. And, thereupon, at the same term, June 1833, the cause came on for final hearing; and the court decreed, that Cunningham, who appeared by the report of the commissioner to have ample assets of Moore's estate in his hands to satisfy the plaintiff Smithson's claim, should pay him the balance of principal and interest appearing due upon Smithson's bill on Davidson of the 18th August 1817, for £1073. 12. 0. sterling, and the costs of this suit: reserving liberty to Smithson, if this decree should prove unavailing, to apply to the court for a decree against the defendants N. and J. Dick and Davidson: and reserving liberty to Cunningham (upon the articles of compromise between him, N. and J. Dick and Robertson and wife) to resort to the court for relief against them as well as Davidson, if the Dicks and Robertson and wife should not save him harmless from this decree in favor of Smithson against him.

Cunningham, and N. and J. Dick applied to this court for an appeal from the decree, which was allowed. Cunningham died pending the appeal, and it was revived in the name of his executors. And N. Dick (it was said) also died, but the appeal was not revived in his name.

41 \*The cause was argued here by Robertson for the appellants, and R. C. Stanard for the appellee. All the points of argument, and all the authorities cited at the bar, appear in the opinions of the judges.

ALLEN, J. Some interesting questions of mercantile law are involved in the decision of this cause: and as this is a branch of jurisprudence with which my previous pursuits have not made me familiar, I feel great diffidence in the correctness of the conclusions to which my reflections have

conducted me. That diffidence is enhanced, in the present instance, from the impression, that the result to which I have arrived, may do injustice to a fair creditor, provided the facts necessary, in my opinion, to make out his case, had been established; facts which possibly he might have established by proof, but has failed to do so. He has elected, however, to submit his cause upon the evidence in the record; and it becomes our duty to pronounce what seems to us to be the law upon the case as it now appears.

The first enquiry presented is, in what capacity did Davidson transact business in England? in other words, did these partners carry on business at Richmond, in the name and firm of Dicks, Moore & Co., and in England under the firm of William Davidson? Upon this question there is no proof in the record. The only information we have is furnished by the answer of Cunningham. On this point, Smithson himself must rely upon the answer, and upon it alone. He does not expressly aver in his bill, that the firm transacted business in England in the name of William Davidson. He states, that in 1817, he sold goods to the firm of Dicks, Moore & Co., of which N. Dick & J. Dick, then residing at Richmond, A. Moore, then of Petersburg, and W. Davidson of London, were partners; that the goods were received by Davidson and shipped to the partners in Virginia;

that for the payment of the price of 42 them, \*he drew a bill on Davidson on account of Dicks, Moore & Co. which was accepted by Davidson, but was not paid at maturity, the house having failed, and the bill was returned: that although the failure took place in England, there was no dissolution of the partnership at that time; the partners continued to do business in Virginia, and for ought he knew, were able to comply with their engagements. Now, this amounts to no direct allegation, that the partnership did business in England under the name of W. Davidson. On the contrary, such a construction would do violence to the allegations, taking them all together. He delivered the goods to Davidson, not to the house of Dicks, Moore & Co. trading under that name. He drew on Davidson individually; and as conclusive evidence that he did not consider that as the style of the firm he draws on him to pay on account of Dicks, Moore & Co. which would have been idle, if the firm transacted business under the name of W. Davidson; for if such had been the fact, the bill on Davidson would have been a bill on the firm. And although it is said by way of recital, that the house having failed the bill was returned, it is not alleged that the house was known by the name of W. Davidson. If the statement could be construed into an averment, that there was a house of partnership established at London, it is still uncertain in what name it transacted business. The answer states, that there was a mercantile house at Richmond, trading under the firm of Dicks, Moore & Co., the members of which resided in different places; one of them, W. Davidson, at London. But it no where is admitted that the firm had a house transacting business at London, in

that or any other name. The firm transacted its business at Richmond; it will not be pretended, that a branch of the house is established wherever a single partner happens to reside.

If a partner in trade draw, endorse, or accept a bill in the name of the firm, it will be binding on the firm jointly in the hands of a bona fide holder. This

43 power \*of one partner to bind the firm, is implied by law from the principle, that members of trading partnerships are constituted agents, the one for the other, for entering into contracts connected with the business and concerns of the partnership, so that by the contracts of the agent all his principals are bound. Fox v. Clifton & others, 6 Bing. 776, 795; 19 Eng. C. L. R. 233, 239. But to give to the act of one partner such an effect, it must be done in the name, and seemingly on behalf of the firm. In this case, the answer of Cunningham not only does not admit, that this partnership transacted business in England under the firm of W. Davidson, or that the partnership had a house in London, but it avers, that the defendant always understood and now believes, that Davidson was doing business in London on his own separate account, with which the firm of Dicks, Moore & Co. had no concern. This allegation is not responsive to any charge in the bill; it is affirmative, and if essential to the defence, should have been sustained by proof. But where, as in this case, no evidence is adduced to prove the existence of a house or firm in London, and the plaintiff is compelled to rely on the admissions of the answer to establish the fact, he makes it evidence; the whole answer must be taken together, and it expressly negatives the pretension that the house in Richmond transacted business in London under the name of W. Davidson.

Where a partnership is conducted in the name of an individual partner, and a bill is drawn, endorsed or accepted by such partner, in an action against the firm, the plaintiff must be prepared to shew that the partner A. drew the bill not as A. but as A. & B. Collyer on partners 226. In the So. Carolina Bank v. Case, 8 Barn. & Cress. 427, 15 Eng. C. L. R. 256, it appeared, that the business of the house of Crowder, Clough & Co. was carried on in England under that name, but in

44 the U. States all the business of the partnership was \*transacted in the name of J. B. Clough alone; and he carried on no separate business: the court of king's bench held, that J. B. Clough was to be considered as the name of the firm for the purposes of business in America, and consequently, that the partners were liable as endorser of the bills. The fact that the partnership transacted business under that name, was necessary to be established, before the partners could be rendered liable on the bills. This is clear from another case in which nearly the same parties were concerned, the case of Denton v. Rodie, 3 Camp. 493. The house of Clough, Wilkes & Clough was established at Liverpool; J. B. Clough, one of the partners, was resident at New York; and he drew bills in his own name

on the house at Liverpool, which were regularly accepted and paid until they stopped payment; when they stopped, one of the bills had been accepted, the others had not been presented. Lord Ellenborough distinguished the case from that of Emly v. Lye, 15 East 7, the circumstances proving a loan rather than a discount; and concluded, that though he could not say the partners were jointly liable on the unaccepted bills, they were jointly liable for the amount, as for money lent, or money had and received. Collyer commenting on the case, (p. 269,) says that the case seems to have been of the same nature and conducted by nearly the same parties as those in The So. Carolina Bank v. Case; and that on the authority of that case, the plaintiffs might have recovered against the defendants as drawers of the bills, supposing the name of J. B. Clough to have been in fact the name of the firm for the purposes of the business in America. The same proposition is maintained by Judge Story in U. States Bank v. Binney, 5 Mason 176, 189. The partnership was carried on in the name of John Winship; he endorsed notes in his own name; and in an action against the firm on these notes, it was held that the plain-

45 tiffs must shew, either directly or by implication, \*that the notes were offered by Winship as notes binding the firm, and not merely himself personally; or that the discount was made for the benefit, or in the course of business of the firm. In the case before us, the plaintiff has not shewn that the partnership of Dicks, Moore & Co. did business under the name of W. Davidson in London; and therefore the defendants cannot, according to these authorities, be held liable on the bill drawn by Smithson on Davidson, and accepted by him, by force of the bill itself, unless it appears upon the face of the bill, to have been accepted in the name of the firm.

Bills of exchange, from their great utility, in carrying on the mercantile transactions of the world, have been highly favoured: and, generally, all the parties are liable to the bona fide holder, who has given value for it before it became due. Such being the binding effect of the contract, no person can be considered as a party unless his name, or the name of the firm of which he is a partner, appear on some part of it. Chitty on Bills 30. What is there on the face of this bill to charge the partnership of Dicks, Moore & Co.? It is drawn on W. Davidson, and accepted by him. I have endeavored to shew, that this was not the name of the firm in England: and if that has been established, or rather, if it has not been shewn, on the contrary, that the acceptance made by Davidson was made in the character of the firm, and not as an individual, the authorities are clear, that an action cannot be supported against the firm on the bill. Wherever a person draws, accepts, or endorses for himself and partners, it is laid down that he should express, that he does so for himself and partners, or subscribe their names, or the name of the firm; and that otherwise, it will not bind

the partners. Chitty on Bills 66. And this has been the settled and uniform doctrine from the earliest cases down to the present day. So strict is the rule, that if a person advances money to the firm, and takes the separate bill of the partner, he \*cannot sue the firm on that security, although he may possibly succeed in an action against the firm for money advanced. On the bill the contract is several, and the individual partner alone can be sued upon it. Collyer 262; Sifkin v. Walker, 2 Camp. 308. In Emly v. Lye, 15 East 7, George Lye and E. L. Lye were partners, and in the habit of drawing bills, some in the name of the firm, some by one partner, others by the other; they were discounted by Burrough at various times, without distinction between the bills, he conceiving that they were all drawn on partnership account; and the proceeds were applied to the partnership accounts: Lord Ellenborough held, that the first counts in the declaration (on the bills themselves) were properly abandoned; for, unquestionably, on a bill drawn by one only, it cannot be allowed to supply by intendment the names of others, in order to charge them; that if the plaintiffs, therefore, rested their claim upon the bills, they should confine it to the drawer: and the court, treating the negotiation as a discount, not a loan, held that the plaintiffs were not entitled to recover on the money counts. And in the argument here, it has been contended, that that was the only point decided. But the quotation given shews that the court held, that the partners could not be rendered liable on the bills; and that is the question of which we are now treating.

It was contended, that this bill shews on its face, that it was drawn on account of Dicks, Moore & Co. that it calls on Davidson a partner to pay on account of that firm, and he has accepted generally; and that, as a general acceptance must be construed to be an acceptance according to the terms of the bill, therefore this acceptance, being made by a partner having authority to bind the firm, must be treated as an acceptance by the firm. The general proposition may be true; but it seems to me, the consequence deduced does not necessarily follow.

To suppose so, we must first concede, that the \*terms, "on account of Dicks, Moore & Co." make it the bill of that firm. If Davidson were not a partner, would such an acceptance bind the firm? That will not be pretended. Is it not equally clear, that a creditor of the firm may take a separate security from one of the partners for the joint liability? This is established by the case of Emly v. Lye, and numerous others. How then is the holder to know, from the face of such an instrument, whether it was accepted by a stranger on account of the firm, or by the partner, on his individual account? He sees the bill directed to an individual, who has accepted; he knows that he is bound, and takes it upon the faith of his individual responsibility; can he then, by extrinsic testimony, be driven to resort to the social effects? This would be to change the contract which the bill and acceptance import, by evidence aliunde, and so far to impair

the general credit of the security. The cases relied on to support the argument, are cases in which the bill was drawn on or accepted by the firm. Thus in *Mason v. T. Rumsey sen. & T. Rumsey jun.* 1 Camp. 384, (a leading case) the bill was drawn on Messrs. Rumsey & Co. and being shewn to T. Rumsey junior, he wrote across it, "accepted, T. Rumsey junior." The action was against both, but was defended by T. Rumsey junior alone, who contended, that he was not liable as a joint acceptor: that if a bill be drawn upon a firm, it must be accepted in the name of the firm or for the firm. The court held otherwise: that such an acceptance does not indeed prove a partnership; but if the defendants were partners, they are both bound by it: that for this purpose, the word accepted, if written on the bill, would have been enough; for if a bill is drawn on a firm, and accepted by one of the partners, he must be understood to exercise his power to bind his co-partners, and to accept the bill according to the terms in which it is drawn. In that

case, the liability resulted from the fact, that the bill \*was drawn on the firm. So drawn, it shewed upon its face, an intention to charge the firm; the terms imported a liability of the firm, and an intention to look to the firm for satisfaction; and being accepted by a partner having authority to bind them, it was an admission of the right to charge the firm, and an agreement to pay according to the terms of the demand. But in the case before us, the words used do not comport such an intention, or establish such a charge. In the supposed case of an acceptance by a stranger, it would not create a charge; and if the acceptance be by a partner, it does not follow that he may not have been furnished with funds; and that fact being known to the drawer, he may have intended to take a separate security for the joint debt. The words "on account of Dicks, Moore & Co." might have been inserted merely to designate, for the benefit of the acceptor, the account on which he pays. *Wells v. Masterman*, 2 Esp. Rep. 731, is like the case of *Mason v. Rumseys*: the bill was drawn on the firm, and accepted by one partner. See also *Dolman v. Orchard*, 2 Car. & Payne 104; 12 Eng. C. L. R. 47. The case of *Lloyd v. Ashby*, 2 Barn. & Adolph. 23; 22 Eng. C. L. R. 17, proceeds upon the same principle. There, persons as partners carried on business under the style of *Ashby & Co.*; one withdrew; and the business was afterwards carried on under the name of *Ashby & Rowland*; Shaw afterwards entered the firm, as a dormant partner, but no change was made in its name; a bill was drawn on the firm of *Ashby & Co.* which firm had ceased to exist; and it was accepted by *Ashby & Rowland*: the court held that notwithstanding the variance between the direction and the acceptance, the three partners constituting the firm of *Ashby & Rowland* were bound. And this would seem to be perfectly clear; for no matter to whom the bill was addressed, or whether addressed at all, one partner having a right to bind the firm, when he acts in the

name of \*the firm, having accepted

in the name of the firm, all were liable.

It is argued, that this is a suit by the drawer against the acceptor, and that as between them, the drawer might recover; though, if the plaintiff were endorsee, it might be otherwise. The drawer might recover by force of the contract, if made with the firm; but not, I conceive, upon the bill. If it is a separate security taken from one partner, he alone could be sued on it. Upon the bill, the plaintiff whether drawer, payee or endorsee, can only charge the persons appearing on the face of it to be parties. Though as between the drawer and acceptor, the former may have a legal remedy against the firm by going to the original consideration, and shewing that the contract was made with the firm, he will then recover for money lent, or had and received, or for the goods sold.

That the expression in this bill "on account of Dicks, Moore & Co." cannot be so construed as to convert the bill into a partnership security, when accepted by one partner, is, I think, shewn by the case of *Thomas v. Bishop*, 2 Stra. 955, which occurred at an early period, and has never, that I can discover, been questioned or overruled. It was the case of an agent; and it decides, that he should accept or endorse in the name of this principal, or state in writing he accepts as agent. The plaintiff was endorsee of a bill drawn on defendant, in these words: "At thirty days sight, pay to J. S. or order £200. value received of him, and place the same to account of the York Buildings Company, as per advice from C. Mildmay." Addressed "To Mr. H. Bishop cashier of the York Buildings Co. at their house in Winchester street London." "Accepted per H. Bishop." At the trial Bishop, against whom the action was brought on his acceptance, proved that the letter of advice was addressed to the company; and the bill having been brought to their house, he was ordered to accept it. A  
50 \*verdict was found for the plaintiff under the direction of the judge; and on a motion for a new trial, the court held the direction right, stating that the bill on its face imported to be drawn on the defendant; it was accepted generally and not as agent; and this being an action by the endorsee it would be of dangerous consequence to admit evidence of extrinsic circumstances, arising from the letter of advice: that a bill of exchange was a contract by the custom of merchants, and the whole of that contract must appear in writing; that here, there was nothing in writing to bind the company, nor could any action be maintained against them on the bill." *Leadbitter v. Farrow*, 5 Maul. & Selw. 349, is to the same effect. These cases, as to the point under consideration, are stronger than the cases before us. In *Thomas v. Bishop*, the bill was drawn upon the defendant as cashier &c. he was directed to place it to the account of the company, and it was directed to him at the house of the company. The evidence shewed, that it was drawn in pursuance of a letter of advice to the company, and accepted by their order. The intention to draw on the company was more fully indi-

cated than in the bill before us, and there was every reason to presume, from the face of the bill, that the party intended to accept according to the terms in which it was drawn, and that upon proof of his agency his acceptance would have been the act of the company. The company was held, however, not to be liable on the bill; which could not have been, if the words "on account of the company," would constitute it the bill of the company, when accepted by an agent having authority to bind them.

It seems to me, therefore, upon a review of the authorities, that the firm of Dicks, Moore & Co. were not bound by this acceptance of Davidson; that it is to be treated as his individual acceptance; and in the absence of proof, that this house  
51 transacted business in the name \*of W. Davidson in London, his acceptance in that name does not bind the house, and that no action could be maintained on the bill against the firm.

It remains to enquire, whether the plaintiff is entitled to recover for the goods for which the bill is said to have been drawn and accepted. On this point, he has adduced no proof. The bill is drawn on the 18th August 1817, at two months, for £1073. 12. sterling. The plaintiff says, that, in that year, he sold the goods, and drew the bill. In support of this allegation he has adduced no evidence: he is compelled to resort to the answer. The parties agreed, that the answer might be taken as a deposition subject to all just exceptions; and it is now contended by the appellee's counsel, that the witness was incompetent, and that his answer cannot be read as a deposition. If he is correct, his case is destitute of all support. For this is a proceeding against the firm of Dicks, Moore & Co. which has since been dissolved, and the answer of the executor of one of the partners, would not be evidence against the other defendants. The proceeding is against absentees, but the court, as against them, cannot take the bill as confessed without proof. The statute authorizes the court, as against absentees, to hear the cause upon such proof as the plaintiff may adduce; but some proof is necessary. 1 Rev. Code, ch. 123, § 2, p. 475. Without the answer, there is nothing to show that any goods were ever received by the house of Dicks, Moore & Co. But passing that objection, and looking to the answer, we must take it altogether, and what does it disclose touching this question? It denies that any goods were received in 1817, but admits, that in 1816, goods to the amount of £1106. 15. 6. sterling, put up by Joshua Smithson were shipped by Davidson to Dicks, Moore & Co. These goods, it is contended, were the same for which the bill was drawn, and that the allegation that  
52 they were sold in 1817 must have been the mistake of counsel. \*That may be so. Yet the amount is different, and the bill said to have been drawn and accepted in payment, is dated in August 1817. The goods admitted to have been shipped by Davidson, were shipped in 1816, about eight months before the date of the bill (at the shortest calculation). What was

the state of the transactions between these parties during this interval, supposing the goods to have been the same? Were they purchased for and charged to the firm? If so, why is not an account exhibited and proof adduced? The answer further avers that Cunningham understood and believed, that Davidson transacted business on his individual account. Was this such a transaction? And when Davidson was in failing circumstances, was this bill drawn to charge the house of Dicks, Moore & Co. with his individual debt? The plaintiff had it in his power to throw light on these transactions, but he has left us in the dark. There is another fact detailed in the answer which has an important bearing, as part of the *res gesta*. The goods shipped in 1816 were charged by Dicks, Moore & Co. to themselves, and to the credit of Davidson in account with him. Would this have been done, if the firm had been advised of a joint purchase, for which a bill was outstanding against them? It is said, that this is the usual mode of entries in the books of partners. I imagine that is a mistake. Such a mode of entry would subject the firm to great inconvenience. Upon a dissolution or settlement of the partnership accounts, the partners to whose credit such an entry appeared, would get credit for the amount, and the firm might thereafter be compelled to pay the creditor. If the partner had been charged with funds, he would be entitled to a credit for the goods. But where the firm was pledged for the payment of the debt, the regular mode would seem to be, to charge the firm with the merchandise, and give it credit for the debts when paid. If, therefore, the firm, in

53 this case, had been advised, \*that it was held responsible for the price of the goods, it cannot be supposed they would have given Davidson credit for the amount; thereby in effect paying the price of them. A fraudulent representation by Davidson could not, it is true, affect the claims of the fair creditor of the firm. But here we are driven by the failure of the plaintiff to furnish the proof which he might have adduced if the facts were as he alleges, to gather our information of these transactions from the acts of the firm, as disclosed by the answer: and these acts, so far from shewing a joint purchase, tend to establish a separate contract with Davidson, to whom the firm has entered credit, and that at a period, when the transactions were recent, and there could have been no motive then existing to misrepresent or make false entries. The credit entered on the bill is relied on as a subsequent admission of the liability of the firm. It does not appear by whom the bill was furnished which was credited: if by Davidson, it would strengthen the presumption, that this was an individual transaction; and if by the firm, nothing would have been easier than to have adduced proof of the fact. Upon the whole, it seems to me the plaintiff has failed entirely in making out this branch of the case. And the admissions of the answer taking it altogether tend to establish, that this was an individual transaction between Davidson and the plaintiff for which the firm was never responsible.

I think the bill should have been dismissed.

BROOKE, J. After the able opinion of Judge Allen, in which I entirely concur, I shall not say as much as otherwise I should have said in this case.

I suppose, that a bill drawn by A. on B. on account of C. and accepted by B. makes B. only, not C. the debtor of A. One mercantile firm may accept a bill on account of another firm, without making the latter debtor to the drawer of the bill, though it may become debtor to the

54 \*accepting firm when it pays the bill. Then let us see how the parties stood upon the bill before us.

We find, on examination of the record, that the bill drawn by Smithson, on W. Davidson, Davidson's acceptance of it, and the statements endorsed on it is the only evidence, except the answer of the defendant Cunningham. The plaintiff is indebted to the answer alone for the fact, so essential in his case, that Davidson was a partner in the house of Dicks, Moore & Co., a fact, without which there is nothing in the record to sustain his claim. But the answer does not stop there: it is responsive to other allegations of the bill, and it is not to be garbled. It states, that Davidson was a partner of Dicks, Moore & Co. and resided at London, but that the defendant understood and believed, that Davidson carried on a separate business of his own at London, in which Dicks, Moore & Co., whose business was transacted at Richmond, had no concern.

There is no evidence to contradict this statement, and no evidence that there was any branch of the house of Dicks, Moore & Co. established at London. It is said, that the answer, in this respect, is affirmative, and the facts affirmatively alleged ought to be proved by other evidence. It is generally true, that affirmative matter alleged in an answer, must be proved: but here, the answer is responsive to the claim set up in the bill, to which the defendant was required to answer, and it must be taken to be true, unless it is contradicted by proof; and if the fact stated had not been true, it might easily have been disproved. Upon this state of the evidence in the record, let Smithson's pretensions be examined.

It is admitted that the acceptance of a bill by a partner of a firm, will bind the firm, if the bill be drawn on the firm, or he accepts it in the name of the firm: all the cases shew that. But this bill was not drawn on the firm of Dicks, Moore & Co. but on Davidson, in his individual character; and he accepted it by writing his

55 \*own name across it, and not as a partner of Dicks, Moore & Co. It was his individual acceptance. The credit of a bill of exchange must appear on its face, and is not to be sustained, much less altered, by extrinsic evidence. An endorsee of this bill would have had no claim against Dicks, Moore & Co., nor can the drawer have any claim upon that house, by force of the bill itself. The evidence furnished by the endorsement of the credit on the bill does not help the case: on the contrary, it excites suspicion, and certainly leaves something to be explained,



with its very material. It is a credit of £500. sterling, for a bill on Jones, Loyd & Co. received as late as February 1819, but it is not stated by whom that bill was drawn, or by whom it was remitted to Smithson, leaving it doubtful whether it was not drawn or remitted by Davidson, in part discharge of his acceptance of the bill in question, of August 1817. There is not a shadow of evidence, that it was drawn or remitted by Dicks, Moore & Co. or by any body authorized by them. If Smithson, at the time, had considered Dicks, Moore & Co. bound by the bill, or by Davidson's acceptance of it, it had been enough in endorsing the credit, to have stated that the bill of Jones, Loyd & Co. was received "on account of the within bill," without taking the pains to add that the credit was given "on account of Dicks, Moore & Co."

Upon the whole, I think it very clear, that Smithson's claim against Dicks, Moore & Co. cannot be sustained upon the bill itself. None of the cases cited at the bar apply exactly to this, but that of *Thomas v. Bishop*, which, in principle, seems directly in point. In that case, the bill was in these words: "At thirty days sight, pay to J. S. or order £200. value received, and place the same to account of The York Buildings Company, as per advice from C. Mildmay." It was addressed "To Mr. H. Bishop, cashier of The York Buildings Company, at &c." And the acceptance was, "Accepted per \*H. Bishop," without addition of his character of cashier. The action was brought by Thomas, an endorsee, against Bishop in his individual character. He proved that the letter of advice, accompanying the bill, was addressed to The York Buildings Company, and that the bill being brought to their house, he was ordered to accept it, which he did in the same manner in which he had accepted other bills. And his defence was that The York Buildings Company, and not himself individually, was bound by the acceptance. The court held, that Bishop was, and that the company was not, bound by his acceptance in his individual name. Now, surely, the words in the body of that bill, "place the same to the account of The York Buildings Company," were as strong to make that company parties to the bill, as the words in the bill before us, "on account of Dicks, Moore & Co." are to make them parties to this bill, and indeed much stronger. And there, too, the bill was addressed to Bishop as cashier of the company; the letter of advice was addressed to the company; and Bishop accepted by its orders: here, the bill was addressed to Davidson individually, and was accordingly accepted by him in his own name.

On the claim against Dicks, Moore & Co. viewed independently of the bill, I shall say a very few words. The only proof is furnished by the answer of the defendant Cunningham: that it appeared, by the books of Dicks, Moore & Co. that goods put up by Smithson were shipped by Davidson to them (not in 1817 when the bill was drawn, but) in 1816, which goods amounted to £1106. 15. 6. sterling (the bill was for

£1073. 12. 0.) and that the goods received in 1816, were charged by Dicks, Moore & Co. to themselves, and to the credit of Davidson, in their account with him. Now, not to mention the discrepancy in sum and date, and taking the goods received by Dicks, Moore & Co. to be the same goods

for the price of which Smithson's bill was drawn, the circumstances strengthen the conclusion deducible from Smithson's bill drawn on Davidson and accepted by him individually, that the goods for the price of which the bill was drawn, were sold to Davidson individually, and by him sent to Dicks, Moore & Co. to be charged to the house, and credited to Davidson; which was accordingly done.

TUCKER, P. Though this case has obviously been very badly prepared, and some obscurity rests on certain facts which might have been easily ascertained, yet I think there is enough in the record to sustain the plaintiff's demand against the firm of Dicks, Moore & Co. of Richmond.

It is admitted, on all hands, that W. Davidson of London was a partner of that house and that he resided at London. Dicks, Moore & Co. appear to have been importing merchants; and the natural course of business was to establish a house in the great mart with which their trade was carried on. Davidson was at London to do the business there. If he was there doing business for and on account of the firm, he constituted a branch of the house there; and accounts were of course opened between the house in London and the house in Virginia, as is usual in such cases. The books of Dicks, Moore & Co. as Cunningham's answer states, shew that, in the year 1816, goods to the amount of £1106. 15. 6. put up by Joshua Smithson were shipped by Davidson to Dicks, Moore & Co. This is a pregnant fact. It shews beyond question, that the partners at London procured and shipped for the house at Richmond, the goods required for their business here; and thus we see that the firm had a house in each of these cities. It is said, indeed, that Davidson carried on business on his separate account. But this is not proved; for Cunningham only says he understood and believes that he did. Still less is there

any denial of his carrying on business at London for the firm. The entry abovementioned proves, that he did procure from Smithson, and ship to them, a quantity of goods. The presumption is, unless the contrary be proved, that this was done by him as partner. Of what advantage was it to the firm, to send a partner to London for the purpose of purchasing their supplies, if they were to be purchased by him on his individual account, and the firm to be charged with an advance for his particular benefit? It could be none, and we must, therefore, in the absence of proof to the contrary, presume, that the transactions between Davidson and the house at Richmond, were not individual but partnership transactions.

That the goods for which the bill of Smithson was drawn, were the same goods which are credited on the books of Dicks, Moore & Co. I think may fairly be presumed. It is said, indeed, that the bill



alleges the goods to have been furnished in 1817 when the bill was drawn. But this was an inadvertence doubtless of the counsel. The statements of a bill are not, like those of an answer, binding upon the party. Peak's Ev. 263. And still less should they be so considered, where the party resides in a foreign land, and the bill is filed by counsel here. The statement of the bill then weighs but little against the established facts here. That Dicks, Moore & Co. received a parcel of goods amounting to £1106. 15. 6. appears by their books: that they received them from Davidson also appears: that they were put up by Smithson is also proved by the books themselves, from which Cunningham derived the information that they were so put up by him. Here then are goods to the amount of £1106. 15. 6. put up by Smithson in 1816, and shipped by Davidson to Dicks, Moore & Co. in the same year, and the bill is drawn for £1703. 12. 0. in 1817. Can there be a reasonable doubt, that those were the same goods, when neither Smithson nor the defendants pretend, that there was more than one parcel of

59 \*goods sent by him from Halifax through Davidson of London to Dicks, Moore & Co. of Richmond? It is believed not. It is, therefore, taken as sufficiently proved, that this bill was drawn for the very goods credited on the books of Dicks, Moore & Co. to the firm in London; the difference between the original cost (£1073. 12. 0.) and the sum credited (£1106. 15. 6.) arising only from the incidental charges of receiving and forwarding.

It is argued, that because the firm at Richmond charged themselves and credited Davidson with the amount of the goods, they must be supposed to have been furnished on his individual account. But this inference is not a necessary one, since if the business of the firm was carried on at London in the name of Davidson alone, the accounts with him as constituting that firm, would have been opened with him in that name alone. This is the usual course of partnership business. The circumstance, therefore, proves nothing; and the rather, as the parties in the possession of the books and papers, have not brought forward the evidences, which must have been ample, if the advance was an individual transaction, of that fact. It is further to be remarked, that the res gesta furnishes the strongest presumption of the contrary. Smithson of Halifax puts up goods for Dicks, Moore & Co., with whom he has no direct correspondence, and they are sent to them through Davidson of London. He draws his bill upon Davidson on account of Dicks, Moore & Co. of Richmond, to whom he looked, as the parties to whom he had advanced his goods. How came he to know them in the transaction, if the goods had not been sent originally with the understanding that they were for them? Davidson also, when they are received, forwards them to the firm in Richmond, without breaking them up, I presume, as Cunningham says that goods put up by Smithson were shipped by Davidson &c. Moreover, he accepts the bill drawn on him for their account. And

60 thus, through the \*whole transaction, the parties appear to have considered it a partnership concern

If, then, we look to the acts of Smithson on the one hand, and of Davidson on the other, the bill was a partnership contract, perfectly fair and in the ordinary course of business. The imputations of fraud on either of them are gratuitous; particularly as to Smithson, who has evidently sold goods to Davidson, for the firm of which he was a member, and drew upon him accordingly in that character. And as the question here is not between an endorsee and the acceptor, but between the original parties to the contract, one of whom had a perfect right to bind his partners, we must hold them to be so bound, if such was the intention of the parties.

Such seems to be the conclusion to which we must arrive, if we consider the case upon principles of reason and good sense, without resorting to the adjudications upon bills of exchange. And as might be expected, these but confirm our deductions. The principles which govern the law of bills of exchange in relation to this subject, are indeed familiar. The power of one partner to bind the firm by his drawing or acceptance, and the necessity, in order to bind a party, that his name should appear upon the bill, are well understood. It seems at one time, too, to have been supposed, that when a person endorses or accepts for himself and his partner, he should always express, that he does so for himself and partner, or subscribe both the names, or the names of the firm, and that otherwise it will not bind the firm. Chitty on Bills 51, citing Pinkney v. Hall, 1 Salk. 126, and other cases. But it has been determined in England, more than thirty years ago, that where a bill is drawn upon a firm, and accepted by one partner in his own name only, it will bind the firm. Mason v. Rumseys, 1 Camp. 384. And this seems but reasonable, since as he has the power, and is called upon to exercise it, the act of writing his acceptance on the bill, may

61 fairly be regarded as done \*in execution of that power. Nor can the payee or any future holder of the bill, be embarrassed by the form of the acceptance: for the party being called upon to pay in his social character, must be understood to promise payment in the character in which it is demanded, and not in his individual character.

If this principle be correct, we have only to see whether the case before us falls within it. If, as I have supposed, Davidson carried on the business of the social house at London in his own name, then the case is clear; for the draft is upon him in that name, and he accepts in the same name; and the body of the bill distinctly shews, that the draft was "on account of the firm of Dicks, Moore & Co." But if it be not sufficiently proved, that the firm in London was under Davidson's name alone, still I think the same result would follow. For the bill calls on one of the partners of the firm, to pay the contents "on account of the firm," and he accepts; that is, he agrees to do that which he is called upon to do, to pay the contents of the bill on account of the firm of which he was a partner. He is called

upon to pay, not individually, but for account of the firm; and he accepts accordingly, not individually but as a member of the firm. If he had said, "accepted on account of the firm, W. Davidson," there could have been no doubt. And yet that is precisely the character and effect of the actual acceptance here.

The case of *Thomas v. Bishop*, 2 Stra 955, is very different from this. 1. That was the case of an agent, the cashier of a company, and this the case of a partner: an agent must always contract in the name of his principal; a partner can bind his copartners by any act which has reference to the partnership, though not done in the name of the firm. 2. In this case, the bill is drawn by Smithson, calling on Davidson to pay on account of Dicks, Moore & Co. In the case of *Thomas v. Bishop*, the bill was directed to Bishop, cashier of \*The York Buildings Company, who was directed to place the same to account of the company; he was not called on to accept on their account. 3. Bishop accepted in his own name only, without assuming his official character, and therefore was personally bound: here Davidson accepts, generally, a bill drawn on him on account of the firm, and that acceptance required no express declaration that it was made for himself and partners. And lastly, in that case, the action was by an indorsee; and the court expressly said, "It might have been otherwise, had the action been by J. S. (the payee) who was privy to the transaction, and it had appeared he tendered the bill as a bill on the company. Here, the action is by the drawer, the original party to the bill. In the case before us, it is very possible that an endorsee, not privy to the bill, might have had his action either against the firm of Dicks, Moore & Co. or against Davidson, individually; against the firm, because it was a social transaction; or against him individually, because the acceptance was in his own name, and an endorsee might therefore fairly take it to bind him separately. The case of *Hall v. Smith*, 1 Barn. & Cress. 407; 8 Eng. C. L. R. 112, furnishes an instance of this. There W. Smith gave a note thus: "I promise to pay the bearer on demand £1. value received. For W. Smith, W. P. Smith and W. R. Taylor; W. Smith." An action against W. Smith, individually, was brought and sustained; but the court clearly intimated, that a suit might also have been sustained against the partners for whom he signed; saying, "there are many cases, where a party entering into a contract in his own name, may be sued, or those for whom he contracts may be sued, &c." Admitting, therefore, that an endorsee might have looked to Davidson individually, it will by no means follow, that the firm of Dicks, Moore & Co. was not responsible upon his acceptance on their account.

63 \*Upon the whole, therefore, I am of opinion, that the firm of Dicks, Moore & Co. were bound by the acceptance of Davidson their partner; but my brethren are of a different opinion on that point; and it is unnecessary I should consider any other matter in the cause.

The decree of this court reversed that of the circuit superior court, with costs, and dismissed the bill as to Cunningham, the executor of Moore, and as to N. and J. Dick, leaving the plaintiff at liberty to proceed against Davidson alone; for which purpose, the case was remanded.

After the decree was pronounced, the appellee's counsel, by way of motion for a rehearing, submitted, that the decree ought to be set aside, or at least ought to be modified, on the following grounds:

1. That, it appeared, from the answer of Cunningham, that Moore's estate was indebted to W. Davidson, or to the firms of which he was a partner, in two sums of £213. 7. 0. and £520. 8. 5. sterling, with long arrears of interest; and it appeared by the commissioner's report, that Robertson and wife had objected to the charge of those two sums to Moore's estate, in Cunningham's accounts of administration, on the ground that Davidson was largely a debtor, and Moore a creditor, of the house of Dicks, Moore & Co. Therefore, the partnership accounts of Dicks, Moore & Co., ought to be settled, in order to ascertain whether any and what balance was due from Dicks, Moore & Co. or from the estate of Moore to Davidson; and if any such balance should be found due to him, the same should be applied to the satisfaction of Smithson's claim; since it was agreed on all hands, and admitted, both in the opinions of this court and in its decree, that Davidson was liable for the full amount of that claim. For the purpose of having these accounts settled, the executor of Moore, \*and the surviving partners of Dicks, Moore & Co. were necessary parties. But the decree of this court dismissed those parties entirely from the cause, and so precluded the settlement of any such accounts. The counsel therefore submitted, that the decree ought to be so altered, as to retain those parties before the court.

2. That as the circuit superior court had held the proof adduced by Smithson of his claim against the house of Dicks, Moore & Co. sufficient to establish the claim, and as the only ground on which this court reversed the decree, was that the proof was not sufficient for the purpose; this court, instead of proceeding to a final decree which would be a bar to the claim, ought to remand the cause, with directions that it should be opened, in order to receive such proofs as Smithson should be able to adduce to establish the liability of Dicks, Moore & Co. If the proof now in the cause was insufficient to ascertain the liability of the partnership so as to warrant a decree against the partners, enough appeared to shew, that this was probably a partnership debt; and Smithson ought to have an opportunity of producing additional evidence, if he can. They cited *Cropper v. Burtons*, 5 Leigh 426, and *Beverley v. Ellis & Allen*, 1 Rand. 106.

3. The cause was not properly matured for hearing in the circuit superior court. For the absent defendants N. and J. Dick, for aught that appeared, were not regularly convened before the court. There was no proof of the publication of the order calling them before the court: there was only the printer's certificate of the publication, not verified by his oath. The decree ought to be reversed for that cause, and the case sent back for regular proceedings. As no decree

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The decree of this court reversed that of the circuit superior court, with costs, and dismissed the bill as to Cunningham, the ex-

against those parties could have bound them, so no decree could properly be pronounced for them.

4. Supposing N. and J. Dick to have been duly convened before the court of chancery, they were both parties \*in this court. But the counsel offered proof, that N. Dick was dead before the hearing of the cause here. The decree should, therefore, be set aside, in order that the appeal might be revived against the representatives of N. Dick, and the cause then heard, with all proper parties before the court.

ALLEN, J. This case was very elaborately argued, and fully considered. Subsequent reflection has tended to confirm me in the correctness of the conclusion at which the majority of the court arrived. Since the decision was pronounced the appellee has asked for a rehearing, or if that could not be granted, for certain modifications of the decree.

The first ground assigned is that as the bill was dismissed as to Cunningham and N. and J. Dick and the cause remanded for further proceedings against Davidson, and as it appears that Davidson or the firm of which he is a member, is a creditor of Moore's estate, an account cannot be settled with the firm of Dicks, Moore & Co. if the bill is dismissed as to Moore's representative and N. and J. Dick. The bill was filed to charge the firm in its social character alone. The plaintiff did not seek to charge Davidson individually, or Moore's estate, or the firm, as a debtor or debtors of Davidson. This court has decided, that the firm was not responsible, but gave the plaintiff leave to proceed against Davidson. If he chooses to amend his bill, and pursue Davidson alone, and in the progress of the cause establishes his claim against him, and shews that others are his debtors, nothing in the decree rendered will prevent his making them defendants, and charging them on this ground. But the possibility of such a result cannot deprive the defendants of the benefit of the decree of the court upon the case as the parties have chosen to submit it.

66 \*The second ground requires a reconsideration of the whole merits. They have already been discussed and decided. The whole issue was the liability of the firm. The plaintiff was, by the whole tenor of the answer, put to the proof of every allegation tending to establish that liability. To remand the cause for further evidence, after a controversy so long protracted, upon the mere suggestion of counsel that such evidence may be in existence, and that too upon the sole point in controversy in the cause, would be to declare that chancery causes, already oppressive for delays, were henceforth to be interminable. The cases cited seem to me to have no application, and to have been decided upon the peculiar circumstances attending them. In *Cropper v. Burton*, the plaintiff had assigned a debt; his debtor proving insolvent; he satisfied his assignee, and filed a bill to set aside a fraudulent conveyance of the debtor. There was a general denial by infants, and strictly speaking the plaintiff was bound to prove his payment to his assignee. The debt, however, was not disputed; it had been secured by a mortgage,

upon which a decree of foreclosure had been rendered, and the claim in part satisfied. The real subject in controversy was whether the conveyances were fraudulent? The county court held they were; and upon an appeal, the chancellor reversed the decree and dismissed the bill because there was no proof of the payment by the assignor to the assignee. This court concurring with the chancellor, that the decree of the county court was erroneous in the absence of such proof, held it was too rigorous to dismiss the bill under such circumstances. The objection to the decree though fatal, was still one likely to have been overlooked. The money was due; the plaintiff or his assignee was entitled to maintain the suit; and so far as the defendants were concerned it must have been immaterial which recovered. Yet even in that case, Judge Carr doubted the propriety of sending the cause back; \*re-

67 marking that it would not seem to be the business of the courts to exercise this kind of guardianship over persons sui juris and able to take care of themselves. In *Beverly v. Ellis & Allen*, the appellees had petitioned the court for another hearing, alleging they could produce evidence that the contract between Carter Beverly and the appellant had been rescinded, and offering an excuse for not adducing the evidence sooner. The court satisfied that the appellees were entitled to recover upon the case as then made, refused the rehearing. This court held, that as the question itself upon which the case turned, was res integra, it would be hard on the appellees, having a decree in their favour, to deprive them of their other defence; and therefore reversed the decree because the chancellor had refused to rehear the cause. This case is totally different from either of those. Here there was no petition for rehearing. The question was one depending on the proofs. The plaintiff alleged a partnership liability; it was denied; and he was bound to sustain his allegations. He has chosen to rest his case upon the proofs in the record, and he must abide by them.

Another objection which the appellee now takes to his own decree, is that he obtained it improperly without due proof of publication against the absent defendants; that the certificate of the printer was not under oath. There was no exception to the certificate in the court below; and the record sets out, that it appeared to the court the plaintiff had proceeded in the manner prescribed by law. It seems to me this would have been a sufficient answer to an objection to the decree on that ground, if made by the appellant; much more when the appellee alleges it as an error in his own proceedings.

The last objection is, that N. Dick is dead. His death has not been suggested; if it is, the suit can abate as to him. In a pro-

68 ceeding to establish a claim \*against a firm, the surviving partners are the proper parties to contest the claim. To what purpose should the case be continued, to bring in the representatives of one of the partners, after it has been decided, that the firm is not responsible, and so decided in a case where the surviving partner is a party. The plaintiff alleges in the bill, that Moore's estate was alone solvent; he seeks for and takes a decree against his representative

alone; and the court having held that he was not responsible, because there was no partnership liability, it would seem to be doing a vain thing to set aside the decree, because it has since been ascertained that another partner was dead. If alive, the decree discharged him; and if his representatives do not claim to be made parties with a view to a proportion of the costs, the appellee cannot complain.

The motion is overruled.

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**\*Pigg v. Corder.**

March, 1841, Richmond.

(Absent, STANARD,\* J.)

**Specific Performance.—What Are Sufficient Objections to Decree for.**—Upon a bill by a son-in-law for specific execution of an agreement or promise of a mother-in-law, brought against her executor, legatee and devisee, after her death: if the terms of the agreement are uncertain—or, if it appear probable, that the promise was made to or for the benefit of the daughter, and not the son-in-law—or, if the plaintiff have delayed for an unreasonable time to assert his claim to specific execution—or if such a change of circumstances has occurred, that the object of the mother-in-law in making the promise, cannot be accomplished by specific execution; any of these considerations would be a sufficient objection to a decree for specific execution, much more, all combined.

**Same—Same.**—And per TUCKER, P., if the promise of the mother-in-law do not appear to have been intended by her as a binding contract, or if it be unreasonable, or if it was founded on no valuable, or on very inadequate, consideration; equity ought not to decree specific execution, but should leave the party to his remedy at law.

**Same—Variance between Pleading and Proof.**—Upon a bill for specific execution of an agreement, the

\*He had been counsel in the cause.

**\*Specific Performance—Discretionary Character.**—Every bill filed in a court of equity for the specific execution of a contract in relation to lands, calls for the exercise of the extraordinary jurisdiction of equity, and is an application to the sound discretion of the court. It is not a case requiring the interposition of the court *ex debito justitiae*, but rests in the discretion of the court, upon all the circumstances. This rule applies as well when the contract sought to be enforced is by parol and there has been part execution as to contracts in writing. *West Virginia O. & O. L. Co. v. Vinal*, 14 W. Va. 686, citing the principal case; *Anthony v. Leftwich*, 3 Rand. 238; *Willard v. Tayloe*, 8 Wall. 565; *McComas v. Easley*, 21 Gratt. 29.

The principal case is cited in *Rockecharlie v. Rockecharlie*, 2 Va. Dec. 586.

**Same—Requisites—Certainty—Variance.**—In order that a court of equity may specifically enforce a contract for the sale of real estate, the first essential is that the contract shall be established by competent proof to be clear, definite and unequivocal in all its terms. Moreover, the contract proved must be the contract charged in the bill. The principal case is cited, in support of this proposition in *Patrick v. Horton*, 3 W. Va. 24; *Baldenberg v. Warden*, 14 W. Va. 407; *Litterall v. Jackson*, 80 Va. 613; *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. 646, 18 S. E. Rep. 100; *Rockecharlie v. Rockecharlie*, 2 Va. Dec. 586.

**Same—What Adjustments Admissible.**—The principal case is cited in *Cox v. Cox*, 26 Gratt. 809, for the proposition that, where the substance of the agree-

ment alleged in the bill must be proved by the evidence, and specific execution can only be decreed of the same agreement so alleged and proved; it is error to direct specific execution of a different contract—per TUCKER, P.

Elizabeth, the widow of Hezekiah Pigg, married a second husband, Adin Gray, who died in 1816, and by his will gave his whole estate, real and personal, to his wife for life, with power to dispose of one moiety thereof, at her death, in any way or manner she should think proper. She died in 1827, and by her will, reciting the will of her second husband, and the power thereby given her, to dispose, at her death, of a moiety of his estate, she gave and disposed of the moiety thereof to her son, the appellant Clement Pigg, and gave him the whole of her own estate, and appointed him her executor.

70 She \*had many grandchildren, the descendants of the two other sons. The appellee Corder married Anne Pigg, the only daughter of Mrs. Gray, by her first husband; and she died before her mother.

In 1828, Corder exhibited a bill in the superior court of chancery of Lynchburg, against Clement Pigg the executor and sole devisee and legatee of Mrs. Gray, and others her

ment can be fully executed, and when a trifling adjustment only is needed to satisfy the equities of the case, performance may be decreed with satisfaction. If, however, the default of the plaintiff goes to the substance of the agreement, or if there be some things which he is bound to do and cannot do, or has not done, and the court cannot compel him to do, equity will not decree specific execution in his favor.

**Same—Laches.**—To the point that unreasonable and injurious delay on the part of the plaintiff in filing his bill for specific performance, may preclude a decree in his favor, see the principal case cited in *Ford v. Euker*, 86 Va. 79, 9 S. E. Rep. 500. The principal case is cited in *McCue v. Ralston*, 9 Gratt. 436.

See monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

**Same—Parol Gift of Land.**—As to the point that a child, who has taken possession and improved land under a verbal gift, may demand specific performance in equity from the parent, see the principal case cited in *Frame v. Frame*, 33 W. Va. 476, 9 S. E. Rep. 906; *Burkholder v. Ludlam*, 30 Gratt. 262. In the latter case the court said that there was nothing to be found in the principal case in conflict or at all inconsistent with the decision in *Shobe v. Carr*, 3 Munf. 10.

But in *Cox v. Cox*, 26 Gratt. 312, JUDGE STAPLES, delivering the opinion of the court, said: "This court has repeatedly expressed its disapprobation of those pretended contracts based upon declarations by parents of intentions to make certain specific provision for children, in consideration of supposed services rendered or sacrifices made by the latter. Such promises are generally made in the freedom and confidence of domestic intercourse, and without a suspicion that they constitute legal obligations. The efforts constantly made to enforce them fully vindicate the statute of frauds and perjuries. Reed's heirs v. Vannorsdale & wife, 2 Leigh 509; *Pigg v. Corder*, 12 Leigh 69."

See the principal case cited in foot-note to *Parrill v. McKinley*, 9 Gratt. 1.

Upon the general subject of "Specific Performance," see monographic note appended to *Hanna v. Wilson*, 3 Gratt. 243.

heirs at law and next of kin; wherein he alleged, that he having married Anne Pigg, the only daughter of Mrs. Gray, and having with his wife and family removed to and settled in Kentucky, where he was doing well, Mrs. Gray, in October 1816, wrote him a letter (which had been lost or mislaid, but its contents could be proved) wherein she promised or offered, that if he would sell out his property in Kentucky, remove back to the county of Pittsylvania, Virginia, and settle there beside her, she would give him, Corder, and his family, one third of the whole estate which she at her death would have a right to dispose of; that in consequence of this assurance, Corder sold his property in Kentucky at a sacrifice, removed with his family back to Pittsylvania, and settled there near Mrs. Gray; that Mrs. Gray, in part compliance with her promise, laid off 200 acres of land for him, built a house upon it, and put him in possession thereof, but did not make him a conveyance of the same; that she afterwards brought an ejectment against him for the land, which was pending at her death, and was still pending. That shortly before Corder removed from Kentucky, he being in Virginia, and on a visit to his mother-in-law Mrs. Gray, she gave him a female slave named Charity, who had since had two male children; that Mrs. Gray intended to deliver him possession of the woman Charity, when he should return with his family to Pittsylvania, and to retain till then the possession for him; but that, in fact, she never delivered the possession of the slave to him; he had demanded the slave of Mrs. Gray,

71 but she refused \*to deliver her, and retained the possession of her and her increase as long as she lived. And that Mrs. Gray died many years after these transactions, and by her will gave her whole estate, and all which she had power to dispose of to her son Clement Pigg, and appointed him her executor. And the bill prayed specific execution of Mrs. Gray's alleged promise or contract of October 1816, above stated; a decree for one third of her estate, and of all the property she had a right to dispose of, and for the slave Charity and her increase, and the profits thereof; and general relief.

Clement Pigg (the only defendant who had any interest in the subject), in his answer, controverted the facts alleged in the bill, touching the promise or contract of Mrs. Gray of October 1816, and insisted, that, even if the facts were true, Corder was not now, under the circumstances, entitled to the relief he prayed; that his neglect to assert his claim during so many years while Mrs. Gray was living, and the change of circumstances (his wife being now dead), were decisive objections to specific execution of such a contract. And he relied on the statute of limitations as a bar to the claim to the slave Charity and her increase. The cause was transferred, in 1831, to the circuit superior court of Pittsylvania. The letter of Mrs. Gray of October 1816 mentioned in the bill, not being produced, nor its contents satisfactorily proved, the court, on a hearing in June 1832, dismissed the bill. But Corder, having afterwards found that letter, filed a bill of review, by leave of the court, exhibiting the letter; and the controversy was renewed.

The document now exhibited, and the prin-

cipal and the only written evidence of the contract alleged in the bill, was a letter of Mrs. Gray, dated the 19th October 1816, addressed "to Shadrach Corder and Nancy his wife," in the following words:

72 \*'"Honored son and daughter—I am glad to embrace the opportunity of writing a few lines to you, to let you know that we are all well at present, thanks be to God for his blessings; hoping that you are enjoying the same state of health. Dear daughter, I want to inform you, that when Mr. Corder was in here last summer after the negro girl Charity that I give her, that he and I made a bargain for him and his family to remove back from the state of Kentucky. I have promised him, that if you did move back here, that I would give you 200 acres of land, and have a house built on it, and the third part of all my estate, as my husband has died, and has left me one half of the estate to do with as I think proper. I am to give Mr. Corder all my hands and plantation, with two mills, as long as I live; and all he can make over and above supporting the family, is to be his own. Also, my dear daughter, I don't want you to regard your property you have gathered in that part of the world—but I would part with it on the best terms I could, and move in here—I have a plenty, and you shall have it; and my house shall be your home as long as you live. Still I want you to build on your own land that I have given you. Will write you another letter in full in a short time. No more at present, but still remains your loving mother till death. (Signed) Elizabeth Gray."\*

This letter was written for Mrs. Gray by one Hutchings, by whose deposition it was identified; and he deposed that it was written at, and agreeably to, her request. It was proved, that she was extremely illiterate. Another witness, named Lovell, deposed, that Corder, not long after the date of the above letter, shewed him two letters from Mrs. Gray; one of which (now said to be lost) purported to explain her views more 73 fully than the \*letter of the 19th October 1816. That other letter was never produced, nor did Corder give any account of it, except that he said it had been lost.

The deposition of several witnesses, examined on behalf of Corder, were filed, to prove declarations of Mrs. Gray, sometimes in Corder's presence, sometimes when he was absent. These declarations of Mrs. Gray, as stated by the several witnesses, were somewhat variant from each other: they, however, amounted to this, that Mrs. Gray admitted, that she had written the letter of the 19th October 1816 to Corder and his wife; that she had induced Corder to sell off his property in Kentucky, and come back with his family to Pittsylvania, by promising that she would give him possession of her plantation and slaves, and put the whole under his management, and let him take to his own use whatever he could make over and above the support of his and her family; that it was her intention to give Corder and

\*The letter was so ill-spelt, that there was some difficulty in making out the words intended by the writer. The spelling has been corrected; but the copy in the text is in other respects exact.—Note in Original Edition.

his wife one third of her estate, but so to give it that Corder should not have a right in it (for fear that if she gave him such right, he might sell it, and go off to the west again), and yet he should enjoy the use of it during his life; that she intended to lay off 200 acres of land, and to add Corder in building a house upon it, but she did not intend to vest the right in Corder, "so that he could make way with it," but he should have his lifetime in it, and at the death of Corder and his wife, she intended to give it to their son Francis Corder.

It was proved, that Corder and his wife left Kentucky, and returned to Mrs. Gray's house, in January 1817, and lived for about a year with her; that she at first put all her property into Corder's hands, and gave him the entire management of it, and Corder made one crop; that, in the mean time, Mrs. Gray had 200 acres of land laid off, and aided Corder in building a house upon it; that after the expiration of about a year, Corder and Mrs.

Gray disagreed; and then he and his family \*removed from Mrs. Gray's house to the house which had been built on the 200 acres of land that had been laid off for them, and Corder occupied that house and enjoyed the use of the 200 acres of land till his wife died; after which Mrs. Gray brought an ejectment for the land, which was pending when she died, and still pending when Corder brought this suit.

It was proved, that a conveyance of the 200 acres of land had been prepared to be executed by Mrs. Gray, but she said "she had willed it" to Corder and his wife "in the same way, and it was not necessary to sign the deed."

This 200 acres of land was about one half of the land of Mrs. Gray's second husband Adin Gray, of which by his will she was authorized to dispose of a moiety in fee.

All the property which Corder had in Kentucky, consisted of two wagons and teams, about thirty heads of cattle, and a stock of hogs. He retained one wagon and team, with which he removed his family to Virginia; the other wagon and team, and his stock of cattle and hogs, he sold in Kentucky, but there was no proof that he sold them at less than their value.

A witness named Sally Owen, examined for the defendant, deposes, that she was present at a conversation between the plaintiff Corder and Mrs. Gray, when he was at her house on a visit previous to his removal from Kentucky: in which Mrs. Gray told Corder to tell his wife (her daughter), that Mr. Gray her deceased husband had given her his whole estate during her life, and one half of it to dispose of as she pleased at her death; and that if she (the daughter) would remove back to Pittsylvania, her (Mrs. Gray's) house should be her home; that she would employ him (Corder) as her overseer, and all above the support of her family should be his as long as they could agree, and if they could not agree, she would build her

(the daughter) a house on \*some part of her (Mrs. Gray's) land, so that she should have a home during her life; and that she intended to give her (the daughter) one third part of her estate for her and her heirs, but that Corder himself should not be one dollar the better thereby, as he had spent

too much of her money already. That Mrs. Gray also desired Corder to tell his wife, not to regard disposing of her property, but to come as light as possible, as she (Mrs. Gray) had a plenty here, and would furnish her.

It appeared in proof, that Mrs. Gray had lent Corder 450 dollars to pay a debt he owed, for which he promised her security; that she afterwards demanded the money, and brought a suit for it, and that this claim was adjusted between them by arbitration.

It appeared, that Corder had children by his wife; but whether those children or any of them survived her, did not appear.

With regard to the woman slave Charity, it was proved, that Mrs. Gray admitted, at the time of Corder's visit to her previous to his removal from Kentucky, that she had given him, or given his wife, the woman Charity, and told him he was at liberty to take her to the west with him; but she said, that as he had concluded to return and settle in Pittsylvania, it was unnecessary to incur the expense of carrying her to Kentucky; and, therefore, he did not take her away. But possession of this slave was never, at any time, actually delivered to Corder or to his wife; on the contrary, Mrs. Gray retained the possession, without interruption and without any claim set up by Corder. The woman Charity had two male children after the alleged gift to Corder, one of whom was sold by Mrs. Gray in her lifetime; of Charity, and her other child, Mrs. Gray held possession as long as she lived, and died in possession, and they came to the hands of the defendant as executor and legatee of his mother. The defendant had sold Charity, but still held one of her children.

76 \*On the hearing in 1837, the circuit superior court decreed, that the defendant should convey to Corder for his life, the 200 acres of land above mentioned, and should deliver to him the child of Charity which he yet held, and render an account of the prices for which the woman Charity and her other child had been sold, and the dates of the sales thereof.

Pigg applied to this court for an appeal from the decree; which was allowed.

Leigh, for the appellant.

R. C. Stanard, for the appellee.

ALLEN, J. I am of opinion, that the decree in this case should be reversed and the bill dismissed.

It is an application for the specific execution of a contract alleged to have been made with the appellee, or with him and his wife, by his mother-in-law Mrs. Gray. Judge Carr, in *Anthony v. Leftwich*, 3 Rand. 245, says, "Every bill calling for the exercise of this extraordinary jurisdiction of equity, is an application to the sound discretion of the court. It is not a case requiring the interposition of the court *ex debito justitiæ*, but rests in their discretion, upon all the circumstances." And among the objections which he enumerates to the interference of the court, were, 1. the uncertainty of the agreement; and 2. the time suffered to elapse before the filing of the bill. Both apply with great force in this case. To which may be added the complete change of circumstances in the situation of the parties before the bill was filed.

The agreement relied on is contained in a

letter from Mrs. Gray to the appellee and his wife, dated the 19th October 1816. It was not written by Mrs. Gray, who was an illiterate woman, and, upon its face, is manifestly the production of a most unskillful draftsman. The witness Hutchings deposes,

77 that he wrote it in pursuance \*of the instructions of Mrs. Gray; but it is very doubtful, whether a writing drawn up by one so unaccustomed to write, could be relied on as expressing her real intentions. It is proved by the witness Lovell, that not long after the date of this letter, the appellee shewed him two letters from Mrs. Gray, one of which (said to be lost) purported to give the views of Mrs. Gray more fully than the letter filed. Another witness, Sally Owens, proves, that she was present at a conversation between the appellee and Mrs. Gray, when he was in Virginia, on a visit from Kentucky, the time when the agreement was made, which is referred to in the letter of the 19th October 1816. In this conversation, Mrs. Gray told the appellee to inform her daughter, what she intended to do for her if they returned, but added, that the appellee should not himself be one dollar the better thereby, as he had spent too much of her money already. From this evidence, it appears the plaintiff was in possession of another letter, which he has not produced, and which, according to the evidence of Lovell, set out the agreement more fully than the letter he has produced; but what that agreement was we know not. And the evidence of Owens, confirmed by the whole current of the proofs, even by the letter of the 19th October 1816, shews, that the daughter was the object of the mother's bounty: it was for her she intended to provide; and she did not contemplate any provision for the appellee distinct from her. It was contended in argument, that the letter contained either a promise to give the land to the husband, or to the husband and wife. I think the promise was intended for the wife alone, especially when the letter is taken in connection with the other proofs in the case. But the uncertainty which rests upon the character of the promise, is of itself a strong objection to the relief prayed; and this uncertainty, taken in connection with the circumstances, that the letter was not written by Mrs. Gray,

78 but by another \*person who may have misapprehended her views, and that another letter was written stating the terms of the contract more fully, and perhaps differently, which letter is not produced, furnishes to my mind an insurmountable obstacle to the exercise of the jurisdiction of a court of equity decreeing a specific execution.

Then, as to the time; the letter is dated in October 1816. The appellee returned to Virginia in January 1817. He remained with Mrs. Gray that year; they quarrelled and separated; controversies arose between them; a suit was instituted against him by Mrs. Gray, for a large sum she had lent him, which was settled by arbitration. All this occurred many years before Mrs. Gray's death; and this suit was not commenced until November 1828. There was no reason for such long delay. "It is laid down generally," says Judge Carr, (in *Anthony v. Leftwich*) "that he who comes for a specific execution, must not sleep on his case, but

come recently. Time is pretty certain to operate a change in the circumstances of the parties, and the situation of the subject matter of the contract. It destroys evidence; it cuts off the parties to the transaction; and their successors know not how to explain what they might have made perfectly clear." All this has occurred in the present instance. Mrs. Gray is dead: her daughter, the object of her solicitude, is dead; evidence which is shewn to have once existed is lost, or perhaps withheld; and the property has been disposed of to another. There could have been no considerations of good will or friendship, which restrained the appellee from asserting his rights at an earlier period, for they had differed and were at law. Such gross negligence, if there were no other objection, should prevent the interference of a court of equity.

And in the last place, there has been an entire change in the circumstances of the parties. Mrs. Corder is dead. Mrs. Gray's promise was made to provide her with  
79 a \*home. The evidence shews she did not contemplate any permanent provision for the appellee, except so far as he might be benefited by the provision for his wife. To permit him now to assert the contract, would, under the changed condition of the parties, violate the intention of the party by whom the promise was made.

As to the slave Charity and her increase: there are two objections to the relief granted, either of which is decisive. To constitute a valid parol gift of slave property, there must be a delivery. Here no delivery was made; the slave never left the possession of the donor. It was nothing but a promise to give, and being without consideration never could be enforced. In the second place, if there had been a delivery, the slave was instantly returned and continued in possession of Mrs. Gray until her death; and though the bill avers a demand, and her refusal to give her up, no suit was brought for more than ten years after the alleged gift. In the mean time, Mrs. Gray sold one of the slaves, and she died in possession of the other two. If the appellee ever had a claim, it is barred by the statute of limitations, which is relied on the answer.

CABELL and BROOKE, J., concurred.

TUCKER, P. Whether the evidence in this record establishes any claim against the appellant or not, it is apparent, that, upon legal principles, this decree can never be supported. The bill set up one claim, the testimony goes to prove another, and the decree is for a third. The bill alleges a promise to give one third of the estate which Mrs. Gray had a right to dispose of, to the plaintiff, Corder; the letter produced as evidence of the contract, goes to prove, that Mrs. Gray had promised not one third of her estate, but 200 acres of land definitively, and this was to be given not to Corder himself but to his wife; and the decree is for a  
80 life estate \*to Corder in the 200 acres of land. These discrepancies are fatal to the case, unless we discard at once those principles which require the proofs to correspond with the demand, and the relief afforded to be consistent with both. If, then, there were nothing more in the case, I should



be of opinion to reverse the decree and dismiss the plaintiff's bill.

But the objections to his case are yet more radical. Whether we consider the paper called the contract, or its reasonableness, or the consideration of it, or the performance on his part by Corder, or his delay in asserting his rights, or the evidence afforded by that delay of abandonment, we must come to the conclusion, that this is no case for specific execution.

With respect to the letter itself, which is introduced by the bill of review, and which supersedes all the oral testimony as to the contract, I am of opinion, that it ought not to be taken to be, in itself, a contract binding Mrs. Gray. I have always thought, that the loose dicta of some of the judges in *Rowton v. Rowton*, 1 Hen. & Munf. 91, were calculated to give rise to claims on the part of children and sons-in-law, to conveyances, upon pretended contracts, sustained by evidence of loose family conversations or correspondence, and of abandonment of imaginary profits in consideration of the promise of a title to real estate. I have always thought there was much good sense in the remark of Chancellor Kent, "that it would be injurious to that freedom of intercourse, and to the operation of those kind and generous affections which ought to be cherished in the circle of domestic connections, to deduce a trust from loose and general expressions in a confidential correspondence, between one member of a family and another, and to give them the force of legal obligations." 5 Johns. 13. What parent could address a letter to his child in the free and unreserved language of affection, if he is to be trepanned into a contract by every expression of favorable intentions

81 \*towards his offspring? What parent, in the use of such expressions, means anything more, than to indicate that, in the exercise of his own free will—in the fulfilment *ex mero motu* of his parental obligations to provide for his child—it is his purpose to make a particular provision. What parent, by such language, conceives himself tied down by an obligatory contract, for which he has received not a stiver, merely upon the pretence that his son has given up some scheme of fancied profit to gratify a father's wishes? The natural interpretation of all such transactions is the reverse of this. If I were even to propose distinctly to my son-in-law, that if he would leave the place in which he resides and settle my daughter near me, I would give her a particular estate, it might, nevertheless, admit of doubt, whether without some definitive arrangement, the parties would have an obligatory claim upon me, or must look altogether to the exercise of my untrammelled discretion in the bestowal of this gratuity. The latter would be the fair inference, at least where instead of asserting their rights in my lifetime they lie by till my death, depending upon my voluntary act, and setting up no pretence to bind me until the grave has closed upon me and on their hopes. It is then too late to demand from my justice what in my lifetime they had looked to only from my affection and munificence. The ordinary principles which require promptness in the assertion of the right to specific performance,

apply with peculiar force, where no consideration is given, and where from that circumstance there is always reason to doubt, whether there was any intention in the parent to bind himself irrevocably by contract.

In the present case, indeed, there are strong expressions which have been relied on to prove there was a contract. Mrs. Gray says, that Corder and herself made "a bargain." But, besides that this form of this expression, in familiar use, does not always mean a technical contract, 82 \*it would be going far indeed, to take this most inartificial letter, of a woman who could not write, written by a scribe who could not spell, and the terms of which are not defined, to be a contract binding her absolutely, without consideration save love and affection, to convey the whole of the land she had to dispose of, to her daughter, when she had three sons, or their descendants, to provide for. Add to this, that in the bill itself, and in the evidence of various witnesses, it is stated, that Mrs. Gray was to convey one third only of what her second husband left her, and not the 200 acres (which was all the land in which she had a fee under his will); and we may well question, whether this paper contains the true understanding of the parties. But every doubt is removed, when we see that she promises "to write another letter in full in a short time," and when we find that she did write another letter, which explained her views more fully, and which the plaintiff has not produced. Whether he has suppressed it, or has not taken care of it, because he looked upon neither of the letters as of any importance, it is not necessary to enquire. On the ground, therefore, that it does not satisfactorily appear that this letter does contain the real contract of the parties, if any, and that it is of itself doubtful and uncertain, I should be clearly of opinion to deny the relief asked by the bill, or that given by the decree.

There are, however, other vital objections to the plaintiff's case. What was the consideration of this pretended contract? There was none moving to her, except affection for her child; and it is therefore attempted to supply the want of it, by his pretended losses and sacrifices in the sale of his property in Kentucky. His property consisted of little more than two wagons and two teams; and there is no proof that these were sacrificed. What adequate consideration then was there for the conveyance of a tract of 200 acres of land and other

83 \*property? It is said he sacrificed his prospects. What those prospects were, does not appear. From his past successes, they could not have been very flattering. But be this as it may, a decree for specific performance, being a matter of discretion, a court of equity will never make it, where the consideration is inadequate, but will leave the party to his action for damages for the breach of the contract. And this is the more proper, where the contract was in its origin unreasonable, where the lapse of time and change of circumstances have rendered it more so, where the evidence of performance on his part by the plaintiff is at least unsatisfactory, and the presumption of his



abandonment of title, if he ever imagined he had any, is well nigh conclusive. Was it reasonable, in the first instance, that Mrs. Gray should have promised to give to her daughter and son-in-law, the whole of her disposable lands, when she had sons and grandchildren having equal claims upon her affections? Was it reasonable, that she should be compelled to do so for the imaginary sacrifices made by her son-in-law in his property and his prospects? and this too, without any security provided by the contract, that as soon as he had got the title he would not sell the property and move out again to the west? Was it reasonable to enforce the contract in favour of Corder when the main objects of Mrs. Gray, the desire, namely, of her daughter's society, and of his services in her family, were frustrated by the quarrel between them in a few months, arising as it seems to me from his own misconduct? And would it now be reasonable, after the death of Mrs. Gray, and of her daughter, and the laches of the plaintiff, to assert his claims until ten or twelve years had elapsed, and the other contracting party was in her grave? I think not, and have no hesitation in saying that as to the land, the decree should be reversed and the bill dismissed.

84 \*I am also of the same opinion as to the slaves, for the reasons so well presented by my brother Allen in his views of the plaintiff's pretensions.

Decree reversed, and bill dismissed.

#### Mason v. Farmers Bank at Petersburg.

March, 1841. Richmond.

(Absent CABELL and STANARD,\* J.)

#### Branch Banks—How Sued—Construction of Statute.†—

Upon the construction of the statute of March 19, 1832, "authorizing suits against branches of banks in this commonwealth:" HELD, a suit cannot be maintained against the president and directors of the branch; the suit must still be brought against the principal bank by its corporate name.

Same—Same—"President and Directors"—Error—Jeofails.—And where a suit is brought against the

\*STANARD, J., had been counsel in the cause.

†"Farmers' Bank of Virginia"—Suit by That Name—Objection on Appeal.—It was held in *Farmers' Bank v. Willis*, 7 W. Va. 32, 52, citing the principal case, that when "The Farmers' Bank of Virginia," by that name, brought suit, and the defendants made no objection, on that account, but pleaded in bar, and agreed the facts, using that name, and the "president, directors and company of the Farmers' Bank of Virginia," indiscriminately, as the name of the same corporation, and submitted the case to the court, which gave judgment in favor of the bank; the defendants, who appealed, cannot, in the appellate court, object successfully to the name in which the suit was brought.

Corporations—Must Sue and Be Sued in Corporate Name.—The principal case is cited in *Stewart v. Thornton*, 75 Va. 217, to the point that a corporation must sue and be sued in its corporate name. The principal case is cited in 1 Va. Law Reg. 548. See monographic note on "Corporations (Private)" appended to *Slaughter v. Commonwealth*, 13 Gratt. 787.

No Cause of Action Alleged—Statute of Jeofails.—See foot-note to *Boyles v. Overby*, 11 Gratt. 202. The principal case is cited with approval in *Robrecht v.*

president and directors of a branch bank, this is not a mere misnomer, which must be pleaded in abatement, but is a bar to any recovery; and though a verdict be founded upon the general issue pleaded, the error is not cured by the statute of Jeofails.

Same—Same—Same—Costs.—In such case, however, the defendants cannot have judgment for costs; for they can no more have judgment against the plaintiff, than he can have judgment against them.

The Farmers Bank of Virginia is a body corporate, chartered by act of assembly, by the name and style of "The President, Directors and Company of the Farmers bank of Virginia." And the bank is authorized and required by its charter, to establish, and has in fact established, offices of discount and deposit at several places, and among others at Petersburg. These offices, or (as they are commonly called) branches of the bank, are each under the management of a president and directors \*appointed by the stockholders in pursuance of the charter of the bank. But the president and directors of the respective offices or branches have never themselves been incorporated by such names, as independent bodies: they are only officers of the Farmers bank.

Mason brought an action of assumpsit in the circuit superior court of Petersburg, to recover a large sum of money, which he claimed as having been deposited by him in the Petersburg office. The process was served on the president of that office. And the first count of his declaration was in these words: "Peyton Mason complains of the president, directors and company of the office of discount and deposit of the Farmers bank at Petersburg, in custody &c. of a plea of trespass on the case: For that whereas, heretofore, to wit, on the 12th day of February 1812, the general assembly of Virginia passed a law and granted a charter, incorporating a company under the style and denomination of The Farmers Bank of Virginia, to be under the control of a president, directors and company, and among other things it was enacted and ordained that there should be established in the town of Petersburg, an office of discount and deposit of the said Farmers Bank of Virginia, and whereas the said Peyton Mason, the plaintiff, became a dealer at the said office of discount and deposit, to wit, on the 1st day of January 1829, and on divers days and times subsequent to the date aforesaid, amounting to the sum of 50,000 dollars, and the said sum of money being so deposited, the said president, directors and company became

*Marling*, 29 W. Va. 774, 2 S. E. Rep. 831; *Boyles v. Overby*, 11 Gratt. 206. See the principal case distinguished in *Hollday v. Myers*, 11 W. Va. 288, 290; *Spengler v. Davy*, 15 Gratt. 397, 398. In the latter case, *JUDGE DANIEL*, after reviewing the principal case, *Ross v. Milne*, 12 Leigh 204, and *Boyles v. Overby*, 11 Gratt. 202, said: "In neither one of these cases was there any room for the inference of facts, supplementary to and consistent with those alleged by the plaintiff, that could make out a good cause of action. In each case, the allegations of the plaintiff showed affirmatively that he had no right to recover."

See monographic note on "Amendments" appended to *Snead v. Coleman*, 7 Gratt. 300.

indebted to the plaintiff in the said sum of 50,000 dollars, and being so indebted, assumed upon themselves, and then and there, to wit, on the day, month and year aforesaid, at the town of Petersburg aforesaid, undertook and promised to pay to the plaintiff the aforesaid sum of 50,000 dollars, when

they the defendants should be thereto afterwards required." \*There were three other counts, in all of which the plaintiff in like manner counted on the assumpsit of the defendants. "By reason whereof and of the act of assembly in such case made and provided, an action hath accrued to the plaintiff to demand and recover from the defendants the aforesaid several sums of money." Nevertheless the defendants not regarding their said several promises and undertakings, but contriving &c. to deceive and defraud the plaintiff in this behalf, have not as yet paid the said several sums of money or either of them, or any part thereof, to the plaintiff, though often requested to do so, but the defendants to pay him the same have hitherto wholly neglected and refused, and still do refuse" &c. The record stated that the defendants appeared by attorney, and pleaded the general issue. At the trial the jury found a special verdict, and referred the question to the court, whether upon the facts found, the plaintiff was entitled to recover the money he claimed. The circuit superior court decided the case upon the merits, and holding that the law was for the defendants, gave them judgment for the costs. The plaintiff applied to this court for a supersedeas; which was allowed.

The question on the merits (namely, whether upon the facts found in the special verdict, Mason was entitled to the money he claimed) was a very important and interesting question of law; which was elaborately argued by Macfarland for the plaintiff in error, and by R. C. Stanard and Taylor for the defendants; and Leigh for the plaintiff was proceeding in the reply, when he was stopped by the court; which suggested, that, upon the construction of the statute of 1831-2, ch. 75, Sess. acts, p. 68, though in a controversy with any of the banks of Virginia arising out of transactions between the plaintiff and any one of the branches of the banks, the plaintiff might bring his suit in the court of \*the county or corporation where the branch was established, and his process might be served upon the president or cashier of the branch, and his execution might be levied in the county or corporation where the judgment should be obtained; yet the suit must be brought against the bank itself, which was the only corporate body responsible for all debts contracted by each of its branches in the course of their dealings, not against the president and directors of the branch, which were not corporate bodies, nor any way responsible for such debts. And the court referred to the case of *Tompkins v. The Branch Bank of Virginia*, 11 Leigh 372, where it was so decided.

The counsel for the plaintiff endeavored to obviate the objection to the regularity of the proceedings, on various grounds; relying, chiefly, upon a distinction they took between

the case of *Tompkins v. The Branch Bank of Virginia*, where there was a demurrer to the declaration, and the present case, where there was a verdict; and insisting, that, as this was "a defect in the declaration, whether of form or substance, which might have been taken advantage of by a demurrer, and which had not been so taken advantage of," the irregularity was cured by the verdict, by the provision of our statute of jeofails, 1 Rev. Code, ch. 128, §103, p. 512.

TUCKER, P. The argument on the merits of this case has been suspended, for the purpose of settling a preliminary question as to the character of the action. It is a suit brought, not against The Farmers Bank of Virginia, which is a chartered institution, but against the branch of that bank at Petersburg, which is not a corporation in itself, but is only an agent of the corporation. Looking to the charter (which though not found in the verdict, is a public law of which we must take notice, *Stribling v. Bank of the Valley*, 5 Rand. 132,) the court must know that The Farmers Bank is a chartered \*institution, and has a branch established by law in the town of Petersburg. Two questions then present themselves: 1. Whether an action can be maintained against the president and directors of the office of discount and deposit at Petersburg? and 2. Whether this action is so brought?

As to the first, it may be considered as definitively settled by the judgment of this court in the case of *Tompkins v. The Branch Bank of Virginia*; in which two judges, who did not sit in that cause, express, in this case, their entire concurrence. The grounds upon which that decision was made are believed to be unassailable; and we see no reason to depart from a precedent, which has settled a point of practice and the construction of a statute, for the future government of the profession.

2. Is this an action against the corporation itself, or is it an action against the branch bank? To this it may be answered, in the first place, that there is no sensible distinction in this respect, between the case at bar and that of *Tompkins v. The Branch Bank of Virginia*, so that, without more saying, that case would determine this. But, secondly, a reference to the declaration ascertains beyond question, that the demand is against the branch and not against the corporation, and the assumpsit is laid accordingly. [The judge quoted the words of the declaration, and said] Language cannot be more plain, and argument would be thrown away in an attempt to prove more clearly, that the action is against the Branch Bank, and not against the corporation itself. It is against the agent, not against the principal. The two boards are distinct, composed of distinct and different individuals, with different powers and authority. The Mother Bank represents the corporation: the Branch Bank does not; it is the mere agent of the corporation, appointed by the stockholders indeed, but only for the management of the branch, "under such agreements \*and subject to such regulations as shall be deemed proper, not contrary to law or to the constitution of the Bank." Hence it is obvious, that the two bodies of

directors are distinct, and that a suit against the president and directors constituting the bank agency at Petersburg, cannot be a suit against the president directors and company, representing, and indeed constituting the corporation itself. There is, indeed, a further distinction between the Branch and the Bank itself, in their name and style: the true name and style of the former is "The president and directors of the office of discount and deposit;" the style of the latter is "The president, directors and company of the Farmers Bank of Virginia." The Branch Bank is not the company; and the words "and company" are in the declaration improperly added to their style. Strike them out, and the company is not sued: insert them and you erroneously bind up with the company as constituting the corporation, not those who do constitute it, but a set of mere agents who do not.

Many ingenious suggestions have been made for transposing the words of the declaration, so as to make this an action against the corporation. It would be useless to examine them in detail, and to prove their unreasonableness. Suffice it to say, that where the meaning of words is plain, there can be neither necessity nor propriety in additions, transpositions, and rejections as surplusage, for the purpose of meeting the exigencies of a plaintiff's case. Such is the case here. There is no room for difficulty or doubt, as to the true interpretation of this declaration; and I cannot therefore consent to tear words from their context in one place, and insert them in others, or to reject words as surplusage, in order to make it that which it is not. Nor can I admit for a moment, that this is to be likened to the construction of wills &c. The very authority cited at the bar, repels the idea. "There is a difference between writs, declarations &c. and leases and obligations; for if the name

90 \*of a corporation be mistaken in a writ, a new writ may be purchased of common right, but it were fatal if mistaken in leases and obligations, and the benefits of them would be wholly lost; and therefore, one ought to be supported and the other not." 10 Co. 125; Gilb. C. B. 234, cited 1 Bos. & Pull. 42; 4 Bac. Abr. Misnomer & Addition D. p. 760.

It was argued, that the error here is cured by the statute of jeofails. This can only be supported upon what I conceive to be a misconception of the character of the error. It seems to be supposed, that this is but a case of misnomer, which the party must object by plea in abatement. But in my judgment the error lies deeper, and is more fatal. There is, indeed, a misnomer of the Branch Bank in the addition of the words "and company:" and this, I concede, might be stricken out. But the essential error is, that the suit is brought against defendants who have no corporate character, and yet not against them in their individual characters. Considering the defendants as the Branch Bank (the mere agent of the corporation), and not as a corporation itself, it is a non-entity, incapable of suing or being sued, and incapable of contracting, except on the part of the corporation itself. The declaration makes a demand against parties, who cannot be made liable to an action, and against whom no

judgment can ever be rendered. Now, where this is the case, the defect is beyond the cure of a verdict, or of the omnipotent statute of jeofails. "No proof at the trial can make good a declaration, which contains no grounds of action on the face of it;" *Rush-ton v. Aspinwall*, 2 Doug. 679, and there can be no ground of action against persons who cannot contract but as agents for others, and are incapable of being sued.

The same answer may be given to the cases which have been cited. They were cases of mere misnomer. In one of them, *The mayor and burgesses of Stafford v. Bolton*, 1 Bos. & Pull. 40, a part of the 91 plaintiffs' name, viz. "of the county of Stafford," was omitted. *Eyre, C. J.*, said—"A corporation is a mere creature of the crown, having no essence but what is derived from its name. On strict reasoning, therefore, I should be inclined to think, that if a corporation sued by a name that did not belong to it, it would be as nothing." And a fortiori, if it were defendant, for a judgment against a non-entity would be null: it could not be carried into effect; or if attempted to be executed upon the effects of a real corporation, it would be no protection to the officer against their action. "In the case" (continues the judge) "of a mistake in the name of an existing person having a right to sue, it may be pleaded in abatement. But the case in *Brooke*, Misnomer 73, seems to put a corporation in the same situation with a natural person as to pleas in abatement: where it is said, in an action by a corporation or a natural body, misnomer of one or the other goes only to the writ; but to say, that there is no such person in *rerum natura*, or no such body politic, this is in bar, for if he be misnamed, he may have a new writ by the right name; but if there be no such body politic, or such person, then he cannot have an action. 22 Ed. 4, ch. 34." And *Buller, J.*, says, "To make it pleadable in bar, it must appear that there is no such corporation. The year books are decisive." *Heath, J.*, was of the same opinion. If then the Branch Bank is sued, and it be no corporation, then the defence is matter of bar, and not of abatement; for if it be matter of abatement, the defendants must give the plaintiffs a better writ; not by shewing that another person, natural or artificial, is liable, but by admitting their own liability, and giving their true name by which they should be sued.

What has been said is a sufficient answer to the other cases cited. Upon the whole I am well satisfied that the objection is fatal, and whenever disclosed is sufficient to defeat the action. It is matter of bar and as 92 \*such may be taken advantage of under the plea of non assumpsit, since it shews the defendants never could have assumed in the character in which they have been sued. Moreover, from what has been said, it is clear, that no judgment can be rendered against the corporation since it has not been sued. Nor can any valid judgment be rendered against the defendants, either as natural persons, for they are not sued as such, or as artificial persons, for as such they are not known to the law.

I am of opinion, upon the whole, that judg-

ment was properly given for the defendants; but it should have been without costs; for they are no more entitled to a judgment, than they are subject to one.

BROOKE, J. The preliminary question which has been raised is not a question of jurisdiction, but is nothing more than whether the suit has been properly brought against the proper parties. I therefore preferred, that the cause should be fully heard upon all its merits; but as that has not been the pleasure of the court, I shall confine myself to the question of practice.

I think the case of *Tompkins v. The Branch Bank of Virginia* was properly decided; and it is conclusive of the point. At first, I was under the impression that this case differed from that in a material circumstance—that there, the point was presented by a demurrer to the declaration; whereas here, there is a special verdict, so that the error might be cured by the statute of jeofails. But upon reflection it seems to me very clear, that the error is not one that can be so cured. The error is, that the suit is brought against persons who have no existence, natural or corporate; against the president and directors of the office of discount and deposit of the Farmers Bank of Virginia at Petersburg, not by their names as natural persons, but as a corporation, which they certainly are not. Such an error cannot, upon the broadest construction of the statute of jeofails,

93 be comprised \*among the errors therein mentioned which shall be cured by a verdict. No judgment can be entered upon pleadings and verdict against fictitious or non-existent parties. I concur, therefore, in the opinion, that the judgment must be reversed; though upon the merits of the case, if the suit had been brought against the proper parties, I am not prepared to say, that the plaintiff would not have been entitled to recover.

ALLEN, J., concurred.

Judgment affirmed, so far as it held that the plaintiff take nothing by his bill, but reversed so far as it gave the defendants their costs.

### Greensville Justices at the Relation of Robinson's Adm'r v. Williamson & Others.

March, 1841. Richmond.

**Administration Bond—Sureties—Motion for Counter Security—New Bond—Nul Tiel Record—Variance between Pleading and Proof.**—In debt on an administration bond against the adm'r and his sureties, defendants plead in bar (upon the statute 1 Rev. Code, ch. 104, § 38, 39,) that upon petition of G. one of sureties to the county court, setting forth that he was bound as one of the sureties of the adm'r and conceived himself in danger of suffering thereby, and praying the court for relief, the adm'r was required by order of court to give a new bond, and did so accordingly with another

\***Administration Bond—New Bond—Principal Case Distinguished.**—In *Beery v. Homan*, 8 Gratt. 53, the court said: "By the condition of the bond it appears that the said Rader was required to execute a new bond, and in pursuance thereof executed the bond in the bill and proceedings mentioned, and this distinguishes the present from the case of *Greensville Justices v. Williamson*, 12 Leigh 93."

See monographic note on "Executors and Administrators" appended to *Rosser v. Depriest*, 5 Gratt. 6.

person as his surety, which new bond was executed in open court on the same day of the order requiring such bond, was in a penalty equal to that of the first bond, was made payable to the justices then sitting, and was duly executed and conditioned as the law directs; whereby, and by force of the statute, all the sureties in former bond were discharged. Plaintiffs reply nul tiel record. And defendants shew an entry on

94 minute \*book of the county court, stating, that on motion of G. against the adm'r, for counter security, the defendant appeared in court, acknowledged summons, and tendered J. M. as security, whereupon it was ordered that said G. be dismissed from further suretyship; and shew also a new bond, executed by the adm'r and J. M. his surety, bearing even date with the entry on minute book, made payable to justices then sitting. In proper penalty and with proper condition required by the statute in a new bond in such case, with an endorsement thereon made by the clerk, that it was acknowledged on the day of its date: **HOLD**, 1. that the entries on the minute book of a county court, and such papers only as are therein distinctly referred to, can alone be inspected to ascertain the record; that therefore, in this case, the new bond, not being mentioned in the minute, to have been required, executed or accepted, cannot be regarded as part of the record; and so the minute itself is the true and the only record of the proceeding; and 2. that the record appearing by the minute, being variant, in several substantial particulars, from the record pleaded by the defendants, the plaintiffs were entitled to judgment, that there was no such record. Dissentiente, ALLEN, J.

Jesse Williamson took administration of the estate of George M. Williamson, on the 2d November 1829, in the county court of Greensville, with Benjamin Gowing and nine others, his sureties, and executed a bond to the justices of the county court, then sitting, in the penalty of 50,000 dollars, with condition, in usual and proper form, for the due and faithful administration of the intestate's estate.

On the 6th June 1831, there was a proceeding had in the county court, at the instance of the surety Gowing, of the short entry of which in the minute book, the following is a literal copy: "Benjamin Gowing vs. G. M. W'mson's ad'r. Mot'n for c'r sec'y; sum'd ack'd in name of s'd Gowing; and the def't appeared in court and tendered Joel Mayes as security: whereupon ord' the s'd Gowing be dismissed from further securityship."\*

No mention was made on the minute 95 book of \*the execution and delivery of a new bond by Williamson the administrator and Mayes his surety: but, in fact, a new bond was executed by them (whether in open court or not, did not appear by the record), dated the 6th June 1831, payable to the then sitting justices, in the penalty of

\*The entries on the minute books of the county courts, are always short memoranda of the proceedings, and generally with contractions similar to those in this entry. This entry written out at length, would be thus: "Benjamin Gowing vs. G. M. Williamson's administrator. Motion for counter security; summoned, acknowledged, in the name of said Gowing; and the defendant appeared in court, and tendered Joel Mayes as security: whereupon ordered, the said Gowing be dismissed from further securityship."—Note in Original Edition.

50,000 dollars, with the following condition: "The condition of the above obligation is, that whereas the above bound Jesse Williamson administrator of George M. Williamson deceased hath heretofore executed a bond payable to John Robinson" and others (naming them), "and conditioned for the discharge of his duties as administrator as aforesaid, which said bond bears date the 2d day of November 1829; and whereas by an order of court made on the 6th day of June, other bond and security have been required of the said executor; now, therefore, if the said executor shall well and truly have kept and performed, and shall well and truly keep and perform the condition of the bond aforesaid, and shall in all respects have performed, and shall continue to perform the duties of his office aforesaid, then this obligation to be void" &c.\* And \*upon this bond (which it seems was filed with the clerk) there was the following endorsement: "Acknowledged 6th June 1831 by the obligors; Teste E. Mason," who was the clerk of the county court.

96 In 1837, an action of debt was brought, in the circuit superior court of Greeneville, on the first administration bond of the 2nd No-

vember 1829, in the name of the justices of the county court to whom it was made payable, at the relation of Braxton Robinson's administrator, against the surviving obligors therein bound, namely, Jesse Williamson the administrator and Benjamin Gowing and six others of the sureties, the other three sureties being dead. The declaration set out the bond, and recited the condition in hæc verba, and then assigned the following breach—That in April 1835, Robinson's administrator recovered a judgment in the circuit superior court of Greeneville, against Jesse Williamson administrator of George M. Williamson, for 100 dollars, with interest &c. and costs, to be levied de bonis testatoris,

\*The statute 1 Rev. Code. ch. 104, § 38, provides, that "when securities for executors, or administrators, or their representatives, conceive themselves in danger of suffering thereby, and petition the court for relief, the court shall summon the executor or administrator, and shall have full power to order, either that the said executor or administrator shall give good counter security, or that he shall execute a new bond with good security, in a penalty not less than the penalty of the first bond executed by him, for the faithful discharge of his duties, and payable in like manner to the judge or judges or the sitting justices. Such new bond shall have relation back to the time of granting probat or letters of administration, and shall be as effectual in every respect as if it had been executed before such letters of probat had been granted. The condition thereof shall be as follows"—and then the statute prescribes the form of the condition of the new bond, when such shall be required; which form was followed in the condition of the new bond taken in this case, except only that Williamson was twice styled executor instead of administrator.

§ 39 provides that "upon the execution of such new bond with security payable and conditioned as aforesaid, all the securities to the former bond, and their legal representatives, shall be forthwith discharged from the obligation thereof, except only as to such matters for which an action on the said bond may then be depending against such securities, or their representatives, or against any of them, and may be prosecuted to a judgment or decree."—"If the court shall order counter security to be given, the bond shall be in a penalty equal to the penalty of the first bond, shall be made payable to the person petitioning for relief, and shall be conditioned for his entire indemnity against any loss or injury already sustained, or which may hereafter be sustained, in consequence of the execution of the first bond." The bond in the present case, was not a bond for counter security made payable to Gowing the surety who petitioned or moved for relief, and conditioned for his indemnity, but a new bond made payable to the justices of the county court sitting at the time the new bond was taken.—Note in Original Edition.

97 \*sued out a writ of fieri facias thereon, and delivered the same to the sheriff, who returned "No effects found;" and the plaintiffs averred, that ample assets of his intestate's estate, to pay and satisfy the judgment and execution, came into the hands of Jesse Williamson the administrator to be administered, and that he wasted them &c.

The defendants took oyer of the bond and condition, and then pleaded in bar, "that before any action on said bond was depending against the sureties thereto, or their representatives, or against any of them, or prosecuted to a judgment or decree, to wit, on the 6th day of June 1831, at the county court of Greeneville aforesaid, upon the petition of Benjamin Gowing, one of the sureties to the said bond, to the said county court, setting forth that he was bound in the said court as one of the sureties of Jesse Williamson for the due and faithful administration of the estate of George M. Williamson deceased, and that he considered himself in danger of suffering thereby, and praying the court for relief, the said Jesse Williamson was required by order of the said court to enter into a new bond, which he accordingly did with a certain Joel Mayes surety thereto, to wit, on the said 6th day of June 1831, at the county of Greeneville, in open court, payable to John Robinson" and others (naming them) "justices of the said court then sitting; which bond was duly executed and conditioned as the law directs; wherefore and whereupon the defendants say, that all the sureties to the former bond, and their legal representatives, were forthwith, by force of the statute in such case made and provided, discharged from the obligation of the former bond &c." (that on which this action was brought) concluding with a verification.

To this plea the plaintiff replied, "that there was no such record of the said supposed order of the county court of Greeneville, by which the said Jesse Williamson 98 \*was required to enter into a new bond; nor was there any such record, as was supposed by the defendants, shewing that the said Jesse Williamson did with a certain Joel Mayes surety enter into a new bond as in the plea mentioned, remaining in the said county court of Greeneville, in manner and form as the defendants had in their plea alleged. And this they were ready to verify, when, where and in such manner as the court should direct &c. Wherefore &c."

The defendants rejoined, that there was such a record of the proceedings and orders set forth in their plea; which they were

ready to verify by the record &c. concluding to the court.

The defendants produced and shewed the entry in the minute book of the county court of Greensville of the 6th June 1831 (the same above literally transcribed). And in support of their plea, they also offered as part of the record of the county court, the bond executed by Jesse Williamson and Joel Mayes, dated the 6th June 1831, and the clerk's endorsement thereon. The plaintiffs objected to the reading of this bond, and the endorsement thereon, as part or in support of the record; but the court overruled the objection, and the bond and endorsement were read; to which the plaintiffs excepted. And this being all the evidence and the only record produced, the court, "upon inspection of the record and the bond and endorsement thereon," held, that there was such a record as that set forth in the defendants' plea, and gave judgment for the defendants.

The relator, in the name of the plaintiffs, applied to this court for a supersedeas to the judgment; which was allowed.

May, for the plaintiffs, maintained, that the judgment was erroneous. He said, the record, namely, the entry on the minute book of the county court, of the 6th June 1831, was so imperfect, that it was utterly insufficient to \*sustain the allegations of the defendants' plea. So far as anything could be understood from that entry, it was obvious, that of ten sureties in Williamson's administration bond, Gowing alone had asked for relief, and that he asked for counter security for his own personal relief and indemnification, not for a new bond for the relief of all the sureties. It could not be supposed, that the county court intended to relieve ten sureties to an administration bond, of which the penalty was \$50,000 dollars, and take Mayes alone as surety for the administrator, whose circumstances were regarded as doubtful, and thus to make themselves personally liable for taking inadequate security; and this, upon a motion for counter security made by only one of the ten co-sureties. Nor did the record shew, as the plea alleged it did, that the county court required a new bond: it only shewed, that the administrator tendered Mayes as security, and that thereupon, namely, upon such tender of security, the court discharged Gowing, and Gowing alone, not his nine co-sureties; an act which the county court could not lawfully do. And certainly, it did not appear by the record, that the new bond was given: the bond did not prove itself; it was not a record, or a part of a record; much less was the endorsement upon the bond, a matter of record. The circuit superior court erred in inspecting the bond and the endorsement.

Robinson, for the defendants, said, the distinction had long since been established between the orders of a county court, which are drawn up in form by the clerk in his office, from short minutes of the proceedings taken in court, and those of a superior court, which are drawn up in due form during the term, read in open court, and signed next day by the judge: he referred to the opinion of Roane, J., in *Cogbill v. Cogbill*, 2 Hen. & Munf. 478. Thus, in *Eubank v. Rail's ex'or*, 4 Leigh 317, the entry of the judgment of the county court on the minute book, was in

these few words—"Plea waived, 100 \*and judgment for specialty and costs;" yet the clerk, in extending the minutes and making up the record from them, was justified in entering judgment for the penalty of the specialty and costs, to be discharged by the payment of the principal sum due with interest and costs. If, in such a case, an action of debt should be brought on the judgment, and the defendant should plead no such record, no one could imagine, that the brief entry on the minute book would be all that the court could look at, to ascertain what was the record: the court would inspect the declaration and the specialty in connexion with the entry on the minute book, and regard that as the judgment, which might have been properly extended as the judgment in the order book. The minute of a trial by jury and verdict, was often briefly thus—"A. B. v. C. D.—Jury, to wit, E. F. and others (naming them all): Verdict for plaintiff and judgment." But this short entry was made complete, by taking the pleadings and verdict in connexion with the minute; and, upon a plea of no such record, the court always ascertained from the whole taken together, what the record was. The minutes of the county courts never set out the proceedings in form or at large, and the papers to which each minute related must be referred to to ascertain the record; otherwise, hardly any judgment of the county courts could be successfully pleaded as a record. So here, the court could only ascertain what the record was, by inspecting the entry of the 6th June 1831, and the bond of the same date, and viewing the bond in connexion with the entry. Whatever the clerk, taking this entry on the minute book and the bond for his guide, might have properly entered in his order book, that must be regarded by the court as the record of the proceeding. And from the minute and the bond, the clerk might and ought to have made a full and formal entry on his order book, to this effect—"Benjamin Gowing, one of the sureties for Jesse Williamson admin- 101 istrator \*of G. M. Williamson, conceiving himself in danger of suffering thereby and petitioning the court for relief, and the said administrator appearing in court, and acknowledging that he has been duly summoned, the court, after hearing the parties, doth order, that the said administrator execute a new bond with good security, for the faithful discharge of his duties: whereupon the said Jesse Williamson executed a new bond accordingly, with Joel Mayes his surety, conditioned as the law directs." And taking such to be the record, there is no difficulty in the case. He said, the statute did not require, that all the sureties must petition for relief, in order to authorize the court to order a new bond, or provide that in case one of several sureties asked relief, the court should only order counter security: whether all the sureties apprehended danger, or only one, the character of the petition, and the summons, were exactly the same; and it was only when the court made its order, that the case took one direction or the other. The court was authorized, upon the petition of one, as well as upon that of all, the sureties, to order the administrator, either to give counter security, or to give a new bond, as in

its discretion the one or the other should be deemed most proper. The only question, then, is whether the court did, in this case, order the administrator to execute a new bond? That it did so, was ascertained from the bond itself (which is in form the new bond prescribed by the statute) taken in pursuance of the order entered on the minute book. Even the minute, brief as it was, expressly "dismissed Gowing from further suretyship;" which he could not have been, unless a new bond had been required and taken; for if counter security only had been directed, Gowing's suretyship must still have continued, though he would have been indemnified against it. But a new bond having been ordered and executed, the statute provided, that it should have the effect of

102 discharging, not only the surety \*Gowing, but all the sureties in the former administration bond. The fact that Mayes alone was taken as surety to the new bond, afforded no argument, that a new bond was not intended, and the ten sureties in the former bond discharged: for it must be supposed, that the county court was satisfied with Mayes's sufficiency, and for ought that appeared, he might have been equal to the whole ten sureties for whom he was substituted.

May, in reply, said, that if anything could be understood, with certainty, from the entry on the minute book, it was that Gowing's motion was for counter security; and it could not be presumed, that the administrator Williamson tendered, or that the court ordered, more than was asked. The cases cited for the defendants shewed, that the minutes of the county court, which the law required to be read and signed in open court, were the true record. The entries on the minute book need not be written out at large and in form; yet they must be full enough, either in themselves or in connexion with something expressly referred to in them, to leave no doubt as to the meaning and extent of the judgment or order to be entered in the order book. In this case, no summons was exhibited, no petition appeared, (and, doubtless, there were none in fact,) from which it might be inferred, that Gowing called for, or Williamson consented to give, or the court ordered, a new bond. On the contrary, all that could be inferred from this singular entry, was that Gowing wanted counter security and Williamson consented to give it; and the mode of effecting the object was left to an unskilful clerk. The court made no order whatever, except that Gowing should be dismissed from his suretyship; it did not order, that any bond should be taken; nor did it appear by the record, that any bond was in fact taken: a new administration bond, or a bond for counter security, or any other form of bond whatever, would have equally satisfied every description and requisition contained in this entry:

103 nay, \*the veriest forgery might as well have been exhibited as part of the record, as the bond which was produced. In *Cogbill v. Cogbill*, the court said that the orders signed by the judge are the records of a superior court, and could not be corrected by the minutes of the proceedings taken by the clerk; but it was intimated, that the rule in respect to the records of a county court

would be different. Accordingly, in *Eubank v. Rall's ex'or*, it was held, that the minutes of the county court, signed by the presiding justice, were the true record; and that an order entered on the order book otherwise than in conformity with the entry on the minute book, was naught. There, the judgment entered on the minute book, was for "the specialty and costs;" and the clerk, in extending this judgment in the order book, entered a judgment different from the legal construction and effect of "the specialty;" and this was held to be a clerical mistake, which, therefore, might be amended by the court at a subsequent term; amended by the entry on the minute book, which was the record of the judgment. In that case, "the specialty" was referred to in the minute, and so furnished a certain guide for entering up the judgment at length in the order book: here nothing was referred to, nothing of the nature of a bond was mentioned, in the minute: nothing of that kind was or could be entered in the order book, or could now be intended.

TUCKER, P. I am of opinion, that this judgment is erroneous.

The plea to the action was of a matter of record, and the plaintiffs' replication was nul tiel record. The matter pleaded was an order of Greensville county court; and it would seem that the record itself and not an exemplification of it was produced in support of the plea. The entry in the minute book of the county court, was in this form [here the judge stated the entry of the 6th June 1831]. A bond was also produced,

104 executed by \*Williamson the administrator and Joel Mayes, which is in the form prescribed by the statute, where, instead of counter security, a new bond is required to be given. But it no wise appears, that this bond was part of the record, nor does the minute state that the bond was entered into at all, much more, that it was entered into before the court, as is usual in such cases. Such being the state of the case, it devolves upon us to enquire, whether this minute could be extended into the form set forth in the plea? For such is the character of the proceedings of the county courts and such often the looseness of their entries, that we are, on the one hand, compelled to look to the short entry or minute as the true record, and, on the other, to consider it as if expanded into that form which the minute will justify. In this case, then, there must be enough in the minute itself, aided by the papers in the cause, if there were any, to authorize its expansion into the form set forth in the plea; or the replication of nul tiel record must be sustained. We are not at liberty to guess or infer ourselves, nor would the clerk have been at liberty to have supplied any thing by his recollection; for if this were permitted, then upon his death or removal, his successor would be disabled to make up the record rightly.

If this proposition be true, the evidence produced shews no such record of Greensville county court as is described in the plea. The minute was of a motion; the plea sets forth a petition alleging various matters. The motion was for counter security; the plea sets forth a petition, in general terms,



for relief. The motion was against George M. Williamson's administrator (without naming him); the plea recites a petition setting forth, that the petition was bound for Jesse Williamson, administrator &c. The record states, that the defendant appeared and tendered security, but does not set forth any bond either required or given; the plea states, that Williamson was required to  
 105 give a new bond, which he \*did accordingly with Mayes as surety, in open court, and which bond was executed and conditioned as the law directs. The record states, that it was ordered that Gowing be dismissed from further securityship; the plea states no such thing, as forming part of the judgment, but alleges the discharge of all the sureties, as arising from operation of law. These variances are, I think, fatal to the plea.

If there was a petition, why was it not produced? If there was none, was there any thing in the minute, to justify the allegation of the plea that there was one? If there was an order requiring a new bond, where is it? If there was none, is there any thing in the minute from whence it can be seen that a new bond, and not a counter bond, was required? If it was a counter bond, then the plaintiffs' action is not affected by it. Now, can we infer from the entry, that the "defendant appeared and tendered security," that the bond, if given, was not a counter bond? Nay more: Are we justified in inferring, that any bond was given, merely because security was tendered? Do we see, that it was even accepted? It was said, this might fairly have been inferred from the entry, that Gowing should be dismissed from further securityship. But, besides that this is no part of the record as set forth in the plea, and that it was moreover unnecessary, it seems to me to be going too far to infer the execution of a bond from this loose expression. It was argued, however, that the bond of June 6, 1831 is part of the record, and that from that all else may be inferred. I cannot think the bond a part of the record. Nothing is said of a bond in the minute; and whether there was one or not, could only be supplied by the recollection of the clerk, or the testimony of witnesses; neither of which could make it a record.

I am therefore of opinion that the plaintiffs should have had judgment. Nor will the defendants be without redress; since they  
 106 may, I presume, seek indemnity \*by a suit on the bond of the 6th June 1831, in which Mayes was bound as surety for Williamson's faithful administration of his intestate's estate.

BROOKE, CABELL and STANARD, J., concurred with the president, that the judgment should be reversed, and judgment entered for the plaintiffs.

ALLEN, J., dissented. He said—The case depends upon the sufficiency of the record of the county court, to support the plea of the defendants. The plaintiffs replied nul tiel record, and it devolved on the defendants to adduce a record corresponding with that set forth in their plea.

The law directs the clerk of the county court to keep minutes of the proceedings of the

court, and these minutes are to be read and signed by the presiding justice, before an adjournment. From the minutes, briefly entered, a record is to be made up at large. In *Cogbill v. Cogbill*, Judge Roane observed, that a distinction is properly taken between the records of the county court, drawn up by the clerk in his office, from the minutes taken in court, and the records of the superior court, drawn up during the term, read in open court and signed on the next day by the judge. Although the record of the county court, when drawn up, must be justified by the minutes; yet the minutes do not disclose all that a full record, when drawn out at large, properly exhibits. Thus in *Eubank v. Rall's ex'or*, the entry of the judgment on the minute book was, "Plea waived and judgment for specialty and costs." This entry, it was held, authorized the clerk, in making up a complete record, to enter a judgment for the penalty of the specialty to be discharged by the payment of the sum actually due with interest. It is the usual practice (as was stated at the bar) when a trial is had, to make

a brief minute, frequently not more  
 107 than these words. \*"*A. B. v. C. D.*

Jury to wit (naming them). Verdict for plaintiff, and judgment." When a full record is made up, the clerk is not confined to the entry in the minute book. He looks to the declaration and specialty in the one case, to the verdict as written out and signed by the jury in the other. And it was well said, that were it otherwise, few judgments of the county courts could be sustained.

The entry in the present case was very brief. It is an entry not in a case depending between suitors in an action between them. The court was exercising its power in reference to a matter of which jurisdiction was conferred upon it, by statute, as a court of probat. On all such subjects, (and in many other cases, as where the court acts as a police court,) the entry is brief. To ascertain its meaning, we must consider it in connexion with the law which authorizes the proceedings; and if the court has done what the law justified, and that sufficiently appears, its act should be maintained: otherwise serious injury may be frequently sustained by innocent individuals, from the carelessness or ignorance of officers over whom they have no control.

The statute provides, that when securities of executors or administrators conceive themselves in danger, and petition the court for relief, the court shall summon the executor &c. and shall have power to order that he give counter security, or execute a new bond. If counter security, is required and given, the bond is made payable to the party petitioning for relief; but he is not discharged from the obligation of his first bond. If a new bond is required, it is made payable to the sitting justices, the penalty is to be equal to the penalty of the first bond, and the form of the condition is prescribed by the statute; and upon its execution, all the securities to the former bond are discharged from the obligation thereof. No particular mode of proceeding is pointed out.

The party conceiving himself in danger petitions for relief; \*the court hears the parties, and gives to the case such direction as it deems best, and, in its



discretion, either requires counter security or a new bond.

In the case before us, the entry on the minute book was, a motion for counter security; summons acknowledged; appearance of the defendant, who tendered Mayes as surety; whereupon ordered, that Gowing be dismissed from further securityship. A bond is certified, in a penalty equal to the penalty of the first bond, signed by Williamson the administrator and Mayes, dated the day the order was made, with condition in the form prescribed for a new bond, and made payable to the sitting justices. But it is objected, that the minute does not shew that a bond was executed or tendered, and therefore we have no right to look into this bond: that to consider this bond as part of the record, would put it into the power of the clerk to exhibit a bond when none may have been given, or at best to substitute his recollection for the record. It seems to me, this is giving too narrow a construction to the entry. By the entry it appears, that the administrator tendered Mayes as surety. How could he tender him as surety for him as administrator, but by the execution of a bond? Until that was done, he was not surety. But the order proceeds, that upon his being so tendered, Gowing was discharged. We must bear in mind what the court was engaged in, when acting upon this subject; the power it possessed, and intended to exercise. The surety in the former bond was before it, asking relief; it could give it in one of two modes, by requiring counter security or a new bond; if the first had been required, the surety was not discharged; if the latter, he was. The order shews, that upon hearing this matter, the administrator tendered Mayes as surety, which he could not have become, until he had executed a bond; whereupon, the petitioner was discharged. It is true, that by operation of law all were discharged upon the execution of a new bond, and

109 \*therefore the order discharging the petitioner was unnecessary; but the fact of making such an order, shews that a bond was given; for until that was done, the court could not have discharged him from his securityship. It was not necessary to describe the bond particularly; any expressions which indicated the execution of the bond would not suffice. No order by which an official bond is shewn to be executed, sets it out in hæc verba. In all cases of the kind, the expression used is, that the administrator with A. B. &c. his sureties executed a bond in the penalty fixed by the court; and I suspect, if the entries were examined, it would frequently be found that the sureties are not named in the order. But it appearing that a bond of a particular kind has been required and given, the bond certified by the sworn officer, as the bond, must be taken as the one given. And we have the same right to apprehend that the clerk would substitute a different specialty or verdict, in the cases before mentioned, as that he would substitute a different bond in a case of this kind.

The order shewing, as I think, by a fair construction, that a bond with Mayes as surety was executed; the bond found among the records, of that date, corresponding with the order, and fulfilling all the requirements

of the law, must be taken as the bond so executed, and constitutes a part of the record, as much so as the specialty or verdict alluded to. If it is part of the record, and can be looked to for the purpose of ascertaining what was done, all difficulty it seems to me is removed; for it shews that a new bond was required, upon the execution of which the sureties in the first obligation were discharged.

It is said, the record produced does not correspond with that described in the plea: 1. that by the plea it is averred, that a petition was preferred, whereas the order shews a motion was made. This does not seem to me to be a material variance.

110 The plea describes the record \*according to its legal effect, and sets it out as the clerk would extend the order in making up a full record. The statute provides that when the sureties conceive themselves in danger, "and shall petition for relief" &c. A petition is the form of bringing the matter to the notice of the court; but this is made ore tenus; no formal petition in writing is ever filed. When the relief is thus asked for, a summons is awarded; and whether the clerk enters, that upon the motion of the party a summons is awarded, or prefaces it with the words that A. B. having petitioned the court, on his motion a summons is awarded,—it would not change the legal effect of the proceeding. 2. That the plea sets out a petition for relief, in general terms; but the record shews a motion for counter security. The legal effect of the proceedings is not varied by the terms of the motion. The statute authorizes the petition for relief; the court decides upon the mode of relief. In whatever mode the party may seek relief, the power of the court is not limited to that mode; and however the subject is brought to its notice, it is tantamount to a general petition for relief, and should be so described. 3. That the plea avers that bond was required; the record merely shews that Mayes was tendered as security. But the bond, as I have endeavoured to shew, is part of the record; and if so, the condition shews, that a new bond was required. 4. That the plea alleges a discharge of all the sureties by operation of law; whereas the order shews, that Gowing only was dismissed from the securityship. The law provides, that upon the execution of the new bond, the sureties to the first shall be forthwith discharged; and no order would be necessary to effect this. It was only necessary for the defendants to set out so much of the order as shewed the requirement and execution of the bond; having done that, they establish enough to discharge them; and it was proper to aver it as arising from operation of law.

The omission to set out in the plea, 111 that which need \*not have been done by the court, does not shew a variance between the plea and so much of the order as they have correctly described.

It is supposed, that if we construe the proceedings here as discharging the sureties to the first bond, the justices may have subjected themselves to a liability for taking inadequate security, when in fact they only intended to permit Mayes to substitute himself as surety in Gowing's stead. Such might be the consequence, if my construction of

their proceedings is the proper one. They must be presumed to be acquainted with the law under which they were acting; and if so, they knew they could not discharge Gowing except upon the execution of a new bond. That they intended to discharge him is clear, for they have said so; and the legal consequence is the discharge of the others. If this was more than they intended, their error ought not to injure the surety. He had asked what they conceded he was entitled to; it was for them to prescribe the mode; and having done so, the surety had a right to repose in safety. He should not be deprived of the relief which his vigilance had procured, because the court, in extending it to him, had inadvertently discharged others and thereby incurred a liability themselves.

It seems to me, upon the whole case, that the sureties to the first bond were discharged, and that the matter constituting the discharge has been properly set out in the plea.

Judgment reversed, and judgment entered for the plaintiffs; and cause remanded, with directions to award a writ of enquiry of damages.

## 112 \*Newton v. Poole.

### Newton & Wife v. Same.

March, 1841, Richmond.

(Absent STANARD,\* J.)

**Will—Construction—Widow's Right to Third of Estate—Case at Bar.**—Testator, after devising some real estate of apparently trivial value, and emancipating one slave, gave his wife, besides and above the use of one third of his real and personal estate, two men slaves with the horses and carts they drove, to be her own proper estate and to be at her disposal, also his carriage and horses, and all his furniture; and then gave his son all the residue of his estate, real and personal, after payment of his just debts, to him and his heirs; with a limitation over to others, of the estate thereby given to the son, in case he should die before twenty-one years of age and without heirs of his body: **HOLD**, that the wife was entitled to a third of testator's estate, real and personal, precisely as the law would have given it to her, and to the specific legacies bequeathed to her, in addition thereto: therefore,

#### 1. Same—Same—Same—Rights of Creditors Superior.

—The wife was not entitled to a third of testator's estate clear of his debts, but only to a third of the surplus after the debts paid—but,

#### 2. Same—Same—Same—How Ascertained.

—In ascertaining her third, the emancipated slave, and the specific legacies, should be taken into account, as part of the subject to be divided—and,

#### 3. Same—Same—Same.

—She took but a life estate in her third of the real and slave property, and an absolute estate in her third only of the personalty other than slaves.

**Administration Accounts—Ex Parte Settlement—Surcharge and Falsification.**†—The rule, that adminis-

\*He had been counsel in the cause.

†Fiduciaries—Accounts of—Ex Parte Settlements—

**Bill to Surcharge and Falsify.**—*Ex parte* settlements of the accounts of a fiduciary returned, approved, and recorded, are deemed *prima facie* correct, and a bill to surcharge and falsify must specify wherein they are erroneous, which specifications must be sustained by proof. The principal case is cited, in support of this proposition, in *Green v. Thompson*, 84 Va. 392, 5 S. E. Rep. 507 (administration accounts); *Carter*

tration accounts, audited *ex parte* by commissioners appointed by the proper court, returned to the court, and recorded, are to be taken as *prima facie* correct, liable to be surcharged and falsified, upon proof adduced, by any party interested, rests not on the ground that such audited accounts stand on the same foot as stated accounts between parties, but, mainly, on the long established practice of the country, and on the supposed integrity of the tribunal provided by law for the adjustment thereof: therefore, **HOLD**, 1. Same—Same—Same.—That such audited accounts are only to be corrected in the particulars in which they are proved to be erroneous, unless corruption in the tribunal itself be established: and,

## 113 \*2. Same—Same—Same.—

Though great and numerous errors appear, or even though the executor or administrator appear to have taken an unfair advantage, and though he never returned to the court, and did not exhibit to the auditors, any inventory and appraisal of the estate, the audited accounts are yet to be taken as *prima facie* evidence, and to be corrected only so far as they are surcharged and falsified by proof.

**Same—Same—Same—Guardian's Accounts.**—Guardian's accounts stand on the same foot, in this respect, as those of executors and administrators.

**Confusion of Goods—Executor and Decedent—Case at Bar.**—A brick-maker, having a parcel of bricks on hand, goes abroad, having constituted his wife his agent, and specially directed her to resume and prosecute his brick-making business; she commences it accordingly, during his life, but he dies abroad before the bricks she had begun are finished, and she completes them after his death: she qualifies as executrix of her husband's will; and, without returning any inventory of his estate, sells the bricks he left on hand, and those she made, without discrimination: **HOLD**, this was not a confusion of the testator's goods with the goods of the executrix: for the bricks begun by her before and completed after her husband's death, as well as those he left ready made on hand, were all properly assets of his estate, and to be accounted for as such; and all the expenses she incurred in the brick-making business, whether incurred during his life or after his death, were proper charges against his estate.

**Guardian and Ward—Repair of Ward's House—Evidence.**—A guardian claims credit in his account, for the price of materials purchased by him for repairs of houses of his ward: he proves his purchase of the materials, and that they were necessary and proper for such repairs; and then being examined on oath, he states, that the materials were in

v. Edmonds, 80 Va. 60 (accounts of the committee of a lunatic); *Radford v. Fowlkes*, 85 Va. 841, 8 S. E. Rep. 817 (administration accounts); *Peale v. Hickie*, 9 Gratt. 445 (administration accounts); *Leach v. Buckner*, 19 W. Va. 45 (administration accounts); *Seabright v. Seabright*, 28 W. Va. 434 (executorial accounts). See *Leake v. Leake*, 75 Va. 793; *Wimbish v. Rawlins*, 76 Va. 48; *Campbell v. White*, 14 W. Va. 123; *McClure v. Johnson*, 14 W. Va. 432.

See *foot-notes* to *Corbin v. Mills*, 19 Gratt. 438; *Robertson v. Wright*, 17 Gratt. 534; *Peale v. Hickie*, 9 Gratt. 437, and monographic note on "Commissioners in Chancery" appended to *Whitehead v. Whitehead*, 23 Gratt. 376. See Va. Code 1887, ch. 121, § 2099; W. Va. Code, ch. 87, § 22, p. 743.

**Settlement of Administration Account—Laches.**—See the principal case cited in *foot-note* to *Stamper v. Garnett*, 31 Gratt. 550. *glitzed by Google*

fact applied to the repairs of the ward's houses, but is unable to designate the particular houses to the repairs of which they were applied: HELD, this is sufficient proof to entitle him to credit for the price of the materials.

Robert Poole, late of the borough of Norfolk, by his last will and testament, devised and bequeathed as follows: "I give to Venie, a free mulatto woman, the half of my house in the fields where she now lives, during her natural life, and after her death to go to her son George. I give to her daughter Mary, the other half of the house, with the enclosed piece of ground thereto. And I give to my negro man Andrew, in consequence of his faithful services, his freedom after my decease. I give to my beloved wife, be-

114 sides and above the use of \*one third of my real and personal estate, the two negro men bought of J. E. Holt, named Sam and George, with the horses and carts which they now drive, to be her own proper estate and to be at her disposal, also my carriage and horses, and all the household and kitchen furniture, as they now stand in my present dwelling house. I give and bequeath unto my son Howard Poole, all the residue of my estate, both real and personal, after the payment of my just debts, to him and his heirs forever; and it is my express will and desire, that in case my son Howard Poole dies before the age of twenty-one years and without heirs legally begotten of his body, the property and estate hereby given to him shall be equally divided between Alex. Jordan, A. C. Jordan, M. T. C. Jordan, and Eliza Jordan, excepting one lot of land adjoining the lot above given to Venie and children, which I will and bequeath to my cousin Edward Poole, in case my son dies without heirs as before mentioned." And he appointed his wife Margaret Poole his executrix. The will was dated the 7th March 1803.

The testator, after having made his will, left Norfolk, in March 1803, on a voyage to the West Indies for his health; leaving his wife his agent for the management of his affairs, and particularly enjoining her to resume and prosecute the brick-making business in which he himself had been many years engaged. He died in the West Indies in May 1803, and news of his death reached Norfolk in June following.

His wife had, in pursuance of his instructions, commenced the brick-making business immediately after he left home, at the same brick yards, where he had previously carried it on, and where he left some bricks he had made the year before; how many he left was a material point of controversy in this cause.

His widow, having received intelligence of his death, proved his will in the hus-  
115 tings court of Norfolk in July \*1803, and took upon herself the execution thereof; and, at the same time, she was appointed guardian of her son Howard Poole, then about eighteen months old.

She returned no inventory of her testator's estate. In addition to the slave emancipated by his will and the two slaves bequeathed to his wife, he left eleven others, of all ages and sexes; and very little other personal property besides the specific chattels bequeathed to her, and the bricks he left on hand. The principal part of his estate was real property;

chiefly houses and lots in the borough of Norfolk.

The executrix proceeded to complete the brick-making business, which she had begun during her husband's life in conformity with his directions. And she continued to administer his estate until some time in 1805, when she married Thomas Newton; and thenceforth, of course, the administration of her first husband's estate, and the guardianship of her infant son, devolved, in fact, upon her second husband.

In September 1808, the accounts of the administration of the testator Robert Poole's estate, were audited and settled by commissioners appointed by the hustings court of Norfolk, returned to the court, and ordered to be recorded. In this account, the auditors charged Poole's estate with some debts paid by his wife as his agent before his death, as well as debts afterwards paid by her as executrix, with all expenses incurred by her in the brick-making business, both before and after his death, and with the taxes and moneys expended in repairs upon the testator's real estate; and they credited the estate with the proceeds of sales of all bricks sold by the executrix, those made by the testator in his lifetime and left on hand, and those made and completed by herself, without discrimination, and with hires and proceeds of sales of slaves, and the rents of the real estate. This account shewed a balance of 1573 dollars then due to the executrix.

116 \*Accounts of Mrs. Poole's (afterwards Mrs. Newton's) guardianship of her infant son, were also returned by her, from time to time, to the hustings court; which the court examined, and ordered to be recorded. Her guardianship ceased in 1810; her second husband, Thomas Newton, being in that year appointed his guardian.

Howard Poole attained to full age in 1823; and in 1825, he brought two suits in the superior court of chancery of Williamsburg, which were afterwards transferred to the circuit superior court of James City; one against Newton, the other against Newton and wife.

1. In the bill against Newton,—after stating that Newton was appointed his guardian in 1810, that in that character he took possession of his whole property real and personal, and received the rents, issues and profits thereof (which were large). and that, since his attainment to full age, he had been put in possession of the real estate that belonged to him,—he alleged, that he had called upon Newton for a settlement of his guardianship accounts, but had been unable to procure such settlement, because of some difference between them as to the manner of settlement, and prayed an account of Newton's guardianship, and of the rents, issues and profits of the ward's estate, that had come, or might with proper diligence have come, to the guardian's hands. Newton answered, that he was ready to account.

The court referred the accounts to a commissioner, with a direction, that the parties should submit to be examined before him, in solemn form, upon interrogatories.

The commissioner reported an account, shewing a balance due the plaintiff of 5046 dollars, with interest on 3009 dollars, part thereof, from the 1st March 1828.

Both parties filed numerous exceptions to the report; all of them relating to the details, and presenting mere questions of fact, except two taken by the defendant, 117 \*viz. 1. That he was charged, as guardian, with the hires of the slaves of the testator Robert Poole's estate which accrued, and with the proceeds of sales of slaves which were sold, after he was appointed guardian; matters that properly belonged to the executorial account. And 2. that the commissioner had refused him a credit he claimed for the price of certain materials he had purchased for repairs of the houses belonging to the estate: as to which, he proved by witnesses, his purchase of the materials, and that they were proper for such repairs; and, being himself examined on oath, he stated, that they were applied to that purpose, but he was then unable to designate the particular houses to the repairs of which they were applied.

The cause coming on for hearing in February 1829, upon the report and the exceptions thereto, the court overruled both the exceptions of the defendant above stated; and, as to the last, instructed the commissioner, that the defendant should not be allowed credit for the price of materials alleged by him to have been purchased for the purpose of repairs of the houses, unless he should prove by the testimony of disinterested witnesses, that the materials were applied to that purpose. And the court, giving further instructions to the commissioner in regard to the questions presented by the other exceptions of the parties, recommitted the report to be reformed accordingly.

At the same time, upon the application of the plaintiff, who represented that his situation required present relief by the payment of so much as was then ascertained to be due to him, the court decreed, that the defendant should pay him 3000 dollars. The defendant asked an appeal from the decree, which the court refused to allow. The sum of 3000 dollars, however, was not paid.

The accounts were reformed and reported; numerous exceptions again taken to the 118 reformed report; the accounts \*again recommitted, a third report made, and exceptions taken to it also. And the cause coming on for final hearing, the court decreed, that the defendant should pay the plaintiff the sum of 6637 dollars, with interest on 4110 dollars, part thereof, from the 1st March 1830; that being the balance after allowing the defendant to retain 350 dollars (being one third of the proceeds of slaves sold) and 147 dollars interest on the same; reserving liberty to the plaintiff, after the death of the defendant's wife, to apply for relief as to the principal sum of 350 dollars retained. And as the sum now decreed included the 3000 dollars decreed to be paid to the plaintiff by the interlocutory decree of February 1829, the court rescinded that decree as to that particular.

II. The purpose of the bill against Newton and wife, was to have settlements of the accounts of Mrs. Newton's administration of her testator Robert Poole's estate, and of her guardianship of the plaintiff, before her marriage with Newton, and of Newton's transactions after their marriage, in her right, as executrix and as guardian.

The bill, advertng to the accounts settled by the commissioners of the hustings court of Norfolk in September 1808, reported to the court and ordered to be recorded, complained, that the accounts of the real and personal estate were therein improperly blended; and proceeding to surcharge and falsify those accounts, impeached almost every item of them; charged numerous errors, omissions, and instances of injustice, such (the bill alleged) as could only be imputed to wilful and gross fraud; and insisted, that, therefore, no manner of respect ought to be had to those audited accounts. The bill then called for a discovery in reference to those charges; and prayed, that the accounts might be fairly settled, and a decree for what should be thereupon found justly due to the plaintiff.

119 \*Newton and wife, in their answer, admitted that the accounts of their administration audited and reported by the commissioners of the hustings court in September 1808, might be erroneous in several particulars complained of in the bill, and professed their willingness to have all errors which should be found therein corrected; but they said, that the errors were chiefly formal, not substantial; that the errors against the plaintiff, were compensated by other errors against themselves; that whatever errors might be detected, resulted from no want of fairness on their part in rendering, and from no partiality or injustice in the commissioners in stating, the accounts; and that, therefore, they claimed for those accounts all the respect and credit that were justly due to a fairly audited administration account. And then they answered, in detail, all the specific allegations of surcharge and falsification, and all the charges of fraud; giving explanations as to the items of surcharge and falsification, and indignantly denying the frauds imputed to them.

A vast volume of depositions, and of documentary evidence, on both sides, was filed. The purpose of the evidence, on the part of the plaintiff, was to surcharge and falsify the audited accounts, to prove overcharges and short credits therein, and to convict the defendants of wilful suppressions, concealments and misstatements, before the auditors, and of actual frauds; and on the part of the defendants, to sustain or to explain the disputed items, and to repel the imputations of fraud. The audited accounts appeared, upon their face, to be erroneous in their frame; especially, in blending the account of the real with that of the personal estate, and the executorial with the guardianship transactions: and the evidence for the plaintiff established many items of surcharge and falsification. Whether the evidence authorized the imputations of the omissions and errors found in the audited accounts, to actual fraud intended and 120 \*practised by the defendants, was a

point of angry contention between the parties, and of debate at the bar: the chancellor (it seems) thought that such actual fraud was proved: but this court gave no opinion on that question, as, in its view of the case, it was unnecessary to decide or to enquire into it. There was no evidence to warrant any imputation upon the auditors of corruption or partiality, participation in or

connivance at fraud, in stating the accounts which they reported to the hustings court.

Upon a hearing, in February 1829, the court directed accounts to be taken before a commissioner, of the transactions of Mrs Poole (afterwards Mrs. Newton) as executrix of the testator Robert Poole, and as guardian of the plaintiff, to the time of her marriage to Newton, and of his transactions in her right as executrix, and also as guardian to the time when he was appointed guardian, with the following instructions to the commissioner: 1. That in taking the accounts, the defendants should not be permitted to offer and use, as prima facie evidence, the audited accounts of these transactions reported to the hustings court in September 1808, but the accounts should be taken de novo, without benefit to the defendants from those audited accounts. 2. That in taking the accounts, the estate of the testator Robert Poole should be credited with the whole personal estate, except the slaves Sam and George, the horses and carts they drove, the carriage and horses and the furniture, (specifically bequeathed to Mrs. Poole); and if such personal estate (except as before excepted) should prove unequal to the payment of the testator's debts, then another state of the account should be reported, wherein the whole personalty, without exception, should be credited to the estate; though the court did not then decide, but left it open for future consideration, whether the testator's widow could be deprived of the specific legacy bequeathed to her by his will. 3. That

121 in taking \*the accounts of administration, as no inventory or appraisement of the testator's estate had been returned, if, by the confusion of the bricks left by the testator with those made by his executrix after his death, it could not be ascertained what proportion thereof were left by the testator, then the commissioner should make and report a statement, wherein he should assume the whole to have been left by the testator, allowing the defendants to prove what part thereof was made after his death by the executrix; it being the opinion of the court, that the party by whose act the confusion of property was made, should be the loser, if any loss was sustained by either party. 4. That a separate account should be taken of the transactions in the brick-making business, embracing the expenses incurred therein after the testator Poole's death, and the proceeds of sales of bricks; in which account, if no satisfactory evidence should be adduced of the quantity of bricks made after the testator's death, the commissioner should credit his estate with one half of the proceeds of sales of bricks sold after his death. And lastly, the court ordered, that the parties, plaintiff and defendants, should submit to be examined in solemn form before the commissioner upon written interrogatories, and that the defendants, if required by the plaintiff, should produce all books, papers, vouchers &c. touching the accounts.

Under this interlocutory order, and the instructions therein contained, accounts were taken and reported by the commissioner; and the accounts were recommitted, once and again, and reformed reports returned. Fourteen exceptions were filed by the plaintiff, and no less than ninety-seven by the defend-

ants: there was hardly an item in the account, of debit or credit, that was not a subject of controversy: but the controversy turned on questions of fact, to be solved by the evidence relating to each. The principles upon which the accounts were 122 \*stated, had been anticipated and decided by the court, in its instructions to the commissioner.

In May 1835, the cause came on for final hearing upon the last report of the commissioner, and the exceptions thereto; and the court decreed, that the defendant Thomas Newton, executor of the testator Robert Poole in right of his wife the executrix, should pay the plaintiff 1531 dollars (being two thirds of the balance appearing due to the testator's estate upon the executorial account), with interest on 608 dollars, part thereof, from April 1, 1834, and the further sum of 4770 dollars (the balance appearing due on the guardianship account, while his wife was guardian, namely, till 1810), with interest on 1924 dollars, part thereof, from the same date.

There were questions which arose in both causes; questions, namely, upon the construction and effect of the testator Robert Poole's will: Whether his wife was entitled to a third of only the surplus of his estate after payment of his debts? or whether she was entitled to a third of the gross estate left by the testator, and the son to the residue charged with all the debts? And what estate did she take under the will, in the third devised and bequeathed to her?

The court held, (and the accounts upon which the decrees were founded, were stated on the principle), that the wife was entitled to only a third of the surplus, after payment of the testator's debts, of the personal estate exclusive of the emancipated slave and of the two slaves and other chattels specifically bequeathed to her; and that, as to her third of the slave as well as of the real property, she was entitled to only a life estate in the same.

Newton in the first case, and Newton and wife in the other, by petitions to this court, prayed appeals from the decrees; which were allowed.

123 \*The causes were argued here, by Harrison, Johnson and Leigh, for the appellants, and Southall and Robinson, for the appellee.\*

I. The counsel for the appellants contended, upon the construction of the testator Robert Poole's will, 1. that his wife was entitled to a third of all the estate real and personal left by the testator, clear of his debts, and that all the debts were charged on the residuum devised and bequeathed to the son;

\*The questions of mere fact, which arose on the numerous exceptions to the details of the accounts reported by the commissioners, or rather, the most prominent of them, were discussed, and the evidence applicable to each minutely examined; but as these involved no principle which could affect any other case, the reporter has not stated any of the points, or the evidence or argument upon them. He would not have done so, even if it had been practicable; but, indeed, it was wholly impracticable. The report of the case is confined to the points which were decided by the court of appeals.—Note in Original Edition.

2. that she took an absolute estate in the third of the real, and of the slave property as well as the other personalty; and 3. that in ascertaining her third, the emancipated slave, and the two slaves and other chattels specifically bequeathed to her, were to be taken into account as part of the subject to be divided. These propositions, they said, presented questions of testamentary intention; and the intention was to be gathered from the peculiar dispositions of the will. 1. As to the first, they said, it was not a question between a legatee of the personal and the devisee of the real estate, whether the personal should be applied to the discharge of the debts in exoneration of the real; in which case, it might be admitted that, without express words or plain intent to charge the debts upon the real estate, the devisee would have a right to require that the personal assets should be applied to the satisfaction of the debts: but here the question was, between a legatee and devisee of a specified part of both real and personal estate, and the legatee and devisee of the residue of the same. The testator gave his wife, "besides \*and above

124 the use of one third of his real and personal estate, two men slaves with the horses and carts they drove, to be her own proper estate, and to be at her disposal," also his carriage and horses and his furniture; and then gave his son "all the residue of his estate, both real and personal, after payment of his just debts." Thus, the debts were, in express terms, charged upon the residue; a provision, which, if the intent had been that the debts should be first paid, and one third of the surplus given to the wife and the residue to the son, would have been wholly unnecessary, and (if that construction should prevail) nugatory. To maintain such a construction, the words charging the residuum given to the son, with the debts, must be stricken out of the will. 2. Whatever was the subject of which the wife was to have a third part, she took an absolute estate in the third part devised and bequeathed to her. She took nothing as dowress or distributee under the provisions of the law; therefore, the law could not be resorted to, in order to ascertain the estate she should take in the third of her husband's real and personal property. She took as devisee and legatee under the will, so that the estate she was to take in the third, was to be ascertained by the will; and the will giving her the third without qualification, the devise and bequest carried the absolute estate, if the husband had the absolute estate in him to dispose of. The gift of the use was equivalent to a gift of the subject itself. Butl. Fearn, 402-3. The words in the devise and bequest to the wife, "to be her own proper estate and to be at her disposal," referred to all the property before given to her; to "the third of the testator's estate," as well as "the two men slaves and the horses and carts they drove." Those words could hardly have been inserted only to indicate the interest the wife was to take in the two slaves and the horses and carts; since the simple bequest of those chattels, without the addition of such

125 words, would obviously \*have carried the absolute property; and this the testator was well apprised of, for the bequest of the carriage and horses and furniture to

the wife, though certainly intended to give them in absolute property, had no such words superadded. But those words, though not necessary, were natural, proper and usual in wills, if they were used to ascertain the interest which the testator intended to give his wife, in the third part of his real as well as personal estate. The will should be understood as if read thus: "I give my wife the third part of my real and personal estate, and besides and above, two men slaves &c. to be her own proper estate and to be at her disposal." If the testator had intended to give his wife only a life estate in any part of the third, he would have expressed it, and then have given the remainder to the son. After giving the residue to the son, the testator limited over to others, in case he should die under age &c. the property and estate thereby given to him: why was there not any limitation of the remainder, or any executory devise, of the third given to the wife? Because he intended she should take the absolute estate in it all. 3. The wife was entitled to a third of the testator's whole estate; and unless it could be maintained (which could hardly be pretended) that the emancipated slave, and the two slaves and other chattels specifically bequeathed to her, were not part of the testator's estate, this property must be taken into account, in order to ascertain the subject of which she was to have a third.

The appellee's counsel answered, 1. That, when the testator gave his wife a third of his estate, he gave her a third of the estate which he had a right to dispose of: his estate, especially his personal estate, was, in truth, no more than the surplus after payment of his debts. In giving her specific legacies "besides and above one third of his real and personal estate," he had reference to the provision which our law made

126 for a widow, independently \*of her husband's will; namely, dower of his real estate, and, subject to his debts, a third of his slave property for life, and of his other personalty absolutely; and he intended to give her the two men slaves &c. in addition to the provision which the law would have given her. Neither did the testator charge the residue given to the son, in exclusion of the third given to the wife, with the payment of his debts: as he had, in effect, given the wife a third of his estate after payment of his debts, so he gave his son the residue "after payment of his debts." Those words inserted in the devise and bequest to the son, only served to indicate the estate which was to be divided between the wife and the son; the estate, namely, which should remain after payment of his debts. They cited Reed v. Addington, 4 Ves. 575, and relied on it as directly in point and conclusive. There, the testator gave his wife the third part of all his property that should become due to him after his decease; then gave several legacies; and "as to all the rest, residue &c. of his estate and effects &c. subject to the payment of all his debts, funeral expenses and legacies," he gave the same to two trustees, upon trust that they should get in the residuary estate, and after payment of his debts, funeral expenses and legacies out of it, invest the same in the funds, for the benefit of three legatees. The wife claimed a third

of the clear personal estate of the testator at the time of his death, discharged from the debts, funeral expenses and legacies. But the court held, that the fund disposed of, was the fund after payment of debts; and that the wife was entitled to a third of the personal estate after payment of the debts; but that the legacies were not charged upon that third, but were to come out of the residue. 2. They said, that supposing their argument on the first point correct, it went far to dispose of the second. If the testator, in giving his wife a third of his estate real

and personal, intended to give her by  
127 his will, what the law would \*have given her independently of the will, then he gave her a third of his real estate for life, a third of his slave property for life, and a third of his other personalty in absolute property. Besides, the testator had marked the difference between the interest she was to take in "the third part of his real and personal estate," and that which he intended to give her in the "two men slaves and the horses and carts they drove," by adding, that those specific legacies were "to be her own proper estate and to be at her disposal:" for those words were, in their collocation, applicable only to the specific legacies, and were in the testator's mind, without doubt, so applied: and being so applied, they excluded the idea, that the wife was to take the third part of the testator's real and personal estate, before given her, in absolute property. The remainder of the estate given to the wife for life, was part of the residue given to the son and his heirs, and was as much subject to the executory limitation, in the event of his son dying under age and without issue, as any other part of the residue given to him by the will; so that no argument could be drawn from that provision, to sustain her claim to an absolute estate in the third given to her.

3 As to the last point, they remarked, that the defendants had not insisted upon any such claim in the account rendered by themselves, and settled before the commissioners of the hustings court of Norfolk in September 1808; they did not present the point in their answer in this cause; they did not present it to the commissioner of the court of chancery when the accounts were before him, or to the court itself by any of their numerous exceptions to the reports. It was presented here, for the first time; and it came too late. If it had been presented to the court below, it might have been obviated: it might have been shewn, that the emancipated slave, and the two slaves bequeathed to the wife, were long since dead, perhaps that they had died before the testator, and that the other chattels

bequeathed \*to her were of trivial  
128 value. She ought to have divided the personal estate, as well as the real, between herself and her son, as soon as the testator's debts were paid, and the administration closed, and in making that division her rights would have been ascertained; but she made no division. She never returned any inventory and appraisement of her testator's estate; and so, by her own fault, she deprived the court of the means of ascertaining her rights in the particular wherein her

counsel here complained of injustice done her

Johnson, in the reply, said, as to the last point, that it was a question of law upon the construction and effect of the testator's will, under which both parties claimed, and claimed whatever they were respectively entitled to; and it was not necessary, that the defendants should have set forth their construction of the will in their pleadings, or brought such a point to the notice of the court by exception to the reports. Proof abounded in the record to shew, that it could not have been obviated in the manner suggested, or in any manner. And though the court below might not have seen the point, and therefore might not have intended to decide it, yet it was, in effect, decided by the decree, and erroneously decided, to the injury of the appellants. In the argument of the first point, he commented on the case of *Reed v. Addington*, cited for the appellee; questioned its correctness and authority, and denied its application to this case. He said, the argument was not reported; Lord Rosslyn gave no reason for his opinion; it was not founded on any previous adjudication or authority of any kind; it had not been followed in any subsequent case; nor had it ever been approved by any jurist. Indeed, there had never been any mention of it that he could find, except by *Hovenden* in his note on the case, in which he referred to another note on the case of *Howse v. Chapman*, 1 *Hov. Supp.* 350, 351, and, taking the two

notes together, it was very difficult to  
129 ascertain what the annotator \*supposed was the reason of the decision, or the precise point which was decided. However, the case stood alone. And whatever was the ground of the decision, and whether it was right or wrong, he said, there was a material difference between that case and this. There, the testator was disposing of personal estate only. In this case, the testator, in one and the same sentence, gave his wife a third of his real and personal estate: he meant to give her the same proportion of the one as of the other: and as he meant to give her a third of the real estate he held at his death, not charged with his debts, so he intended to give her a third of his personal estate likewise clear of his debts. This was put beyond doubt by the consideration, that the third of the real estate given to the wife, was nowhere and nowise charged with debts: whereas the devise and bequest to the son were of the residue of his estate, both real and personal, after payment of his just debts, in express terms; which was, unquestionably, a charge of the debts upon the residue of the real estate, and, by consequence, upon the residue of the personal. [*Tucker, P.*, mentioned the case of *Overton & ux. v. Maben*, 10 *Leigh* 609.] Johnson said, that case was decisive of the point, that the emancipated slave and the specific legacies to the wife, in this case, were to be taken into account in ascertaining the subject of which the wife was to have a third; but as to the questions, whether the wife was to take a third clear of debts or only a third of the surplus after debts paid, and what estate she was to take in the third, it decided nothing. There, the testator *Maben*,



after directing that his real estate, his slave property, his household furniture and his stock of goods on hand, should all be sold, said—"In addition to what the law allows my wife, I give her my carriage and horses," and three slaves, by name. The widow claimed that which the law would have allowed her, if the whole property had been at the testator's death, as he directed it

130 should be \*afterwards, converted into money; that is (as her husband left no children) an absolute estate in a moiety of the real property, and of his slave property as well as of his other chattels. or of the proceeds of sales thereof. The court held, that she was only entitled to that which the law allowed her of her husband's property, real and personal, in its existing condition at the time of his death; namely, dower (or one third for life) of his real estate, half of his slave property for life, and half of his other personalty in absolute property: and that if she consented to the sale of the real and slave property, she would be entitled to the same proportions, and to the same estate, in the proceeds of the sales thereof. The decision turned upon the consideration of the testator's words "what the law allows my wife." and of the law referred to, which only made provision for a widow out of the estate her husband left in kind. Those emphatic words were wanting in our testator's will; nor were there any equivalent words. If this testator had given his wife specific legacies "besides and above her thirds of his estate real and personal," *Overton v. Maben* might have been in point; the widow's thirds being the phrase in common use, to express the provision which the law made for widows out of their husband's estates. But the language of this will was never used to express the same meaning.

II. In the case of *Newton v. Poole*, the appellant's counsel said, 1. That as the slaves of the testator Robert Poole had never been divided between Newton's wife and his ward, though he held the double character of executor of the testator in right of his wife the executrix, and of guardian of the appellee, all his transactions in receiving the hires of the slaves, and in making sales thereof, clearly belonged to his executorial character, and ought to have been brought into his executorial accounts; and the court below

131 erred in overruling his \*exception to the charge thereof to him in his guardian's account. 2. That as the houses of his ward must have required occasional repairs, proof that he purchased materials proper for such repairs, and his own oath (upon examination before the commissioner, under the order of the court) that the materials were applied to the purpose of such repairs, were sufficient to entitle him to a credit for the price he paid for the materials. It could not be necessary, that he should designate the particular houses in the repairs whereof the particular materials were used; since all the houses, without doubt, required frequent repairs, so that the discrimination would have been useless, and hardly practicable. The court below erred in overruling Newton's exception on this point, and yet more in the instruction it gave the commissioner, that he should be held to proof, by the testimony of disinterested witnesses, of the actual application of

the materials to the purpose; which, in effect, excluded all circumstantial evidence however strong.

The appellee's counsel answered, 1. That as Newton was personally liable for the hires and for the proceeds of sales of the slaves received by him, or rather for his ward's proportion thereof, and liable for the same amount in whichever of his two characters he should be charged, it was immaterial, whether he was charged with these moneys as executor or as guardian: and as no substantial injustice was done him by charging him as guardian, even if, in point of form, he ought to have been charged as executor, such an error was no ground for reversing the decree. 2. That it was the duty of the guardian to keep regular accounts, and regular vouchers; and the only question was, whether he should be allowed to supply the defect of vouchers by his own oath.

III. In the case of *Newton and wife v. Poole*, the counsel for the appellants maintained, 1. That the first instruction given by the court to the commissioner, in 132 \*its interlocutory decree of February 1829, was erroneous. They said, it was contrary to principles now settled by repeated adjudications of this court—That accounts of executors or guardians, audited and reported by commissioners of the court to which such fiduciaries are required to render such accounts, are to be taken as prima facie evidence; that though such audited accounts are liable to be surcharged and falsified, the burden of proof lies on the party complaining; and that if proved to be unjust in ever so many particulars, they are yet prima facie evidence as to all items not so impugned. Nor were such audited accounts to be regarded merely as stated accounts: their effect depended on the consideration that they have been settled by a tribunal provided by law for the settlement thereof. They cited *Anderson & al. v. Fox & al.*, 2 Hen. & Munf. 245, 259-261; *Carr's ex'or v. Anderson*, Id. 361; *Atwell's adm'r v. Milton*, 4 Id. 253; *M'Call v. Peachy*, 3 Munf. 288; *Burwell's ex'ors v. Anderson adm'r*, 3 Leigh 348; *Garrett ex'or v. Carr & ux.*, Id. 407; *Sherman adm'r v. Christian*, 9 Id. 571, and the statute concerning guardians &c. 1 Rev. Code, ch. 108, § 7, p. 407, directing the settlement of guardians' accounts, and declaring the effect of such settlements. Whatever was the ground upon which the court thought it proper to instruct the commissioner to reject the audited accounts of September 1808 as prima facie evidence, there was nothing in the case to justify such an instruction. If the court proceeded on the ground, that the audited accounts were entirely discredited by the number and nature of the items of surcharge and falsification, which the plaintiff succeeded in establishing, the court misunderstood the rule of law which held such accounts prima facie evidence: the rule was, that they are prima facie evidence, notwithstanding that they are liable to be surcharged and falsified, and corrected in all particulars in which they are shewn to be unjust. 133 And if proof of \*surcharge and falsification should be allowed to prevent the application of the rule, hardly a case would be found in practice to which it could be applied; since there was very seldom an



account of the kind that was not liable to be surcharged and falsified in some particulars, more or less, according to the care and skill of the fiduciaries in keeping their accounts, and the skill of the auditors in stating them. If the court thought the instruction proper, because, in its opinion, the errors found in the accounts were justly imputable to wilful frauds practised by the parties, whereby they deceived the auditors; they said, the evidence did indeed prove their want of care, and yet more their want of skill, in keeping such accounts, from which grievous injury had resulted to themselves; but of any wilful fraud, they submitted, there was no proof whatever to convict them: (That, however, was a mere question of fact, the argument of which consisted in an examination of the evidence.) But suppose the actual frauds so recklessly imputed to Newton and wife (or rather, for the most part, to Mrs. Newton) had been proved upon them; that would not have justified this sweeping instruction to the commissioner, to reject the audited accounts entirely—to call for new proofs even as to items that were no wise impugned—unless it had been also shewn, that the auditors who settled the accounts were corrupt and partial; that they were apprised of the frauds intended by the parties, connived at and lent their aid to support them. Now, there was no evidence, upon which the character or conduct of the auditors could be impugned. 2. The third and fourth instructions were equally erroneous and injurious to the appellants. The abstract principle of law as to the consequences of a "confusion of goods" to the party who confounds them, upon which the court founded those instructions, was inapplicable to the case. There was no confusion of goods. The court supposed,

134 that the \*bricks already made, which the testator Robert Poole left on hand when he departed for the West Indies in March 1803, were alone to be accounted for as part of his estate; and that those which his wife began to make during his life, but did not complete till after his death, were her own property: and the supposed "confusion of goods" consisted in her confounding her testator's bricks with her own. But she did not engage in the brick-making business on her own account, to be prosecuted at her own expense, and at her own risque of profit or loss. She commenced it as agent of her husband, and under his positive instructions to her to resume it without delay and prosecute it; and though she did not and could not complete what she began during his life till after his death, all her transactions in the brick-making business were on account of her husband and his estate; so that the bricks he left on hand, and those she made, were all to be accounted for as assets of his estate, and her whole outlay, and all the expenses she incurred, from beginning to end, were proper charges against his estate. Why, then, was this "confusion of goods" now imputed to her? why was a discrimination between the two parcels of bricks required? Only, in the first place, to justify the inferences from her confusion of them, that the burden of proof lay on her to shew how many she had made, and that she, as "the party by whose act the confusion of

property was made, should lose, if any loss should be sustained by either party;" and, secondly, to lay a foundation for the fourth instruction,—that if she should not adduce satisfactory evidence of the quantity of bricks made by her after her testator's death, his estate should be credited with one half of the proceeds of her sales of bricks after his death; clear, of course, of all expenses incurred by her in her brick-making business. She had made no such discrimination at the time; the auditors in 1808 had confounded the two parcels of bricks, credited the 135 testator's \*estate with the whole, and charged it with all the expenses she incurred in her operations; and it was next to impossible she should be able now to adduce satisfactory evidence on the subject. And, in the absence of such proof, the court deemed it fair to assume, that one half of the bricks she sold were left on hand by her husband; and that the other half only were made by her; and made of her own accord, on her own account, at her own charge and risque of profit or loss. Thus, by a misapplication of a principle of law, the court, in effect, ascertained a state of facts, whereby the opinion of the court, that "she should lose, if any loss were to be sustained by either party," was carried out into its practical consequences.

The counsel for the appellee premised, that, in the accounts actually taken and reported by the commissioner, upon which the final decree of the court was founded, no injustice had been done the appellants in consequence of the instructions of the court which their counsel complained of: the instructions seemed, indeed, to have been forgotten; the audited accounts of September 1808 had been corrected only so far as they were surcharged and falsified; and the brick account, and every matter that appertained to it, had been stated upon actual evidence. And to shew this, they referred to and examined the commissioner's reports. But they contended, that the instructions were right. 1. As to the instruction, that the audited accounts of September 1808 should not be received even as prima facie evidence, but the whole account should be stated de novo: they admitted the general rule, that such accounts are to be regarded prima facie as correct, liable to be surcharged and falsified by the party complaining of them; but they said, that rule had never been, and could never be, applied to a case, in which the party who relied on the audited accounts, was shewn to have been guilty of wilful injustice—of such and so many 136 overcharges and \*omissions of credits, as could only be imputed to fraudulent design; or to a case, in which, if corruption and partiality was not proved upon the auditors, the errors and injustice of the accounts they reported were so palpable, that they could only be accounted for upon the supposition of that gross negligence which was as injurious to the other parties interested in the accounts, as actual corruption could be; or to a case, in which the fiduciaries who rendered the accounts had never returned any inventory and appraisement of the estate to be accounted for, whereby the auditors could test the accuracy of the accounts they rendered and submitted to examination.

(As to the gross negligence imputed to the auditors, and the actual frauds imputed to Newton and wife, chiefly to Mrs. Newton, these were questions of fact, which were argued on the evidence, and the affirmative as strenuously maintained on the one side, as they were denied on the other.) Supposing the fraud imputed to Newton and wife proved; such fraud, they insisted, took away all credit from the audited accounts, and deprived them of all benefit from the use thereof as evidence: such *ex parte* audited accounts could not stand higher than stated accounts *inter partes*; as to which, if either party was convicted of fraud, the whole accounts were opened. But, however, the charges of fraud against the appellants, and of negligence against the auditors, and the effect of those charges if just on the credit of the audited accounts, might be controverted, the fact that no inventory and appraisal of the estate was returned to the court, or laid before the auditors, was incontestable and certain; and that fact alone, they said, sufficed to exclude the audited accounts as evidence. The making and returning such an inventory was an essential part of the duty both of executors and guardians, which was positively enjoined by law, and they were sworn to perform. 1 Rev. Code, ch. 104, § 35, 44, 45, p. 383-6-7, ch.

137 108, § 7, p. 407. Then, \*what was the effect of the omission of that duty upon the audited accounts of these fiduciaries? Tucker, J., in his opinion in *Anderson & al. v. Fox & al.* was the first judge of this court who stated the rule, that these audited accounts are to be taken as *prima facie* evidence of the several charges and credits therein contained, liable to be surcharged and falsified by any person interested therein, if capable of adducing satisfactory evidence to that purpose: and after stating the rule, he said, that the party seeking to surcharge and falsify an account of the kind, ought "to call for the inventory, appraisal and account of sales of the estate, together with the vouchers in the hands of the executor." The same judge, in *Atwell's adm'r's v. Milton*, after adverting to the unanimous opinion of the court in *Carr's ex'ors v. Anderson*, that an inventory and appraisal which did not appear to have been signed by the executor nor submitted to the court and ordered to be recorded, was not proper to be admitted as evidence, and after referring to the opinion he had expressed in *Anderson & al. v. Fox & al.* as to the effect of an audited account, said, "I beg leave to add a further reason in support of that opinion. By our law both executors and administrators are bound to make a true and perfect inventory of their testators' or intestates' estates, and to exhibit the same, when required, to the court, and to make a just and true account of their actings and doings therein &c. The executor may certainly, without being required, exhibit his accounts to the court for settlement, because, being bound by obligation under a heavy penalty to do so when required, he ought to be permitted to do so without being required. The court are to proceed to have the accounts duly examined and settled. To this end, the inventory and appraisal (when the latter is required) must be considered as

preliminary requisites, and necessary vouchers. And when the court has referred them to commissioners to examine, state  
138 \*and settle, who report, that they have examined the account and vouchers to them submitted, and closed the account, which is afterwards certified to have been examined and allowed by the court, and ordered to be recorded; can there be doubt that a copy of the account so exhibited, examined, allowed and admitted to record by the proper tribunal, would *prima facie* be so far conclusive evidence in favour of an executor, in an action brought upon his official bond, as to shift the burden of proof, as to any thing which might surcharge and falsify such account, from the executor to the plaintiff? I conceive not" &c. And Roane, J., in the same case, held the audited account *prima facie* evidence, because, though it was not expressly stated that the inventory of the estate was produced before the auditors, yet, that being the natural course of business, it should be intended. Thus, from the very authorities which laid down the rule, that audited accounts were to be taken as *prima facie* evidence for the executor, it appeared that the reason of it was, that an inventory of the estate was "a preliminary requisite and necessary voucher" to be laid before the auditors. And it was indeed most manifest, that without such a document, the auditors would have no materials upon which they could settle the accounts; no means of ascertaining, whether the accounts rendered by the parties were fair and full accounts or not. Therefore, the fact, in this case, that no inventory of the testator Poole's estate had ever been returned to court, that none was laid before, or called for by, the auditors, that in truth none was pretended to have been made at any time or in any form, was alone sufficient to justify the instruction given by the court to the commissioner to disregard the audited accounts as evidence. 2. The want of the inventory was also an essential consideration in the enquiry, whether the third and fourth instructions were correct: it was the principal consideration on which the court founded those instructions. The  
139 confusion \*of the bricks left on hand by the testator with those made by the executrix, left it uncertain how many she had made; and while that uncertainty remained, it was impossible to know whether her charges for expenses incurred by her in her brick-making operations, were reasonable or exorbitant, real or pretended. And it was in this way, that this confusion of goods produced by her own neglect to return an inventory of the bricks left by her testator, worked, as she used it, to her own advantage; whereas the court thought, and rightly thought, that it ought to operate to her loss rather than to the prejudice of the plaintiff. Yet it gave her the opportunity of ascertaining by oral evidence, the true state of facts, which the inventory she ought to have returned; would have shewn. In the absence of any evidence on her part, the court did not arbitrarily assume, but thought it a fair inference from the evidence, that one half the bricks sold by the executrix, had been made and left on hand by the testator, and therefore directed that the es-

tate should be credited with half of the proceeds of her sales of bricks; wherein (as they said, and endeavoured by a minute examination of the evidence to shew) the court did indeed err, but the error was grievously injurious to the plaintiff.

Johnson, (in reply to the argument against receiving the audited accounts as *prima facie* evidence, founded on the circumstance that no inventory and appraisal of the estate had been returned,) called the attention of the court to the case of *M'Call v. Peachy's adm'r*; where, though the administrators had returned an inventory, it was acknowledgedly imperfect, in omitting the important items of the debts due their testator at his death, which constituted the main point in controversy, yet it was held, that they were not chargeable with more on that account, than the debts which should be proved to have been collected by them or lost by their negligence, and that the audited accounts, stated in the absence of a perfect inventory, should be taken as *prima facie* evidence.

I. In the case of *Newton v. Poole, CABELL, J.*, pronounced the opinion and decree of the court—That, no division having been made of the slaves which belonged to the estate of the testator Robert Poole, and no accounts having been taken, to shew what proportion the appellee would be entitled to of the slaves of that estate, it was wrong to charge the appellant with the hires of the slaves or of any of them: those hires belonged to the executorial, and not to the guardianship accounts, and ought not to be settled in this suit, but in the other suit of *Poole v. Newton & wife*—That, on the same ground, it was improper to bring into the accounts in this suit, either as debits or credits, any portion of the proceeds of sales of any of the slaves of the estate of the testator Robert Poole; those proceeds of sales being a fit subject for the suit against Newton and wife, and not for this—That, therefore, the court below erred in overruling the appellant's exceptions on those points. And that this court was also of opinion, that, in settling the appellant's accounts of the rents and disbursements of the real estate, the court below erred in directing, that he should not be credited for articles satisfactorily shewn by disinterested testimony to have been purchased by him, and to have been necessary and proper for the lawful purposes of the real estate, unless it should be also proved by like testimony, that they were in fact applied to the purposes of the estate; this court being of opinion, that when such articles were thus proved to have been purchased by the appellant, his own oath that they were applied to the purposes of the estate, should entitle him to credit for them, whether they be of large or small amount, and although he should not be able to designate the particular tenement to which they were applied.

141 \*Therefore, the decree, as to so much thereof as was above declared to be erroneous, was reversed, with costs &c. and as to the residue thereof affirmed: and the cause was remanded to the circuit superior court of James City, for further proceedings according to the principles of this decree.

II. In *Newton & wife v. Poole, TUCKER,*

*P.*, delivered the opinion of the court. He said—The cases before us are of extreme hardship to the appellee, to whom it is obvious from the records, that large sums are due, in his character of ward and distributee, although his recovery has hitherto been prevented, and may be still further delayed, by the complicated situation of the accounts, and by the embarrassments, which, in cases of this description, are so easily thrown in the way of a final decree. In such cases, it cannot be improper for the court of chancery, where it is apparent that, under any aspect of the case, an indisputable amount is due to the distributee, to make an interlocutory order for the payment of it, instead of tying up for a quarter of a century what is beyond dispute, merely because there may be matters of minor importance unsettled between the parties. In this case the appellee's father died in 1803. He himself came of age in 1823, and filed these bills against his own mother and father-in-law, in the character of executors and guardians; and in May 1835, a final decree was pronounced from which the defendants appealed, and the cause has lingered here ever since. So that, at forty years of age, the appellee has not yet received one cent of that portion of his patrimony which has accumulated in the hands of his guardian. Such a state of things is a reproach upon the justice of the country. To avoid, in some degree, the crying hardship of the law's delay, it is certainly desirable, that the court of chancery should, in such cases, make such interlocutory decrees as I have indicated.

142 \*In proceeding to settle the contested questions between the parties, the first that presents itself is as to the rights of Mrs. Newton in her deceased husband Robert Poole's estate. And here we are agreed, that she is entitled to one third of the estate, real and personal, precisely as the law would give it to her, and to the slaves Sam and George and the other specific legacies, in addition thereto. In other words, the widow is entitled under this will, to one third after payment of debts, and to the specific legacies besides; and, in estimating that third, the specific legacies and the emancipated slave are to be taken as part of the dividend, so that she will have a third of the whole estate after payment of the debts. This is the principle on which the court proceeded in *Overton & wife v. Maben*.

It next becomes necessary to decide, whether the court properly forbade the introduction by the appellants of the administration accounts, settled in September 1808, under the orders of the borough court of Norfolk, as *prima facie* evidence in their behalf. And we are of opinion, that the instruction upon that subject was erroneous. It has long been the established rule of our courts, that settlements of administration accounts made by auditors appointed by the courts of probat, when duly returned, approved and recorded, are admissible evidence for the executor, and are to be taken as *prima facie* evidence of the several charges and credits, subject to be surcharged and falsified by any person interested. The decisions to that effect (cited at the bar) rest, mainly, upon the long established practice of the

country, and are somewhat sustained by the principle, that where the law entrusts the performance of certain duties to commissioners, it will be presumed they have properly fulfilled them, till the contrary is proved. *Stark. Ev. part 2, § 49, p. 173; Id. part 4, p. 263; Moody v. Thurston, 1 Stra. 481.* Guardians' accounts stand upon the same footing by statute. The order, 143 then, in this \*case, was erroneous, unless there was something from which we could infer falsehood and unfairness on the part of the commissioners. What requires us to disregard the rule, which, until the contrary be proved, attributes verity to their certificate, that the items of charge and credit in those accounts were sustained by vouchers or sufficient evidence? The objections which have been made, very sufficiently indeed prove surcharges and falsification; and, so far, the account must be corrected. But such proof does not operate to discredit the whole account; for, if it did, no account could stand, as there is perhaps none in which some error or omission may not be found. It is not, therefore, enough to shew that there has been no inventory; or that great errors appear, or that the executor has even taken an unfair advantage; for though such evidence unquestionably would affect the general result, and forbid us to take the amount reported to be just, yet so long as the commissioners are unassailed, the verity of their certificate of the proof of the items of the account must be allowed, unless controverted by evidence. For the audited account does not, as has been erroneously supposed, stand upon the footing of a stated account between the parties. The latter rests upon the supposed adjustment between the parties themselves; and if there be fraud, it is of course void in toto. The other rests upon the supposed integrity of an impartial tribunal, and is only to be corrected so far as it is proved to be erroneous, unless corruption in the tribunal itself can be established: for where the law authorizes any person to make an enquiry of a judicial nature, and to register the proceedings, the proceedings so registered are not only to be presumed to be true, but they are generally held to be the only legitimate medium to prove the result. *Stark. Ev. part 4, p. 1043.* As in this case; although the audited account is not conclusive evidence against those not parties to it, to establish the amount 144 and justice of \*the executorial disbursements, yet the fact that a particular item was proved by a voucher, or that all the items were proved by vouchers, depends upon the certificate of the persons entrusted, and must therefore be taken as true unless disproved. Therefore, the circuit superior court erred in refusing to permit the audited account to be received as prima facie evidence before its commissioner.

As to the instruction upon the abstract principle about the confusion of goods, we are of opinion, that that principle has nothing to do with the case. The whole of the bricks, whether made before or after the testator Poole's death, belonged to his estate, and ought to be credited to it; and the whole of the expenses in his lifetime, or since his death, should, in like manner, be charged to the estate, the net balance constituting, in

fact, the assets of the testator, chargeable with debts and distributable among those entitled.

These principles being settled, the result would prima facie require a reversal of the decree. But the appellee's counsel contend, that if upon a full examination of the whole record, the amount decreed does not exceed what is due to the plaintiff, the decree should be affirmed, although the court below may have arrived at the result in an irregular manner. As a general principle, this may be admitted; but the enquiry still recurs, whether such a course can be safely adopted in this complicated case, depending upon masses of evidence, documentary and oral, and requiring detailed explanations of the numerous exceptions filed in the cause? We think not; and the rather, as the accounts may assume a very different aspect, when stated by a commissioner, upon a recommitment with instructions to receive the audited accounts as evidence, and to adjust the brick account, and the legacies and distribution, upon the principles above mentioned. We therefore decline going into an examination of the exceptions in the second case, as 145 that examination \*could not end in any profitable result, and might conclude matters which ought to be left open to the operation of the evidence afforded by the audited accounts.

The decree of this court declared, that there was error in the said proceedings and decree of the court below, in the following particulars: 1. In the instructions given to the commissioner by the interlocutory decree of February 1829, that in taking the accounts the defendants should not be permitted to offer and use as prima facie evidence the accounts of their transactions rendered to the hustings court of Norfolk, but that the accounts should be taken de novo without benefit to them from those accounts; this court being of opinion, that it is the well established rule, that ex parte settlements of administration accounts by commissioners appointed by the court which granted probat or administration, and passed by such court, are to be received prima facie as evidence in favour of the executor or administrator, subject nevertheless to be impugned, surcharged and falsified by the opposite party: 2. In the application of the principle of law as to the confusion of goods, to the ascertainment and adjustment of the brick account; this court being of opinion, that the whole of the bricks, whether made before or after the testator Poole's death, should be taken to have belonged to his estate, and ought to be credited to it, and that the whole of the expenses in making them, whether in his lifetime or since his death, should in like manner be charged to his estate; the net balance constituting, in fact, the assets of the testator chargeable with debts, and distributable among those entitled: 3. In the construction of the will of Robert Poole; this court being of opinion, that the widow was entitled first to her specific legacies in absolute property, and, in addition thereto, to one third of the real and personal estate of the testator after payment of debts; the real estate 146 \*and slaves (if any) in her share to be held for life, and the other personality in absolute property; and that, in estimat-

ing her third, the specific legacies and the emancipated slave are to be taken as a part of the dividend, so that she will have a third of the whole estate including them, in addition to her specific legacies. And the court being of opinion, that further decision by this court upon the various exceptions and other points in the cause, will lead to no profitable result, as it is impossible to see how far they may be affected by the opinions upon the questions above decided, waived any such further decision. Therefore, decree reversed, so far as it was above declared erroneous, with costs &c. And cause remanded to the circuit superior court of James City, to be finally proceeded in according to the principles declared in this decree.

147 \*Slaughter's Adm'r v. Tutt.

March, 1841, Richmond.

(Absent STANARD,\* J.)

**Parol Gift of Slaves—Evidence—Case at Bar.**—In trover against adm'r of plaintiff's father, plaintiff claims title to slaves under a parol gift from his father, and possession under the alleged gift; there is no direct proof of the gift, but only proof of such a temporary possession held by the plaintiff, as may as well be referred to a loan as to a gift from the father, and, under the circumstances, more probably referrible to a loan than to a gift: HELD, this proof is insufficient to maintain the title.

**Bills of Exception—Motion for New Trial—Rule of Decision When Facts Certified.**—In a bill of exceptions to a judgment of a court overruling a

\*He had been counsel in the cause.

**+Gifts—Necessity of Delivery.**—See foot-notes to Miller v. Jeffress, 4 Gratt. 472; Tutt v. Slaughter, 5 Gratt. 364. The principal case is cited in Miller v. Neff, 33 W. Va. 206, 10 S. E. Rep. 381; Thomas v. Lewis, 89 Va. 82, 15 S. E. Rep. 889. See generally, monographic note on "Gifts" appended to Barker v. Barker, 2 Gratt. 344. Tutt v. Slaughter, 5 Gratt. 364, is the sequel to the principal case.

**‡Bills of Exception—Motion for New Trial—Rule of Decision Where Facts Certified.**—Where, in a bill of exceptions to the decision of the lower court upon a motion for a new trial, the facts proved at trial are stated and certified, and not the evidence merely, the appellate court, without regarding the opinion of the jury and the inferior court, will proceed to judge for itself originally, and determine whether the proper inferences and conclusions were made and drawn from the facts. In support of this proposition, see the principal case cited in Valden v. Com., 12 Gratt. 727; Harrison v. Farmers' Bank, 6 W. Va. 8; Gillilan v. Ludington, 6 W. Va. 143.

But in Richmond, Fred. & Pot. R. Co. v. Sneed, 19 Gratt. 364, the court said: "It is not necessary therefore to say any thing in reference to the case of *Slaughter's Adm'r v. Tutt*, 12 Leigh 147, which was cited in the argument by the counsel for the railroad company, to show that as the facts proved, and not the evidence merely, has been certified, we ought to draw our own conclusions from them, uninfluenced by the opinion of the jury or of the circuit court. That case, however, admits, that when the facts proved do not establish the fact necessary to a just conclusion, but such further fact is to be inferred from the facts proved, and the facts proved leave it uncertain whether such further fact can or cannot be fairly inferred, respect ought to be paid by the appellate court to the verdict and judgment in the court below."

motion for a new trial, the facts proved at the trial are stated and certified by the court; upon appeal from the judgment, it appears that the verdict is an erroneous inference from the facts stated; therefore, judgment reversed, and a new trial awarded.

**Same—Same—Same.**—And where the facts proved at the trial, are stated and certified by the court that tried the cause, and the question is whether the verdict conforms with the facts stated, and there is no question as to the weight or credit of evidence, the appellate court should judge of the correctness of the verdict upon the facts stated, uninfluenced by the opinion of the jury, or of the court that sanctioned the verdict; TUCKER, P. paulo dissentiente.

Trover for six slaves, brought in the circuit superior court of Culpeper, by Tutt against Slaughter, who died pending the action, and it was revived against his administrator. Plea, the general issue. The jury having found a verdict for the plaintiff for 1500 dollars damages, the defendant moved for a new trial; the court overruled the motion; and the defendant filed a bill of exceptions, in which it was stated, and certified by the court, that the following "were all the facts established by the evidence:"

That the plaintiff claimed the slaves under a parol gift from his father, now deceased, of whom Slaughter the original defendant was the administrator.

148 \*That in 1816 or 1817, the plaintiff, then a very young man, who had been previously living with his father, removed to a place in Culpeper about fifteen miles from his father's residence, and there set up a blacksmith's shop (not being, however, a blacksmith himself); in which a negro man slave, named Moses, worked as a smith, and his wife Mimy, and one little negro girl, then their only child, lived there with him. These slaves had been previously the property of the plaintiff's father: there was no evidence to show on what terms they went to the plaintiff's residence: only the fact that they did go thither, appeared. The blacksmith's shop was continued about a year, and then broken up; upon which the slaves, Moses and his wife and child, were returned to

The principal case is cited in Hilb v. Peyton, 22 Gratt. 568; Valden v. Com., 12 Gratt. 728. See foot-note to Fisher v. Vanmeter, 9 Leigh 18.

**Same—Rule of Decision When Evidence Certified.**—On the other hand, the principal case is cited in State v. Flanagan, 26 W. Va. 120, for the proposition that, where the evidence, and not the facts, is certified, the appellate court will review the opinion of the trial court granting or refusing a new trial on the ground that the verdict is contrary to the evidence, whenever the court by excluding all the conflicting parol evidence of the exceptor, and by giving full faith and credit to all the evidence of the adverse party, can see that the verdict is plainly contrary to the evidence. See foot-note to Valden v. Com., 12 Gratt. 717. See monographic note on "Bills of Exception" appended to Stoneman v. Com., 25 Gratt. 887.

**Review on Appeal—Matters of Discretion.**—As to when matters of discretion decided by the court below, will be reviewed by an appellate court, see the principal case cited in Welch v. County Court, 20 W. Va. 60, 1 S. E. Rep. 341.

the residence of the plaintiff's father, who had a large farm, and many slaves upon it: there, Moses worked in a blacksmith's shop, and his family lived on the farm with the rest of the father's slaves. The plaintiff went over the Blue Ridge, and lived a short time, but whether this was before or after he opened his blacksmith's shop, did not distinctly appear: however, he returned to his father's house, to reside with him, about the same time the slave Moses and his family returned: and, thenceforth, till the father's death, Moses and his family continued at the father's residence, and the plaintiff resided there, superintending his father's business.

In November 1827, the father executed two bonds for debts of his own, in which the plaintiff joined as his surety; and the father, by deed of trust dated the same day, conveyed the slaves Moses and Mimy and all the increase they then had to a trustee, for the purpose of indemnifying the plaintiff against loss by reason of his suretyship. It was not expressly stated in the bill of exceptions, that the plaintiff had notice of the execution of that deed of trust at the time; but it was stated, that he afterwards told the trustee (a near neighbour an intimate acquaintance of the family) that he wished and \*hoped to borrow money to pay the debts, and then to have the slaves sold under the deed of trust, and to buy them himself: he never, during his father's life, told the trustee that he had any claim to the slaves: and both the trustee and another witness (the father's next neighbour) always considered Moses and his family, from the time of their return from the plaintiff's blacksmith's shop as abovementioned, as constantly in the father's possession, and his property; nor did they ever know the plaintiff to claim them during his father's life, though they heard from others of such a claim, some two or three years before the father's death.

In February 1830, the coroner of Culpeper went to the father's house, with an execution against him to a large amount, which he intended to levy on slaves; when the plaintiff said, the execution should not be levied on the slaves that belonged to him, but without naming the slaves he claimed as belonging to him; and the father, hearing this, said there was enough of other property to levy it on. The execution was levied on slaves, but not on Moses or his wife or their children.

Until 1830, all the slaves on the father's farm, including Moses and his family, had been given in, to the commissioner of the revenue, in the father's name, sometimes by himself, and sometimes by the plaintiff, to whom he referred the commissioner; but when the commissioner came to take the list of taxable property in 1830, the father told him that all the property had theretofore been listed in his name, but it must now be separated, and "the boys" (meaning his sons) must give in their own property in their own names: he did not say what property was his, or what belonged to "the boys," nor did any one else tell the commissioner: but a change was made in the mode of entering the property; and in 1830,

which was the first year the plaintiff was charged with taxable property, he was charged with two black tithables (two slaves above the age of sixteen) and 150 \*three slaves between the ages of twelve and sixteen. It was not shewn, that the plaintiff had or claimed any other slaves, but those above mentioned, and a negro girl which had been given him by his wife's father.

A witness (a dealer in slaves) proved, that he had frequently, within ten or twelve years before the trial, and down to twelve or eighteen months before the death of Tutt the father, told him, that a negro blacksmith might be sold very well, and either asked him whether he had such a slave to sell, or suggested to him that he might make such a sale; to which he always replied, that he had none such, but that his son, the plaintiff, had a blacksmith, the man Moses, and his family, which he might sell if he pleased; and the witness applied to the plaintiff to purchase these slaves, who declined to sell them.

Tutt, the father, was a widower. Tutt, the plaintiff, took a wife in 1828, and brought her to his father's house, where they lived with him till his death, deriving their subsistence from his estate; but they lived there only by the father's courtesy: the plaintiff attended to his father's business, who reposed great confidence in him, and his wife officiated as housekeeper.

Mimy, the wife of Moses, died in the lifetime of Tutt, the father; and Moses and six children of Mimy, being found on the father's farm at his death, were inventoried and appraised as part of the father's estate, and then sold by his administrator Slaughter, the original defendant in this action, though the plaintiff forbade the sale.

Tutt, the father, though once in affluent circumstances, so that in 1817 the slaves Moses and his wife and child were a reasonable advancement to his son the plaintiff, had become much embarrassed before his death, and died insolvent.

The slave Moses had been recovered by the plaintiff in an action of detinue against Slaughter in his lifetime; 151 \*and the present action was brought to recover the value of Mimy's six children, which had been sold by Slaughter, as administrator of Tutt the father, in October 1832, for 1200 dollars, which sum with interest was what the plaintiff claimed in this action.

And "these being the facts and all the facts in the case," the court overruled the defendant's motion for a new trial, and gave the plaintiff judgment for the damages found by the jury.

The defendant applied to this court for a supersedeas to the judgment; which was allowed.

Leigh, for plaintiff in error, said, that upon the facts stated, the verdict was plainly against law. Tutt claimed title to the slaves in question, under a parol gift of his father: and to maintain such a title, there must be proof, in the first place, that the father made such a gift to the son; and then, that the slaves so given

came at some time into the actual possession of, and remained with, the donee or some person claiming under him. 1 Rev. Code, ch. 111, § 51, p. 432. Now, in this case, there was no proof whatever of any gift made by the father to the son, to which the possession of the son, even if possession had been proved, could be referred; and, allowing the utmost latitude of inference from the proofs of the son's possession, set out in the bill of exceptions, it was impossible to infer such an actual and abiding possession in the donee, as the statute required to support a parol gift of slaves. To sustain the judgment of the circuit superior court, this court must not only infer the fact of the parol gift of the father from the mere fact of the son's possession, but it must infer the fact of the son's possession from facts altogether equivocal and inconclusive. The son, it seemed, rested his claim on an alleged gift of his father made in 1816 or 1817, when he left his father's house, set up his blacksmith's shop fifteen miles off, and

152 carried the slaves Moses and his \*wife and child with him; but the slaves remained in his possession only one year, and were then returned, and thenceforth remained in the father's possession till his death in 1832; and in 1827, the father exercised complete ownership over them, and his right to them was acknowledged by the son; for he mortgaged the slaves to the son, to indemnify him against a suretyship the son had incurred for him, and the son declared his purpose to acquire the slaves under the mortgage. That transaction was a complete refutation of any gift prior to its date. Was any gift made subsequently to that date? Certainly, no direct proof of such gift was adduced. Did the son ever acquire the possession subsequently to 1827? The possession continued without change or interruption in the father till his death. As to the conversations stated to have occurred in 1830, between the coroner, Tutt the son, and Tutt the father, concerning the levying of the execution, between the father and the commissioner of the revenue in the same year, and between the negro-dealer and the father; he said, these proofs were too vague to warrant the inference of an actual gift by the father to the son, even of the slaves Moses and his wife Mimy, much more a gift of their six children. But if the gift could possibly be inferred from the facts, still proof of the actual possession of the donee under the gift, was wanting; and without such possession, the gift was invalid.

Patton, for the defendant in error, contended, that the parol gift under which he claimed, and his possession under the gift, were fairly inferrible from the facts proved at the trial. This was not a controversy between the creditors of the donor and the donee, but between the donee and the administrator of the donor: neither the donor nor his representative could avail himself of any such want of formality in the gift, or the want of such a change in the possession visible to the world, as

153 might render the transaction void as against the donor's \*creditors. The question was, whether there was

a valid gift of the slaves as between the parties? Tutt the father made a simple unqualified delivery to Tutt the son, of the slaves Moses and his wife and child, in 1816 or 1817; and this was a perfectly reasonable advancement from the father to the son: the son removed the slaves to a distance, and employed and held them in his service, till it suited his purposes or his pleasure, to break up his blacksmith's shop, and to abandon his new residence. This, he argued, was proof enough of the original gift, accompanied by possession in the donee, and therefore complete. It was true, the slaves were afterwards returned, not however to the father, but to the father's residence, and lived on the father's farm; but then it was to be considered, that the son returned to the father's house about the same time, and he also resided there, having the superintendence of all the slaves on the farm, including the slaves in question. His control over the slaves which were the property of his father, was exercised as his father's agent; but his control over the slaves in question, which were his own property, was referrible to his own rights, and was a continuance of his possession. When a father and son live together on the same farm, and both have slaves on the farm, it was most reasonable, that the possession of each parcel of slaves should be regarded as following the rights of the respective parties. As to the circumstance of the father's making the deed of trust in 1827, whereby he conveyed these slaves to a trustee for the indemnification of the son against the suretyship he had incurred for the father's debt; that could not be regarded as a waiver by the son of his rights under the previous gift of the father, or as an acknowledgment of the father's right of property in the slaves; for it did not appear that the son was apprised of the execution of the deed of trust at the time; and his subsequent wish

154 to purchase the slaves under the deed of trust, might be \*fairly attributed to his wish to avoid an unpleasant controversy with his father. That Tutt, the father, did not, at the time he executed that deed, or even afterwards, claim any right in or control over the slaves in question, that, on the contrary, he acknowledged the absolute right of Tutt the son to them as his own property, was, he said, proved beyond question, by his admission in 1830, that these slaves (for there were no others that could have been referred to) were not liable to executions for his debts; by his insisting, that they should be listed on the books of the commissioner of the revenue as the son's property, so that he should pay the taxes upon them, and the charging of them to the son accordingly; and by the father's declaration, frequently repeated in the course of several years, that he had no such slaves as these to sell, but that his son had a blacksmith, "the man Moses, and his family," which he might sell, if he pleased. Royston & wife v. Hankey, 3 Moore & Scott, 381; 30 Eng. C. L. R. 308. It was a material circumstance, that Tutt, the son, had recovered the slave Moses in an action of detinue against Slaughter in his lifetime, upon the



same title, upon which he now claimed the value of the six children of Moses: that recovery ought to conclude the question here. *Shelton v. Barbour*, 2 Wash. 64.

But supposing the question of title more doubtful than it was, yet, he said, the verdict of the jury ought not to be disturbed. This was a motion for a new trial on the ground that the verdict was against evidence; and it was well settled, that, in such a case, a new trial ought to be granted only where the verdict is a plain deviation from right and justice; never in a doubtful case, merely because the court, if of the jury, would have given a different verdict; per *Roane, J.*, in *Ross v. Overton*, 3 Call 319; *Brugh v. Shanks*, 5 Leigh 598; *Mays v. Callison*, 6 Leigh 230; *Brown v. Hundley*, 7 Leigh 119; *Mahon v. Johnston*, Id. 317.

155 \*Leigh, in the reply, insisted, that the verdict here was a plain deviation from right and justice. But, he said, the question was, whether it was not against law? whether, upon the facts stated in the bill of exceptions, and certified by the court as the facts established by the evidence at the trial, the jury was warranted in inferring a gift, valid in law, by the father to the son, of the slaves in question? He said, it had been well understood, since the case of *Bennett v. Hardaway*, 6 Munf. 125, that appeals from judgments overruling motions for a new trial, could never present any question of fact) properly so called) to this court; any question as to the weight of evidence, or the credit of witnesses, which the jury, and the court that tried the cause, could judge of better than an appellate court. If the court that tried the cause should overrule the motion for a new trial, its duty was to state and certify the facts, which, in its opinion, were proved at the trial; and then the question in this court, upon an appeal from the judgment, was, whether the jury, in their verdict, drew improper, or failed to draw proper, inferences from the facts proved? And this has been regarded here as a question of law, upon which this court has exactly the same materials for forming a correct judgment as the court below had. He cited *Carrington v. Bennett*, 1 Leigh 340; *Ewing v. Ewing*, 2 Leigh 337; *Fisher v. Vanmeter*, 9 Leigh 18; *Rohr v. Davis*, Id. 30.

ALLEN, J. Upon the facts stated in the bill of exceptions, and certified by the court as all the facts proved at the trial, it seems to me, that the court erred in overruling the motion for a new trial. A gift of slaves, to be valid, must either be by deed or will properly proved and recorded, or else the possession must have passed from the donor to the donee, and remained with the donee or some person claiming under him.

156 \*The first fact relied upon to establish the gift is, that in 1816 or 1817, Tutt the son, then a very young man, removed to a place in the same county, about fifteen miles from his father's house, and opened a blacksmith's shop, in which the slave Moses worked as a smith; the wife of the negro and one child were with him. They remained about a year, when the shop

was broken up, and the negroes returned to the farm of Tutt the father. There was no evidence to shew the terms on which the son held the negroes during this period; the fact alone appeared, that they were in his possession, as stated. Would this proof, standing alone, justify the inference of a gift, and delivery of possession consummating it? It does not strike me as being sufficient. It was remarked by Judge Tucker in the case of *Mahon v. Johnston*, that "where the gift is without value received, it is but reasonable, that the party who is to be deprived of his property without an equivalent, should be clearly proved to have actually parted with it. This can never be done, where the evidence to establish the gift is altogether equivocal; and such is always the case with mere evidence of possession in a transaction between a father and a child; such possession being equally consistent with the idea of a loan or gift, and both loans and gifts, under such circumstances, being common, the fact of possession does not prove much." These remarks seem to me to be sound, and that much mischief might ensue, if it were ever to be established that the mere possession by a child of a slave theretofore belonging to the father, should afford sufficient evidence of a gift. The act is equivocal of itself, and unconnected with other circumstances it proves nothing; it is every day's practice for the parent to permit the child to hold possession of a slave for his accommodation, without intending to part with the property, or deprive himself of the power to dispose of it according to his own pleasure, when he comes to distribute his estate.

157 \*The circumstances attending the transaction in this case, would rather lead to the inference of a loan than a gift. The son was a very young man, and unmarried. It does not appear, that he returned immediately to his father's house on the breaking up of his shop; he crossed the mountains, it appeared, and lived some time there, and then returned to his father's; but whether this was before or after opening the shop did not distinctly appear. But, as it did appear he was very young when he opened the shop, the inference is strong, that it was on abandoning the business that he crossed the mountains. The whole seems to have been an experiment by a young man, in which the father aided him, probably with the intention of giving him the slaves, if it turned out successful; but there is nothing to warrant the inference of a gift at the time.

The slaves returned to the father's plantation, which was large, and on which there were many slaves. The son also returned, and managed for the father. To all appearance, the slaves in question were as much the slaves of the father as the other slaves on the plantation. And in November 1827, the father executed two bonds to a creditor, in which the son joined as a surety; and on the same day, the father executed a deed of trust of the slaves in question, to indemnify the son against loss as his surety. The son afterwards told the trustee, that he hoped to borrow money to pay the debts, to have the slaves sold,



and buy them himself. He did not, to the trustee, a near neighbour and friend, set any claim to the slaves. If the father had executed a deed of trust on the slaves to secure the creditors, the circumstance might not have had much influence: the son, though asserting a claim, might have consented to the slaves being pledged to secure a debt for which he himself had become responsible. But that is not this case. The deed was given for his own indemnification. He could not then have asserted

a claim to the negroes by virtue  
158 \*of any supposed donation in 1816 or 1817; for he would, in that case, have taken a deed of trust of his own property to secure himself. It is not expressly stated, that he knew of the deed; but he was then living with his father, and the deed is stated to bear date on the same day he became surety in the bonds. And whether apprized of the execution of the deed at the time or not, he knew of it afterwards and before the debt was satisfied, and expressed a hope of being able to borrow the money to pay the debts, and an intention to purchase at the sale under the deed of trust. The execution of the deed of trust, and the conduct of the son in regard to it, are decisive against any right as growing out of the short possession held by him in 1816 or 1817. He must rely exclusively on the subsequent transactions.

Is there any fact certified, which proves, or from which the jury could fairly have inferred, a valid gift? In 1830, an officer went to the house of the father to levy an execution against him to a large amount. The son observed, it should not be levied on the slaves belonging to him, but did not name the slaves. The father, hearing this, said there was enough of other property. Prior to 1830, all the slaves had been given in, to the commissioner of the revenue, in the father's name, sometimes by the father, sometimes by the son: in that year, the father told the commissioner, that the property had theretofore been listed in his name, but it must now be separated, and "the boys" must give in their own property. He did not, nor did any one else, say what was his, or what belonged to "the boys;" but a change was made, and the son was charged with some slaves. A witness had frequently, for the last ten or twelve years before the trial, suggested to the father that a blacksmith would sell well, and asked whether he had such slave to sell, or suggested he might make such a sale; to which the father replied he had none, but that the plaintiff had a blacksmith, a man Moses, and his family,

159 \*which he might sell if he pleased. These are all the facts bearing directly on the question of the gift after the deed of trust. And taking them most favourably for the son, it seems to me, we cannot construe them as amounting to a gift, without overturning the well settled principles of law. To the validity of such a gift, possession is essential. This possession should not be colourable, but real. The possession of the donor, in the words of Judge Carr, in *Durham v. Dunkly*, 6 Rand. 141, should be broken up. According to the facts of this case, there

was, subsequent to the deed of trust, no such actual change of possession. To the world, the slaves continued in the situation they had remained in for years before. There was nothing to distinguish them from the other slaves on the father's farm. The father still remained the visible owner. The possession remained unchanged. It is then unnecessary to enquire, whether, if there had been proof of a subsequent change of possession, the facts would establish a gift. For unless the donee has obtained possession, no proof of an intention to give, or of declarations that a gift had been made, would suffice.

It was argued, that as the jury and court below have, upon these facts, decided in favor of the plaintiff below, the deviation should be gross and palpable, before this court should interfere with the verdict: and *Ross v. Overton*, *Brugh v. Shanks*, and *Mays v. Callison*, are cited. *Ross v. Overton*, the leading case on this subject, and referred to in all the subsequent cases as giving the rule, was decided before the case of *Bennett v. Hardaway*, in which this court established the rule, since rigidly adhered to, except in one or two instances not affecting the principle, that a bill of exceptions to a judgment overruling a motion for a new trial, ought not to state the evidence, but the facts appearing to the court to have been proved. The grounds

upon which this rule was established  
160 are familiar. "The appellate \*court (it is said), sees the evidence on record only; and on paper the credit of every witness, not positively impeached, is the same." The inferior court, "while it can faithfully transmit to this the actual words spoken by the witness, can give it in no fac simile of the manner" of the witnesses. It is further stated to be an important principle, that the revising court should have the same lights, and act on the same data, as the court below; and that where this advantage is wanting in the appellate court, the judgment of the court below will preponderate. These remarks of Judge Roane in *Bennett v. Hardaway*, are unanswerable, when confined to the subject to which he applied them. He was discussing the propriety of the appellate court's reviewing the verdict and judgment of the trying court, upon the evidence as given before the jury. But I do not perceive their force, or the application of the principle laid down in *Ross v. Overton*, when the facts, and not the evidence, are certified. And I incline to think they were relied on in the case of *Brugh v. Shanks*, and other cases since the case of *Bennett v. Hardaway*, without sufficiently adverting to the change which that case has made. Thus, Judge Carr, in *Brugh v. Shanks*, after quoting the decision in *Ross v. Overton*, observes, "These remarks are applied to the court which presides at the trial, and has all the advantages (possessed by the jury) of seeing and hearing the witnesses: how much more strongly do they apply to the appellate court, deprived of these all important aids in eviscerating truth?" But when the facts are certified, this court has nothing to do with the credit of the witnesses. The truth has been eviscerated for

it. The appellate court acts upon an admitted state of facts; it takes them as the conceded facts, upon which the court and jury have proceeded; and so taking them, what is to prevent it from arriving at a correct conclusion? Having all the facts, the question is, whether the court and jury drew a correct conclusion from 161 them? \*And what better opportunity is possessed by the court and jury, than the revising court? Their opportunities of deciding whether facts are or are not established by the evidence, are certainly far superior. But having advanced that far, and arrived at the facts, the conclusion of law upon the facts may as well be drawn by the revising as the inferior court. This, it seems to me, is the fair construction of the case of *Bennett v. Hardaway*. The important principle is, that the revising court should have the same lights, and act upon the same data, as the inferior court. And therefore Judge Roane held it improper to set out the evidence in the bill of exceptions. But when the facts are stated, he observes, "the appellate court does not in that case depart from or overrule the decision of the trying court, as to the weight of testimony, or the credit due to any witness. It only acts upon his own certificate and acknowledgment of his opinion upon the subject." A bill of exceptions setting out the facts, he observes, "briefly states them, as they appeared to the judge, and are admitted by him to have been proved; and, in consequence of such his admission, the appellate court founds its decision upon the same facts as those which governed the court below." If the appellate court has the same lights and proceeds upon the same data, as the jury and the trying court, there would seem to be no sufficient reason why it should not draw its own conclusions, uninfluenced by the judgment and verdict.

A different practice is calculated to do injustice. The exceptor is compelled to take the certificate of facts from the tribunal which has pronounced against him. With every disposition to do equal justice, it is the natural tendency of the human mind to give prominence, and sometimes imperceptibly to attach undue importance, to evidence which has influenced its own decision. And if, upon the facts so certified, the party is to be met in the appellate court with every presumption 162 against him, \*the right to appeal from the decision overruling the motion for a new trial, becomes but a mockery.

This view is supported by the decision of this court in *Carrington v. Bennett*. That was an action on a bond, to which the defence of gaming was set up. A doubt arose whether the bill of exceptions set out the evidence, or the facts proved; a majority of the court considered it as setting out the facts proved. There was no direct proof that the bond was given on a gaming consideration. And Judge Carr, after citing *Bennett v. Hardaway*, said, "that the appellate court must act on the facts stated, as upon a special verdict, and is to infer or imply nothing:" that the evidence

went strongly to shew that the bond was for a gaming debt; but that the jury had said otherwise, and the court agreed with them; that they both heard the witness, and their decision must have been governed by the credit given to him. The other judges differed. Judge Green observed, that "in a case where there was no direct evidence to prove the fact in issue, but only proof of other facts from which the matter in issue might or might not be inferred; if the court, instead of stating the proved facts, from which such an inference might arise, were required to state its own inference, this would be, not to state the fact or facts proved, but the judgment of the court as to their effect; and there would be nothing for the appellate court to decide upon. Yet the jury and the court below may err as essentially, and as fatally to the rights of the parties, in their inferences of other facts from the admitted facts, as in respect to the law arising from the facts proved." The opinion of Judge Coalter was to the same effect. And the court in that case, from the proved facts, inferred the fact that the bond was given for the gaming debt, contrary to the finding of the jury and the judgment of the trying court: thereby, in effect, determining, that with the facts before it, it must pronounce its own judgment 163 \*upon them; that having the same lights it must deduce its own inferences. If the facts proved did not establish the fact necessary to a just conclusion, but such further fact was to be inferred from the facts proved, and those facts left it entirely uncertain whether the further fact could fairly be inferred; there, I think, respect should be paid to the verdict and judgment of the trying court, because a fair presumption might arise, that the fact necessary to warrant or repel the inference, had been omitted in the certificate of facts; and because that should be held as rightly determined which the facts did not shew to be wrong.

I am of opinion, that upon the facts stated, we have all the power and authority of the jury and court below, and that the facts stated do not warrant the verdict in this case. I think the judgment should be reversed and a new trial awarded.

CABELL and BROOKE, J., concurred.

TUCKER, P. Concurring as I do in the opinion just delivered by my brother Allen, that the verdict in this case is unsupported by the facts certified by the court, and that the judgment should be reversed and a new trial awarded, I think it proper to say, that I cannot altogether acquiesce in his views as to the principles which should govern this appellate tribunal on questions of new trial, where the jury and the inferior court have concurred in their opinions against the party asking it. There is, perhaps, after all, but a shade of difference; but I deem it right, until we can have a full court to settle the question, to prevent the conclusion which might be drawn from my silence, that I yield entire concurrence in the opinions which have been expressed.

Where the facts certified to this court under the rule established in *Bennett v.*

Hardaway, present but a naked question of law, there seems to be no difference of opinion. \*In such a case, this court would not be influenced by the opinion of the jury or inferior court as to the law of the case, and would grant a new trial or not, according to its own opinion of the law arising upon the facts stated. Fisher v. Vanmeter, cited at the bar, rests on this principle. But it sometimes happens, that from the facts stated, some other fact must be inferred, in order to make out the case of the party. As in trover, though the conversion may not in terms be proved, yet facts may be proved from which the jury may have inferred a conversion. So, in Carrington v. Bennett, gaming was not distinctly proved to be the consideration of the contract, yet from the facts stated, the jury might have inferred it. And so in this case of a gift. Facts are here proved, from which the jury doubtless inferred a gift; and the only question is as to the correctness of this inference. Indeed, in all these cases, the question presents itself, not whether the verdict is right in point of law, but whether the jury have fairly inferred the issue, or main fact in the cause, from the facts which have been actually proved with a view to establish it. Where such a case presents itself, my brethren seem to think, that little weight is to be attributed to the opinions of the court and jury, though they admit that they would lean in favor of the verdict, if they felt doubt upon their own minds in relation to the propriety of the inference to be drawn. On the other hand, it seems to me, that although the decision in Bennett v. Hardaway removes one great difficulty, by substituting a certificate of the facts, for a certificate of the evidence, it is still reasonable to presume, that the jury and the trying court may often have superior means of arriving at a correct inference from the facts found, arising out of incidents at the trial which may be omitted, or could not easily be committed to the court's certificate. The prevarication of an unwilling witness might lead the jury, who heard him, to \*draw stronger inferences from the facts extorted from him, than this court might be disposed to draw from the naked fact appearing upon the record. I therefore think, that the true rule still is, that where the jury and the court below concur, this court should not grant a new trial upon the ground that false inferences have been drawn from the facts found, "unless in a case of plain deviation, and not in a doubtful one, merely because the court, if of the jury, would have given a different verdict."

Judgment reversed, and cause sent back for a new trial.

166 \*Raynolds & Another v. Carter, Adm'r &c.

April, 1841, Richmond.

[37 Am. Dec. 642.]

(Absent BROOKE, J.)

Usury—Pledge of Slave as Security—Case at Bar.—J. advances \$200 to R. and R. puts a slave of the yearly value of \$50 into J.'s possession, upon an agreement

that J. shall hold the slave and take the profits for interest on the money, till R. shall redeem the pawn by paying the principal sum of \$200—J. the pawnee holds the slave for two years, and dies: and then his adm'r takes a bond with sureties from R. the pawner, for the principal sum of \$200 advanced by his intestate, and restores the slave to the pawner: HELD,

1. Same—Same.—That the contract between J. and R. was usurious and void.

2. Same—Same—Bond to Redeem.—That the adm'r of J. stands in the place of his intestate, and the usury of the original contract taints and avoids the bond taken by him for the debt.

Pawn—Effect Where Pawn Is Lost.—Where property is pawned generally for debt, if the pawn be lost or destroyed, without fault of the pawnee, he may recover the debt of the pawner: alter, if there be a special contract, that the pawnee shall take the pawn as the only security for the debt.

Debt, in the county court of Frederick, by Carter against Jane Raynolds, Thomas Raynolds and James Wigginton, on a bond executed by the defendants to the plaintiff as administrator of Jackson, for 200 dollars. Plea, the statute of usury. The defendant Jane Raynolds died pending the action, and it was prosecuted against the surviving defendants. The parties agreed, that the following evidence should be taken and received as a case agreed between them.

1. The bond on which the suit was brought; which was a single bill under seal, executed by Jane and Thomas Raynolds and Wigginton, to Carter as administrator of Jackson, dated the 1st January 1827, for 200 dollars, payable twelve months after date, with interest from the date.

2. The evidence of E. Milton; who proved, that some five or six years prior to May 1830, he as deputy sheriff had executions in his hands against Thomas Raynolds: that Raynolds told him he expected to get some money (200 dollars as the witness understood from Raynolds at the time) from Jackson, the plaintiff's intestate, for the use of which he Raynolds was to put in pledge with Jackson a man slave named David (as well as the witness recollected, that was his name) whose services were to go for the interest of the money: that shortly after this conversation between the witness and Raynolds, the witness met with Jackson, and asked him whether Raynolds had got the money from him which he expected to get; Jackson answered, that he had not at that time received it, but he intended to let Raynolds have it, so soon as he should put into his hands a man slave named David as a pledge, whose services, Jackson said, were to go for the interest of the money: that the witness told Jackson he had better not make such an arrangement, for it would be considered an usurious contract; Jackson replied, that he would evade the law by taking a bill of sale for the slave; and the witness told him he could not evade the law by any possible means: that sometime after this conversation, another conversation took place between the witness and Jackson; in which Jackson told him, that he had run the risque, and had let Raynolds have 200 dollars, for which he had a man slave whose

labour and services were to go for the interest of the money: that the witness acted as deputy sheriff, for many years, in the part of the country where Raynolds lived, and had in his hands many executions against him, indeed was never without one; that in all these cases Raynolds's mother Jane became his surety; the debts were always paid by Raynolds, but how he got the money (except the 200 dollars above mentioned) the witness did not know.

3. The evidence of Benj. Wigginton, the subscribing witness to the bond on which the suit was brought; who proved that the bond was executed by the obligors  
168 \*at the house of Thomas Raynolds on the day it bears date: that the plaintiff Carter (Jackson's administrator was also present when the bond was executed: that it was mentioned by Carter, and by the obligors in Carter's presence, that the bond was executed to redeem a man slave named Milford, who had been in the possession of Jackson for about two years as a pledge for the money for which the bond was given: that the witness was a brother-in-law of Raynolds, lived near him, and was frequently at his house; and he was sure, that no other slave of Raynolds but the man Milford was in Jackson's possession, between 1825 and the first of January 1827; Raynolds had a slave named David, who lived at home during all that time, and was constantly in Raynolds's own service: that Milford was given up to Raynolds at the time the bond was executed; and that the services of this slave, while he was with Jackson, were worth 50 or 60 dollars a year; he was young, healthy and a good farm hand.

4. The evidence of William Wigginton; who proved that there was a man slave named Milford belonging to Raynolds in the possession of Jackson between the years 1825 and 1827; that he was the only slave of Raynolds that Jackson had during that time; that Raynolds had a slave named David, but he remained at home in the service of Raynolds himself; and that the services of the slave Milford were worth \*from 50 to 60 dollars per annum, at least 50 dollars.

And the parties agreed, that the law arising upon the above evidence should be adjudged by the court according to the very right of the case without regard to the pleadings; so that if the court should adjudge the law of the case to be in favour of the plaintiff, judgment should be entered for him for the debt, with interest according to the terms of the bond and costs; and if for the defendants, judgment should be given for them.

169 \*The county court held that the law was for the plaintiff, and gave him judgment; and, upon a supersedeas, the judgment was affirmed by the circuit superior court of Frederick. And then the defendants applied to this court for a supersedeas; which was allowed.

Leigh, for plaintiffs in error.

G. N. Johnson and Cooke for defendants.

TUCKER, P. The judgment in this case is, in my opinion, clearly erroneous. Two questions are made: 1. whether the orig-

inal contract was usurious? and 2. whether Raynolds, by giving the new bond, has lost the right of setting up the defence of usury?

As to the first, it was argued, that there is no usury, because the principal sum was put in hazard, and the money was not to be returned at all events. If this were so, and it did not appear that the scheme was resorted to as a device to avoid the statute against usury, there could be no question that the transaction would not be usurious. But I think the proposition is itself a false inference from the facts proved. Because the proof is that the slave was to be returned when the money was paid, it seems to be supposed that the lender had no right to demand payment, and that it was at the borrower's option to retain the money as long as he pleased, even though the slave should die or prove unprofitable. I do not think this a fair construction of the transaction. Such an arrangement might indeed have been made, but it was not made. The transaction was a simple loan of money without a day of payment being fixed, and the pledge of the slave for its security was but collateral. If there had been no pledge, it would not have been denied that the money might have been demanded presently. But the taking the pledge was not designed to change the contract, but to enforce the performance of it.

There was nothing in the language of 170 the bargain, \*from which it could be inferred that the lender intended to take the risque of losing his money, and to waive the legal effect of the loan by which it might be demanded at any moment. It seems therefore clear, that the lender had a right to require repayment when he pleased, upon the stipulated terms of surrendering the pledge; and it is equally clear, that if the slave had died, he would nevertheless have been entitled to his money; for the pledge was given to secure repayment, and not as a substitute for it.

This view of the case is fully sustained by the cases cited by Mr. Leigh on the subject of pledges. In case a pawn be lost without the fault of the pawnee, he has still his remedy for the money against the pawner. *Radcliffe v. Davis*, *Yelv.* 17, 179; *Anon.*, 2 *Salk.* 523. Opinion of *Holt, C. J.*, in *Coggs v. Bernard*, 2 *Ld. Raym.* 917; *Anon.*, 12 *Mod.* 54; *Manly v. Westbrook*, *Bull. N. P.* 720. And the rule must be the same, where the property pledged dies, as where it is lost. So, in *South Sea Co. v. Duncomb*, 2 *Stra.* 919, it was held, that where money is lent generally upon a pledge, it will not deprive the lender of his remedy against the person of the borrower; and that to discharge the person, there must be a special agreement to stand to the pledge only. The same principle is affirmed in *Thomas v. Terry*, 1 *Eq. Ca. Abr.* 139, pl. 5, and recognized by this court in *Price v. Williams*, 5 *Munf.* 507, where there was such special agreement. Every pledge implies a loan, and every loan implies a debt; *King v. King*, 3 *P. Wms.* 360. And if the pledge be destroyed, the payment of the debt may still be enforced against the person; 3 *Bac. Abr.* Bailment. B. p. 370, (citing *Yelv.* 179; *Co. Litt.* 209.)

where it is laid down, that if a man lend perishable goods as a pledge, and they decay, yet the pawnee may have debt for his money, for the duty continues. These authorities are all decisive of this case, unless it can be shewn to have been the intention of the parties that the lender should look only to the pledge, and that in no event was he to have a charge upon the person. But this does not appear in the case. There was then a personal obligation to repay, and of course the principal never was in hazard. The contract was usurious.

The next question is, whether the giving the bond by Reynolds to the administrator of Jackson, deprives him of the defence that the original contract on which it is founded was usurious? I think it very clear, that the contract is not purged of the usury. If it were, the bond would indeed be valid; for though the original contract be usurious, yet if no part of the usury has been received, and a new security is given for the principal sum with legal interest only, it is good. In such case, the parties having repented of the usury, and purged the contract of its taint, the new security has only bound the debtor to fulfil a moral obligation by paying what he had borrowed: for he could not even be relieved in equity against the usury without doing this. *Barnes v. Hedley*, 2 Taunt. 184. But where any part of the new security is for any portion of the usury, or where, after receiving the usury, the lender takes a new security for the principal, it is void; for it is a security given to further the usurious contract, and its direct effect is to give full efficacy to the original corrupt agreement. In truth, the avails of the slave's hire, in this case, were applicable to the principal, in part, at least. Of course, there was not 200 dollars due of principal. A part of the \$200, therefore, was interest, and usurious interest included in the bond, which, consequently, was void. *Wickes v. Gogerly*, 1 Carr. & Payne 396; 11 Eng. C. L. Rep. 434.

It was argued, that the bond being taken to a third person makes a difference. And this is true, where the third person is not a volunteer, but an assignee for value; and then, if the assignee is ignorant of the usury, the new security will estop the party who gives it from pleading the usury; otherwise not. *Chapman v. Black*, 2 Barn. & Ald. 588; *Cuthbert v. Haley*, 8 T. R. 390. According to our decisions, in cases of the kind, the debtor must hold out inducements to the third person who purchases it, to deal with the claim; else, the debtor will not be deprived of his defence; *Buckner & al. v. Smith & al.*, 1 Wash. 299; *Hoomes v. Smock*, Id. 389; *Woodson & al. v. Barrett & Co.*, 2 Hen. & Munf. 80; *Mayo v. Gile's adm'r*, 1 Munf. 533. And the reason of his being bound is, that by his mala fides in concealing the consideration and inducing the assignee to pay his money for the claim, he has exposed him to a loss. But this reason cannot apply to the administrator of the lender, who takes a bond for an usurious debt: he stands in his intestate's shoes. He has sustained no loss, and unless he acts foolishly, he cannot sustain

any. The debt is not assets till recovered, and it is his own folly to treat it as such, either by applying it to the payment of debts or by distribution. But admitting the contrary, it would only afford a ground for relief in equity against the defence of usury, upon proof that the administrator had actually treated the bond as assets, and paid or distributed the amount of it in advance. The suggestion that he might do so, is not enough to deprive the debtors of the defence of usury.

The other judges concurred. Judgment reversed, and judgment entered for the plaintiffs in error, defendants below.

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**\*Townes v. Birchett.**

April, 1841. Richmond.

(Absent BROOKE and STANARD, J.)

**Stated Account—Retaining Account Rendered without Objection.**—The rule of courts of equity, that an account current rendered by one party to another, received and held without complaint or objection, shall be deemed a stated account, considered.

**Same—Same—Rule Not Confined to Merchants.**—It seems the rule is not confined to accounts rendered by merchant to merchant, of mutual dealings between them as merchants, much less to accounts rendered by merchants abroad to merchants at home; that objections to such accounts rendered, which will prevent them from being deemed stated accounts, must be made within a reasonable time; and that it lies upon the party contesting the accounts so rendered, to prove that he made objection within a reasonable time: the rule is founded on the acquiescence of the party. Dissentiente ALLEN, J.

**Same—Same—Surcharge and Falsification—Onus Probandi—Case at Bar.**—B. whom the court regarded as a merchant of P. employed T. & W. auctioneers and merchants of the same town, to sell goods at auction for him: T. & W. five years after the sales made, render B. an account sales, and an account current wherein they charge him inter alia with commissions, with moneys paid to and for him, and with amount of debts lost by failure of buyers; and B. holds these accounts for two years after he receives them, without objection proved to have been made by him: HELD, these shall be deemed stated accounts, which shall be taken as prima facie just; and tho' B. may surcharge and falsify, the onus probandi of surcharge and falsification lies on him. Dissentiente ALLEN, J.

**Equity Jurisdiction—Bill by Principal against Auctioneer.**—Equity has jurisdiction of a bill by the principal against auctioneer for an account, if the account be yet open; or to surcharge and falsify the account, if it has been stated.

**Same—Same—Rule Where Auctioneers Are Stake-Holders and Trustees of Proceeds of Sale.**—And where

**\*Stated Account—Retaining Account Rendered without Objection.**—An account rendered by one party to another, received and held without objection beyond a reasonable time, becomes admitted as correct, and will be deemed a stated account. The principal case is cited, to support this proposition, in *Radford v. Fowlkes*, 85 Va. 858, 8 S. E. Rep. 817; *Robertson v. Wright*, 17 Gratt. 542; *Tazewell v. Whittle*, 18 Gratt. 349; *Ruffner v. Hewett*, 7 W. Va. 606; *Shrewsbury v. Tufts*, 41 W. Va. 225, 28 S. E. Rep. 697.

auctioneers are stake-holders and trustees of proceeds of sales by them made, bound to pay them to one or the other of two parties, upon conditions agreed upon, equity has jurisdiction to relieve, on a bill by one of the claimants against the auctioneers and the other claimant.

**Auctioneer—Sale on Credit—When Principal Must Bear Loss By Insolvency of Buyer.**—Auctioneers employed to sell goods, with discretion to sell on credit, take notes from certain buyers to themselves, payable at a future day, and the makers of these notes fail before they come to maturity:

**Held**, the principal, and not the auctioneers, shall bear the loss, unless it appear that the auctioneers appropriated the notes to their own purposes; and tho' the auctioneers procure such notes to be discounted for their accommodation, yet, if at the time they were in advance to their principal to an equal or greater amount, this will not be such an appropriation to their own use, as will make them liable to bear the loss.

174 poses; and tho' the auctioneers procure such notes to be discounted for their accommodation, yet, if at the time they were in advance to their principal to an equal or greater amount, this will not be such an appropriation to their own use, as will make them liable to bear the loss.

**Chancery Practice—Partnership—Death of One Partner Pending Suit.**—Bill in equity against two persons, who have been auctioneers and partners; one dies pending the suit; it is not necessary to revive the suit against the representative of the decedent; the plaintiff may proceed against the survivor alone.

**Assignment for Benefit of Creditors—Money Assigned Decreed to Assignee.**—One makes an assignment of a claim for money due him, among other property, to a trustee for benefit of his creditors, and then files a bill in equity, in his own name, to recover the money, and by amended bill makes the trustees a party, and prays that the money due may be decreed to the trustee: **Held**, regular to decree the money to the trustee.

On the 5th June 1821, Robert Birchett of Petersburg, assigned to Martin Thayer a bond of William Birchett for a large amount, and a deed of trust executed by the obligor mortgaging property to secure the debt. The assignment was made under a contract between the parties, which appeared by two instruments afterwards executed, one by Thayer, and the other by S. D. Townes and Charles Webb, auctioneers of Petersburg.

1. That of Thayer was in the following words: "Having sold my stock of merchandise amounting to 12,885 dollars, to Robert Birchett, for the bond of William Birchett of Mecklenburg, dated May 1, 1818, for 14,416 dollars, with credits on the same for 2985 dollars, assigned to me on the 5th June 1821, in which bond is secured by a deed of trust on the land and slaves of the said W. B. in Mecklenburg, dated March 15, 1820, and recorded in the clerk's office of the said county; and the said R. B. having deposited the said stock of merchandise in the hands of Townes & Webb for sale; it is understood, that they are to hold the proceeds of sales of the same until the said R. B. shall furnish such further security upon the bond as shall be reasonable and satisfactory; and I bind myself not to take any steps against the said W. B. for the space of one year from the 11th May last"—"As the said stock of

175 goods does not amount to the principal and interest of the bond computed to the 11th May last, I bind myself to pay to R. B. any balance of said bond over and above the amount of the said stock

of goods." Dated June 16, 1821, and signed by Thayer.

2. The other instrument, executed by S. D. Townes and Charles Webb, after reciting the sale of his stock of goods by Thayer to Robert Birchett, and his assignment to Thayer of W. B.'s bond and deed of trust, proceeded in these words: "And the said Thayer not being satisfied, that the said bond is made secure beyond all reasonable doubt, and wishing to be further secured, provided upon enquiry he should not be satisfied with the present security; it has been agreed by the parties, that the aforesaid stock of groceries should be placed in our hands as auctioneers for sale, and has been accordingly received by us, in consideration of the above premises and in pursuance of the agreement of the parties aforesaid; and we, the undersigned, do bind ourselves, our heirs &c. to pay to the said Thayer the net amount produced by the sale of the stock of merchandise aforesaid, at the end of twelve months, provided the said Thayer shall not be able to obtain from the said Robert Birchett additional reasonable and satisfactory security for the payment of the aforesaid bond. It is understood, that the said R. B. shall not be allowed a longer time than twelve months to give the required security: he failing to do so, we agree forthwith to pay the said net proceeds to the said Thayer. Given under our hands and seals, this 16th June 1821." Signed and sealed by S. D. Townes and Charles Webb.

Townes & Webb, as agents of Robert Birchett, had negotiated the contract between him and Thayer. They took the inventory of the goods (chiefly groceries sold by Thayer to Birchett, and settled the prices; and they took charge of the goods, and proceeded to make sales thereof, from time to time, as they could effect sales. \*They were auctioneers and partners, residing at Petersburg. Birchett also resided there, but whether he was a merchant or not, did not appear by any proof in the record.\*

On the 13th October 1827, Townes rendered Birchett an account of sales of the goods and the account current of Townes & Webb with him; the latter of which shewed a balance due Birchett, on the 1st June 1827, of 1758 dollars. On comparison of the account of sales with the account current, it appeared, that Townes & Webb's debits against Birchett (including interest and commissions) amounted, in December 1821, to 5051 dollars; and the amount of proceeds of sales received before that time, was 3403 dollars.

In these accounts, Birchett was charged two and a half per cent. commission on the value per inventory of the goods sold by Thayer to Birchett, and two and a half per cent. commission on the proceeds of sales of the goods; he was charged with sundry sums paid to him, and other sums paid for him, among which latter were the sums of

\*The reporter, on a careful examination of the record, found no such proof, and therefore stated that there was none. The president, however, in his opinion, regarded Birchett as a merchant.—Note in Original Edition.

515 dollars "paid to Durkin, Henderson & Co." and of 728 dollars "paid D. Foster's draft assumed by Birchett;" with interest on the moneys advanced to or for him; and with three debts stated to be still uncollected, namely, 828 dollars due from Morton & Co. 538 dollars due from Arnold & Co. and 206 dollars due from one Flomerfelt, (amounting to 1572 dollars,) on account of their purchases at the sales of the goods. And Birchett was credited with the sum of 11,178 dollars, for the proceeds of sales of the goods, which sum included the amount of uncollected debts above mentioned; and this credit was only given conditionally; for it was stated, that "it might be contested by Martin Thayer, and the amount was held accordingly."

177 \*Along with the account of sales and account current rendered, there was a letter from Townes to Birchett, also dated the 13th October 1827, in these words: "Dear sir, Enclosed please find sales of the groceries received from Martin Thayer for William Birchett's bond, the account current of J. H. Brewer & Co.\* and your own; balance due you 1758 dollars on the 1st June 1823, if I should not be held liable to Mr. Thayer, to whom the bond was assigned. I regret that about 1500 dollars of the sales proved to be bad, but it is impossible to provide against occurrences of this sort. Taking every thing into consideration (the rapid decline in the value of groceries after the negotiation of the bond) I think the result ought to be satisfactory. If it should be found, that I am not liable to Thayer, I shall desire to close the matter. And the better to explain the terms on which alone it can be effected, a disclosure of my unfortunate situation is necessary. I owe about 34,000 dollars, and my disposable effects, under the best management, will not produce more than 12,000 dollars, consequently, I can only pay 6-8ths. And at that rate, 25,000 dollars have been settled, payable in one and two years, with an understanding that I am to pay what further sum my situation may hereafter enable me, but that no suit is to be instituted against me. Such an arrangement is obviously advantageous to both parties; it places it in my power to make an effort; and there are none who do not believe that when I can pay I will pay. These are, of course, the only terms I can offer; but if it should be possible, I will shorten the payments. When the weather is better I will have the pleasure of seeing you. (Signed) S. D. Townes."

Nothing was done, at the time, in consequence of this letter of Townes; nor did it appear in proof, that any

178 \*communication between Birchett and him on the subject, took place till January 1831, when Townes wrote a letter to Birchett (in answer to one from Birchett to him, which was not produced) in the following words: "Dear sir, I have received your note of this morning. I have been for a long time extremely desirous to

have our accounts settled; and so soon as you find it convenient, I will do all that justice to the rest of my creditors and my own situation will authorize. I hope an early day may suit your convenience. (Signed) S. D. Townes." The parties did not themselves effect a settlement, if indeed they attempted it, which did not appear.

In May 1832, Birchett exhibited a bill in chancery in the circuit superior court of Petersburg, against Townes & Webb and Thayer; wherein, after setting forth all the facts of the transaction, and exhibiting the documents, as above stated, he charged Townes & Webb with a fraudulent contrivance to get his funds into their hands, and to hold them for an indefinite period, namely, until Thayer should be satisfied with the security for the debt due on William Birchett's bond; and he alleged, that, in truth, W. B.'s deed of trust mortgaging property for the security of the debt, was an ample security; that Townes & Webb sold the goods they received from Thayer at their leisure, and never rendered any account till after they had failed; and that the account of these transactions remained yet to be settled, Townes & Webb having always refused to come to a fair settlement, which he had often asked them to do, under the fraudulent pretext that they were still liable to Thayer. And then, adverting to the account current rendered by Townes & Webb in October 1827, he alleged, as instances of injustice attempted by them, that they had charged him double commissions, namely, two and a half per cent. on the value of the goods (per inventory) received from Thayer, and two and a

179 half per cent. on \*the amount of proceeds of sales of the same goods; that they had debited him with the amount of the debts due from Morton & Co. Arnold & Co. and Flomerfelt, on the ground that those debtors had proved insolvent; and also with several debts paid by them to Durkin, Henderson & Co. and others, without authority and without propriety; that after having thus reduced the balance due to Birchett, to 1758 dollars, they claimed to hold even that sum, for an indefinite period, liable to the claims of Thayer; and Townes proposed to Birchett, that he should compound with him, and take only a part of the money acknowledged to be due him, or rather his very unsatisfactory assurance for the payment of it at a distant day. The bill, therefore, prayed, that Townes & Webb might be compelled to render an account of the whole transactions before a commissioner of the court, and a decree for whatever balance should be found justly due thereon; and general relief.

The bill was regularly taken for confessed, for default of appearance, not only as to Thayer and Webb, who were absent defendants, but as to Townes also, who was a resident of Petersburg; and the accounts had been ordered, taken and reported, and the cause stood ready for final hearing, when Townes obtained leave to put in his answer.

In this answer, Townes denied the fraudulent contrivance imputed by the bill to Townes & Webb; and alleged, that they had, at Birchett's request, negotiated the

\*The balance due from Brewer & Co. was brought into the account, and charged to Birchett: and he did not contest the justice of that charge.—Note in Original Edition.



contract with Thayer for him; that they had effected the sales of the goods received from Thayer for William Birchett's bond, as speedily and upon the best terms they could; that the transactions took place during a period of great mercantile embarrassments, and when many failures were frequently occurring; that the sales of the goods were necessarily made on credit, and approved negotiable notes were taken from the purchasers; and that the pur-

180 chasers, Morton & Co., Arnold & Co. and Flomerfelt were merchants in good credit at the time the sales were made to them, but failed before their notes came to maturity, and therefore the moneys due from them were not and could not be collected. That the money paid by Townes & Webb to Durkin, Henderson & Co. for Birchett, was paid by his authority; and the drafts of Foster, charged to Birchett, had been assumed by him, Foster being Birchett's son-in-law, and connected with him in business. That Thayer gave notice to Townes & Webb, that they should not pay over to Birchett the proceeds of sales of the goods put by him into their hands, alleging that the security for the debt due on William Birchett's bond was inadequate; and Thayer required further security from Robert Birchett, which he failed to give; yet Townes & Webb, at their own risque, advanced to and paid for Birchett, about 5000 dollars. That the commissions charged, were charged in pursuance of an agreement between Townes & Webb and Birchett, and were moreover reasonable. And lastly, referring to the account rendered by Townes to Birchett on the 13th October 1827, he said, that Birchett made no manner of objection to the justice and fairness of those accounts, but was only solicitous that Townes should pay the balance thereby acknowledged to be due, which it was entirely out of his power to do; nor did he ever hear of any objection to those accounts so rendered till the commencement of this suit. And he objected, that the case was not properly relievable in equity.

In June 1833, Birchett filed an amended bill, stating, that on the 13th October 1827, he by deed of that date assigned all his effects then at his disposal, and among them his claim against Townes & Webb, the subject of this suit, to Richard Pegram (since dead) and Robert Birchett the younger, in trust for the benefit of his creditors; and praying, that the surviving trustee, R. B. the younger, should be 181 made party defendant, and that the money due the plaintiff should be decreed to the trustee.

Robert Birchett, the younger, put in his answer; in which, acknowledging that he had taken upon him the trust, he asked that whatever should be found due from Townes & Webb to the plaintiff R. B. the elder, should be decreed to him for the purposes of the trust.

In November 1833, the original defendants being then all in default, the bill was taken for confessed as to them, and the court made an order referring the account between the parties to a commissioner.

The commissioner made two special reports, stating, that Townes had been

required to produce the original books and papers of Townes & Webb touching the transactions between them and Birchett, and that these documents were necessary to a fair adjustment of the account; upon which the court made a rule for an attachment against him for not producing them. He never produced them; and the commissioner, at length, proceeded without them, and in April 1837, returned a report of the account.

The report contained two statements of the account; one according to the claims of the plaintiff, and the other according to those of the defendant Townes.

In the latter, the account rendered by Townes & Webb in October 1827, was assumed to be just, and only some trial corrections were made in it.

The former was stated upon the supposition, that the burden of proof lay upon Townes & Webb to sustain all the contested items of debit against Birchett; and on this principle, the debit to Birchett of 728 dollars on account of "D. Foster's draft assumed by him," that of 1572 dollars, the amount of the debts due from Morton & Co., Arnold & Co. and Flomerfelt, represented to be yet uncollected, and lost by reason of the insolvency of the debtors, and the charge of two and a half per cent. on the value of the goods (per inventory)

182 sold by Thayer \*to Birchett, as commission for negotiating the contract with Thayer, were (with some other items not necessary to be here stated) disallowed, on the ground that Townes & Webb adduced no proof to sustain them. And the commissioner reported, that this statement of the account insisted on by Birchett was, in his opinion, the just one, since no satisfactory proof of the disputed debits had been adduced. The account stated upon this principle, shewed a balance due Birchett of 5644 dollars, with interest on 5291 dollars from the 1st June 1823.

In support of the debit to Birchett of 728 dollars for D. "Foster's draft assumed by him," two drafts of Foster drawn upon New York in November 1820, in favour of Townes & Webb, with the protests thereof for non-payment at maturity, were laid before the commissioner: the balance due upon which drafts, after crediting some payments, was 728 dollars. But there was no proof of Birchett's assumption of this debt.

As to the uncollected debts: Townes laid before the commissioner, two notes of Morton & Co. payable to Townes & Webb, and negotiable at bank, one for 412 dollars due in March, the other for 416 dollars due in April, a like note of Flomerfelt for 206 dollars due in June, and a like note of Arnold & Co. for 538 dollars due in October, 1822. The commissioner stated, that the first note of Morton & Co. for 412 dollars had been endorsed by Townes & Webb, and discounted for their benefit; that the other note of Morton & Co. and the notes of Arnold & Co. and of Flomerfelt, had been endorsed by Townes & Webb to Townes individually, but they did not otherwise appear to have been applied to his own use; that the two notes of Morton & Co. had been deposited in bank and were noted for nonpayment at maturity; but the notes of



Arnold & Co. and of Flomerfelt were never deposited in bank for collection. And the depositions of five witnesses on behalf of the defendants, were taken before the 183 commissioner, and returned \*with his report, to prove the fact of the failure and insolvency of Morton & Co., of Arnold & Co. and of Flomerfelt, and of their failure, respectively, before their notes came to maturity: but the commissioner reported, that the evidence was insufficient for the purpose, and it certainly seemed too vague to be relied on.

In respect to the commissions charged by Townes & Webb, objected to as being double commissions, there was the deposition of an auctioneer of Petersburg, taken before the commissioner, which proved, that the charges appeared reasonable; but there was no proof, that Birchett had agreed to allow such commissions.

Townes excepted to the report, for the disallowance of each and every of the charges of Townes & Webb, above specified.

There was no proof that Thayer had given notice to Townes & Webb, that they should not pay the proceeds of the sales of the goods to Birchett, but should retain the same in their hands, under their covenant of the 16th June 1821.

In November 1837, the death of Webb being suggested and proved, the fact was stated on the record. And in December following, the court having (as before stated) allowed Townes to put in his answer to the bill, proceeded immediately to the hearing of the cause; and approving the commissioner's first statement of the account, that, namely, which was made according to Birchett's claims, (except the disallowance of the commission of two and a half per cent.\* on the value of the goods purchased of Thayer, as to which Townes's exception was sustained,) the court decreed, that Townes, surviving partner of Townes & Webb, should pay the defendant Robert Birchett the younger, the trustee for the plaintiff Robert the elder and his creditors, the sum \*of 5308 dollars, with interest on 4966 dollars, part thereof, from the 1st December 1823, and the costs.†

Townes, by petition to this court, prayed an appeal from the decree; which was allowed.

The cause was argued here, by May, Lyons and R. C. Stanard, for the appellant, and Macfarland and Rhodes, for the appellee.

I. The counsel for the appellant maintained, that the account current rendered by Townes & Webb on the 13th October 1827, accompanied with the account of sales of the goods, having been received by Birchett, and retained by him for above two years, without any complaint or objection proved to have been made by him to any item of the account, during all that

time, must be deemed a stated account; and, therefore, the burden of proof lay now on Birchett to shew any errors, omissions or unjust charges in the account, not on Townes & Webb, to sustain their charges. Birchett could only surcharge and falsify; and had he framed his bill with that view, it would have lain on him to prove the injustice of which he complained. They cited *Sherman v. Sherman*, 2 Vern. 276; *Willis v. Jernean*, 2 Atk. 249, 252; *Chapdelaine v. Dechenaux*, 4 Cranch 306; *Freeland v. Heron*, *Lenox & Co.*, 7 Cranch 147, 151; 1 Sto. Eq. ch. 8, § 526-9. Now, the decree was founded on the contrary principle: namely, that the account was still to be considered as an open one, and that therefore the burden of proof lay upon Townes & Webb to prove every disputed item of their account; and, consequently, though Birchett adduced no proof to impeach any item of the account, yet as Townes & Webb produced none on their part to sustain the disputed charges, the court below disallowed all those charges.

185 \*The counsel for the appellee entered into a critical examination of the authorities cited to shew that Townes & Webb's account current, rendered to Birchett in October 1827, ought to have been deemed a stated account; and contended, that the rule of equity laid down by those authorities, was inapplicable to this case: that the rule was confined to accounts between merchant and merchant, having mutual dealings as merchants; nay even to accounts rendered by merchants abroad to merchants at home; and, certainly, to such accounts only as both parties intended and treated as stated accounts. Now, in the first place, though Townes & Webb were merchants, it nowise appeared by this record, that Birchett was also a merchant; and if it may be supposed that he in fact was so, yet there were no mutual dealings between him as a merchant and Townes & Webb. He employed them as auctioneers to sell a parcel of goods for him, and (as they say) as agents to negotiate an exchange of a bond he held for the goods: the duty to be performed was all on their part, and that was, simply, to sell the goods, and pay the proceeds to him or his order. 2dly, Birchett and Townes & Webb resided in the same town. They said, it might be reasonable enough to take an account rendered by a merchant abroad to a merchant at home, and held without objection for two years, as a stated account: because, in such case, neither party could be expected to seek a personal interview with the other, in order to have a formal settlement; the business must be conducted by correspondence. But, they submitted, there was no such reason for taking an account rendered by one party to another residing in the same town, as a stated account it was as much the duty of one party as of the other, to adjust and close their accounts: and either party might, at his pleasure, have a personal interview with the other for a settlement. But, 3dly, in this case, neither Townes & Webb intended that the account rendered should under

\*The commission allowed by the decree was 326 dollars, a deduction of which with interest from the balance reported by the commissioner, left the sum decreed by the court.—Note in Original Edition.

†The minuteness and particularity with which the state of the case is reported, was rendered necessary by the views taken of it by the judges in their opinions.—Note in Original Edition.

stated account, in other words, as a settlement, nor had Birchett the least reason to believe, that they expected it should be so taken and treated by him; for in Townes's letter to Birchett of October 1827, which accompanied the account rendered, he told Birchett, that "if it should be found that he was not liable to Thayer, he should desire to close the matter;" that is, that the matter could not be closed, in other words he could make no settlement with Birchett, till it should be ascertained whether or no Townes & Webb were liable for the proceeds of the goods to Thayer; and even then, he was willing to close the matter only upon conditions that Birchett should agree to compound the debt, and take his assurance for the payment of 6-8ths at a future and distant day. If Thayer was entitled to the money, Birchett could not settle the account; and if he was to get nothing unless he agreed to the terms proposed for compounding the debt, and was not willing to accede to those terms, he had no motive for insisting on a regular and prompt settlement. The transaction was nothing more, in truth, than on the part of Townes & Webb, an exhibition of their claims, and a conditional invitation to Birchett to come to a settlement of the account, if he was willing to do so on the terms they proposed, and on Birchett's part, the settlement on such terms declined. But, they insisted, Townes's letter to Birchett of January 1831 was conclusive, that, in Townes's own opinion, the account was then still open, either because he himself had never intended that the account rendered in October 1827 should be regarded as a stated account, and had never expected Birchett to state his objections to it, or because he was conscious that Birchett had timely stated his objections: for, in that letter, written in answer to a note from Birchett, which he has not produced, and which (as was clearly inferrible from the answer) demanded and urged a settlement, he told Birchett, that "he had been for a long time extremely desirous to have their accounts settled." They cited *Irvine v. Young*, 1 Sim. & Stu. 333; 1 Cond. Eng. Ch. Rep. 170; *Ld. Clancarty v. Latouche*, 1 Ball & Beat. 428.

II. The appellant's counsel contended, that taking the account rendered in October 1827 to be a stated account, the court of chancery had no jurisdiction to give the relief prayed in the bill. Birchett's plain remedy was an action of assumpsit for the balance stated to be due. They cited *King v. Rossett*, 2 Young. & Jerv. 33.

The appellee's counsel said, whether this was to be regarded as a stated account, or as an open account, the jurisdiction was clear: if the account was still open, Birchett had a right to call Townes & Webb to account in equity: if there was a stated account, he had a right to go into equity to surcharge and falsify it. Besides, Townes & Webb were, in truth, trustees of the fund; bound to account for and pay it to Birchett, if Thayer had no claim upon it; and bound to Thayer, if he had a claim, to pay him the whole, or such part as he should be entitled to; so that Birchett had

no remedy but by bill in equity against Townes & Webb and Thayer.

III. The appellant's counsel contended, that, in any view of the case, Townes & Webb were not accountable for the uncollected debts, lost (as, they said, was sufficiently proved) by the failure and insolvency of the debtors before their notes came to maturity, and not by any neglect or misconduct. Even as to the note of Morton & Co. which they had had discounted for their use, the case was distinguishable from that of *Johnson & Duggers v. O'Hara*, 5 Leigh 456. There, J. & D. had been employed by O'H. to sell his tobacco as commission merchants, and they not only took a note to themselves, for the proceeds of that tobacco and the proceeds of other tobaccos, mixed together, but (what was most material) without being in advance to O'H.

their principal, they procured the note to be discounted for "their accommodation; and it was held, that they had, by thus dealing with the note, under such circumstances, made the note their own, and whether they collected the contents or not, were liable to O'H. for the proceeds of his tobacco included in the note which they had so appropriated. In the present case, the auctioneers were well warranted in taking the notes for the purchase money of the goods, to themselves: it was according to the known course of trade; and they had a special property in the goods and in the proceeds of sales, and might have maintained an action against the vendee as for a debt due to themselves; *Williams v. Millington*, 1 H. Blacks. 81; *Babington on Auctions*, 91. Besides, it was not only their right, but their duty, to collect the proceeds of sales of the goods, and to hold them, under their covenant with Thayer of the 16th June 1821. They were also well warranted in procuring this note of Morton & Co. to be discounted for their own use, since at the time they had it discounted, it clearly appeared by their account, even as reported by the commissioner, they were in advance to Birchett to a larger amount, and surely had a right to reimburse themselves advances which they were under no obligation to make for him. Then, as to the other note of Morton & Co. and the notes of Arnold & Co. and Flomerfelt, there was no ground whatever for holding Townes & Webb bound to account for the contents of them. But, supposing they can be held liable for these uncollected debts, still they should not have been charged with interest on them; *Rootes v. Stone*, 2 Leigh 650.

The appellee's counsel answered, that as the note of Morton & Co. which Townes & Webb got discounted for their own use, the case could not be distinguished from that of *Johnson & Duggers v. O'Hara*. The principle on which that adjudication was founded, was, that the commission merchants, in getting the note they had taken for the proceeds of sales of their principal's tobacco "discounted for their own accommodation, had exposed their principle to a twofold risque; the risque of the failure of the maker of the note, and the risque of their own fail-

ure. That case, therefore, in reason and in principle, was directly in point. They cited *Wren v. Kirton*, 11 Ves. 377. As to the other notes, they said it was fairly to be inferred that Townes & Webb had used these notes also for their own purposes; else, why had they endorsed them? As the notes were not put in bank for collection, they could only have endorsed them for the purpose of negotiating them. But there were two considerations, which they thought conclusive of Townes & Webb's liability for the amount of these uncollected notes: 1. Townes said, in his answer, that Townes & Webb sold the goods and took approved negotiable notes from the purchasers; that Morton & Co., Arnold & Co. and Flomerfelt were in good credit at the time, and that the sales were made during a period of great mercantile embarrassment, when many failures were frequently occurring. Now, if the makers of these notes were in good credit at the time, they could easily have procured endorsers; and, in such times, the notes of the debtors alone, not secured by responsible endorsers, ought never to have been taken as approved negotiable notes: so that there was gross neglect in taking such notes at all. And 2. they held these notes in their hands (importing on the face of them to be their own property) from 1822 to 1827, about five years, without ever giving any intimation to Birchett of their existence; and this alone ought to make them liable to Birchett for the amount of them; *Jackson v. Baker*, 1 Wash. C. C. R. 394.

IV. The appellant's counsel objected, that the representative of the deceased defendant Webb ought to have been brought before the court, before it proceeded to the final decree; for their covenant of the 16th

June 1821 made Townes & Webb responsible as joint covenantors, \*not as partners. To this it was answered, that even as to Thayer, it was a partnership transaction, though both partners executed the covenant, which was proper as the instrument was a deed. But, supposing them individually liable to Thayer by force of their covenant, it was not by that covenant that they were liable to Birchett: to him they were certainly liable as partners; and he was entitled to decree against the surviving partner for the whole amount due him.

V. There was another objection taken to the decree, namely, that this was not a proper case for a decree between co-defendants, and therefore it was erroneous to decree payment of the money to Robert Birchett the younger. The appellee's counsel submitted, that, in this particular the decree was plainly right.

TUCKER, P. On the question of jurisdiction in this case, I have found no difficulty. Townes & Webb were the agents of Birchett, and in that character were peculiarly amenable to equitable jurisdiction. Moreover, Birchett's claim being for the proceeds of sales of a parcel of goods, which were in the knowledge of the auctioneers exclusively, he had a right to call for an account of them, and he did call for an account accordingly. It is said, however, that the account had been already rendered.

True: but there was no obligation on Birchett to sit down satisfied with that account not rendered on oath: he had a right to have it so verified by proceeding in equity. And though by retaining the account rendered he gave it the character of a stated account, it did not conclude him, for he still had a right to surcharge and falsify, and he had a right to a discovery from the defendants on oath to aid in sustaining his objections. It is said, indeed, that the bill does not surcharge or falsify. But that is a mistake. There are various items of both: the complaint of excessive charge for commissions, and of the payments made to Durkin, \*Henderson & Co. and others, are instances of surcharge; and the charge of 1572 dollars to him for bad debts, is also objected to, and properly forms an item of falsification. Now, the rule is that if one item of objection is sustained, the whole account is opened before the commissioner for surcharge and falsification. The first item is clearly sustained, though it is one of small importance; and whether the others can be, is a matter which ought to be the subject of further enquiry. But what is conclusive as to the jurisdiction, is, that Birchett could not have sued at law. By the arrangement between the parties, Townes & Webb were not to pay the proceeds of sales of the goods to Birchett, until he should give Thayer additional security. This, Townes alleges, he never did. He could not, then, have recovered at law. Equity was the proper forum, where the stake-holders and both claimants could be convened. Neither claimant could compel payment at law; at least, he could not without the assent of the other. This assent was never given by Thayer, as Townes himself alleges; it was never given until since this suit was brought. On various grounds, therefore, I think the jurisdiction is beyond reasonable question.

Seeing then no substantial objection to the jurisdiction, and not deeming it necessary to go more at large into that point, I proceed to the merits. And here the first question is as to the weight to be attributed to the evidence of the account rendered in October 1827. The transactions in question took place in the town of Petersburg, where both the parties resided. They stood in the relation to each other, of a vendor of goods at auction, and the auctioneers. The goods were sold as early as the year 1821; and the appellee being in embarrassed circumstances, had every motive to demand an account of sales, and the payment of the proceeds. It is alleged, that the parties were on friendly terms, and that the accounts were at all times open to inspection, and were in

192 \*fact examined by the appellee: and though there is no direct evidence of this fact, the circumstantial evidence is irresistible. It is inconceivable, that Birchett, after selling a bond for goods, that he might raise money by the sale of them, should have remained inert from 1821 to 1827, without critical scrutiny into the account of sales and disbursements, when the amount which had been made available

to him had fallen short more than one third of the estimated probable proceeds of sales. My own mind is, therefore, satisfied that Birchett knew all about the matter before he received the account in October 1827. Then, at least, he was fully informed; and it is observable, that except the claims for commissions and interest, there is only a single item excepted to on the debit side of the account. On the other side a short credit of 1572 dollars for the lost debts is complained of. This account was retained by Birchett from October 1827 till the year 1831, without objection or complaint. Can it be believed, that it never was examined by him, or that being examined he never would have pointed out the objectionable items, and insisted on their expunction? He is charged, for instance, with Foster's draft: if improperly so charged, would he have acquiesced for four years? I think not; and if there were no rule upon the subject, I should take that acquiescence as sufficient evidence that Townes, the agent of Birchett, who was collecting his funds and applying them, obviously with his assent and by his direction, to the discharge of his responsibilities, had justly charged him with Foster's draft. But there is a rule upon the subject, and particularly applicable to merchants. "Where one merchant sends his account current to another, though residing in a different country, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him at least so far as to cast the onus probandi on him."

Such are the terms in which the rule 193 is laid down in *Freeland v. Heron*, *Lenox & Co. and Willis v. Jernecan*, cited at the bar. Doubtless, it applies with more force between merchants in the same country, and yet more between merchants residing in the same town, and in the daily habit of intercommunication. Between such, a shorter period would give rise to the presumption. For the principle of the rule is that the retention of the account for an unreasonable time without objection, is evidence of acquiescence in its justice, and throws the burden of proof upon the party so acquiescing: and so it is laid down by Judge Story, in his treatise on Equity, vol. 1, ch. 8, § 526-9. The rule is founded in good sense and justice. If a party does not deny what his adversary states in his presence and hearing, we infer the truth of the statement from his silence and apparent acquiescence. How much stronger is the case of the silence of a regular merchant for two years after he has received the account of his correspondent, which can be looked upon in no other light than as an assertion of a claim, which, if not admitted, should, in good faith as well as in prudence, be promptly repelled. I say in good faith, because its requisitions demand, that the earliest information shall be given to the claimant to enable him to assert his claim and preserve his evidence. If I do not intend to allow a demand, it is not fair dealing in me to delay payment, and by my conduct put off the commencement of a suit for years, and then

take the chances of success from the loss of my adversary's testimony.

The present is a strong case for the application of the rule. There is every reason to presume an early acquaintance with the accounts, and the account rendered was moreover about two years in Birchett's hands without objection. It must then be taken as true unless disproved.

Now as to Foster's draft there is no evidence, so that that item ought to

have been allowed. Next, as to the 194 \*lost debts. These are distinctly set

forth in the account, and the principle just adverted to, applies to them. They should not be charged to Townes, unless there is proof either of culpable negligence or misappropriation. The latter ground has been most earnestly urged, and the cases of *Johnson & Duggers v. O'Hara* and *Wren v. Kirton*, are relied on to sustain it. I willingly defer to the principle of those cases; but I do not think they have any application to this peculiar case. To bring them to bear upon it, it must be shewn, that the notes in question have been diverted from their legitimate objects and applied to the purposes and accommodation of the defendants. To establish this, it has been said, that the auctioneers took the notes in their own names, and discounted them for their own purposes. As to the notes being taken to themselves, it is, I think, the common course of business with auctioneers. As bailees to sell, they are bailees to receive payment; and hence they confessedly have a right of action in their own names against the purchasers. If so, it is not perceived that there is any thing improper in the ordinary custom of taking notes to themselves for the proceeds of sale. But if this be true, in any case, it was particularly true in this, where the auctioneers were stakeholders; where they were required to sell, but until the expiration of twelve months, it could not be determined whether the proceeds of sale were to go to Birchett or to Thayer. The notes then were properly taken in their own names. Have they been properly dealt with? It is said, they were improperly discounted before maturity for the defendants' use. That one was discounted seems probable: there is no such probability as to the others. Then, as to that one: was it discounted for the defendants' use or for the legitimate purpose of discharging Birchett's responsibilities, or reimbursing their advances for him? The facts, I think, prove the latter. As early as December 1821, their just debts against 195 him, including \*their commissions and interest, to which no objection had ever been made, were more than 5000 dollars. The proceeds of sales for money were only 3400 dollars, and there is no evidence that any other of the various notes, all of which were due at distant days, were discounted before maturity. The defendants had a right to discount some of them to reimburse themselves. They exercised this right by discounting one note of *Morton & Co.* and in doing so, are liable to no imputation of unfairness. I am, therefore, of opinion that there is nothing in the

record which can justify throwing the loss of these notes upon the defendants. Yet, in reversing the decree, and sending the cause back for further proceedings, I think the questions as to Foster's draft and the bad debts should be considered open before the commissioner to any further evidence of either party.

I see no just objection to the decree for being in favour of Robert Birchett the younger, or for the omission to revive the suit against the representative of Webb.

CABELL, J., concurred.

ALLEN, J., dissented upon all the important points of the case. He said—The first and the main question in the case, is, whether the account rendered by the auctioneers in October 1827, is to be regarded as a stated account between the parties, so as to throw the onus probandi upon the plaintiff? If it is to be so regarded, then it seems to me a court of equity should not have taken jurisdiction of the case. Where an account is settled, or has been stated and so treated as to give it the effect of a settled account, and a balance is struck, an action of assumpsit would be the proper remedy. The relation existing between the parties of principal and agent, would not of itself, and where the account was stated,

give the court jurisdiction. The 196 case of *King v. Rossett* was a suit by a principal against his agent, and the circumstances much stronger than in the present case (treating the account here as a stated account); but the court held the party had a complete remedy at law, and dismissed the bill. The plaintiff, in the present instance, has not treated this as a stated account, which he was bound to surcharge or falsify. The gravamen of his bill is the refusal to render any fair account, under the pretext, fraudulent as he alleged, that Thayer had some interest in the subject: and though some comments are made upon some of the charges, that is done, rather with a view of impeaching the whole account, than of falsifying the particular items. If compelled, then, to regard this as a settled or stated account, the only relief the party could be properly entitled to upon his bill, would be a decree for the balance thereby ascertained, and that could have been much more readily recovered in a court of law.

But, under the circumstances of this case, I cannot regard the account rendered, as such a stated account, as to throw the burthen of impeaching and falsifying it upon the plaintiff. This was not a transaction between merchant and merchant. The plaintiff placed an assortment of goods in the hands of the defendants as auctioneers to sell: they were to dispose of them, and account for the proceeds. It was a single transaction, and all was to be done by the auctioneers. Where merchants deal with each other, and accounts current are rendered, the party receiving and not objecting, deprives the other of the opportunity of declining to deal with him, as not advantageous. He has a right to presume from long acquiescence, that his rates and mode of charging are satisfactory, and continues to deal upon that presumption. But I have been unable to find any case not

between merchant and merchant, where the mere delivery of an account, unaccompanied with any other circumstance, except the silence of the party to whom 197 delivered, \*gives to the account so delivered the character of a stated account. Where the account has been settled between the parties, there is no difficulty; but by the term settled, I understand a transaction in which both were actors, concurred in adjusting the items, and struck the balance. And it will be found, that many of the propositions laid down by the judges, have been in cases of this character. Thus, in *Willis v. Jernegan*, the defendant relied on a stated account, in bar of the relief asked for. The account had been settled, as he alleged, between him and the plaintiff, and entered in a book that related to the transactions between them merely; the adjustment had occupied a week; the plaintiff, at the time and often afterwards, had declared himself extremely well satisfied; and the facts relied on by the answer were sustained by several witnesses. Upon this state of facts Lord Hardwicke remarked, "There is no absolute necessity that the account should be signed by the parties who have mutual dealings, to make it a stated account. For when there are transactions, suppose between a merchant in England and a merchant abroad, and an account is transmitted; it is not the signing which will make it a stated account, but keeping it by him any length of time, which shall bind him and prevent him from opening the account." The circumstances of the case clearly established the account as a settled account, provided signing were not essential; and this, the case decided, is not necessary. The fact, that accounts transmitted from merchant to merchant in different countries, and not objected to, placed them in the condition of stated accounts, though from the relative position of the parties they could not be signed, is relied on to shew that it was not the signing which made the account a stated account. *Sherman v. Sherman* is very briefly reported. The bill was filed for an account; but from the statement, it does not appear that any

settled or stated account was relied 198 on: the plaintiff's husband and \*the defendant had dealings together as merchants; the plaintiff's husband lived for many years after the dealings had ceased, and after differences and disputes had arisen between them, and acquiesced until his death. The plaintiff was left to seek redress at law: and Lord Hutchins observed—"Amongst merchants, it is looked upon as an allowance of an account current, if the merchant receiving it does not object to it by a second or third post." The remark (judging from the report of the case) was not called for: it was a mere dictum, and, even confined to merchants, I question whether it would be held law at present. In *Chappelaine v. Dechenaux*, the account had been settled and signed by the parties, and the bill was filed to surcharge and falsify. In *Freeland v. Heron, Lenox & Co.* the parties were merchants, one residing in Great Britain, the other in America; accounts were furnished annually

for several years, and no objections were made; the defendant too, after these accounts, wrote a letter to the plaintiffs, promising to pay the balance due. This circumstance was relied on by the court: it is said, that these circumstances bring it within the influence of the rule of the chancery court and of merchants, which was, that when one merchant residing in one country sends an account current to a merchant residing in a different country, between whom there are mutual dealings, and the merchant who receives, keeps it two years without objection, it is to be regarded as an account stated, and his silence and acquiescence shall bind him, so far as to cast the onus probandi on him. This case confines the rule to merchants residing in different countries, between whom there are mutual dealings; and fixes a time, two years, after which it is regarded as an account stated. The rule so guarded is a safe one; but it conflicts with the principle laid down in *Sherman v. Sherman*, according to which the merchant must object by the second or third post.

All these are cases of mutual dealings, \*continued upon the faith of no objection being made to the accounts as rendered. It seems to me, they can have but little application to cases between individuals not standing in that relation, or dealing with each other generally. Nor do I conceive that the principle, that an admission may be presumed from the silence of the party, where a right has been asserted in his presence and he fails to contradict it, can be applied to this description of cases. The weight of such evidence always depends on the circumstances attending the transaction: neither party is concluded by it. The evidence, though competent, and under some circumstances entitled to much respect, under others would be entitled to none whatever; and its effect would depend upon many other matters, all of which would be considered by the tribunal charged with the ascertainment of the fact. But if, upon that rule of evidence, we determine that the silence of a party to whom an account is sent, is to be treated as an admission of its correctness, so far at least as to throw upon him the burthen of disapproving it, we convert that which is a safe rule of evidence when the weight of it is to be ascertained by all the amending circumstances, into a positive and inflexible rule of law controlling the rights of parties. And if the rule can be sustained on this ground, then its application should be universal. If silence is to be treated as an admission, it applies to all to whom an account is forwarded: and many men against whom unjust accounts have been preferred, and who were silent because they intended to resist payment, would, unexpectedly, find themselves debtors for large amounts. This view is sustained by the cases of *Lord Clancarty v. Latouche* and *Irvine v. Young*, cited by the appellee's counsel. In the first of these cases, the transaction was between Conoly, the plaintiff's testator, and his banker: an account had been settled in 1789, dealings continued, twelve different accounts fur-

nished to Conoly in his lifetime, and 200 \*two to the plaintiff after his death. It did not appear that Conoly ever admitted the account to be correct, or expressed any opinion in relation to it. In 1802, after the twelve accounts had been rendered, he apprised the defendant of an intention to dispose of some property to raise money, and thanked him for his forbearance. He died in 1803. The court held, that the acquiescence of Conoly did not amount to a settlement of the accounts, though they thought it entitled to considerable weight in the adjustment of them. In *Irvine v. Young*, the bill averred, that three years before the bankruptcy, the defendant had delivered an account to the bankrupt, but treated it as an unsettled transaction: the answer relied upon the fact, that the account had not been objected to, and should therefore be treated as a settled account. The court decided, that the naked fact of delivery, without evidence of contemporaneous or subsequent conduct, affords no sufficient legal presumption that the account was settled. In each case, the court speaks of a settled account; but where circumstances authorize an account, which both did not concur in settling, to be dealt with and treated as a stated account, the same legal consequences follow. For where the court takes it as a stated account, it establishes it without further evidence, and the onus probandi is thrown on the party who seeks to falsify or surcharge it.

It seems to me, therefore, that we are not warranted by the authorities in treating this as a stated account, from the mere fact that it was rendered, and there being no proof that the plaintiff objected. Neither do the circumstances attending this transaction justify us, in my view, in arriving at such a conclusion. The plaintiff avers, he frequently demanded a settlement; the defendant denies it: the parties lived in the same town, and the plaintiff was embarrassed. But the defendant, on the 13th October 1827, when he rendered the account relied on, wrote to the plaintiff, that his balance was 201 \*1758 dollars, if he should not be held liable to Thayer; shewing that, at that time, the rights of the parties were not adjusted; and accounting, perhaps, for the silence of the plaintiff as to the particulars of the account; for his first object no doubt would be to ascertain whether Thayer or himself would be entitled to the funds. The defendant, in the same letter, apprised the plaintiff of his own embarrassments; and that he could pay his creditors but 6-8ths of their claims, and that in one and two years upon condition he was not to be sued. There was no very strong motive offered the plaintiff, notwithstanding his embarrassments, to press the matter; and, certainly, the fact of his embarrassments furnishes no presumption, that he acquiesced in the account, when his debtor proposed such terms of composition to him. But the defendant's letter of January 1831 is, it seems to me, conclusive upon this pretension. In that letter, which appears to be in reply to one from the plaintiff, he says, he had been for a

long time extremely desirous to have their accounts settled, and as soon as the plaintiff should find it convenient to come to an adjustment, he would do all which justice to the rest of his creditors, and his own situation, authorized. It was contended, that by the terms settled and adjusted, the defendant referred to the composition before mentioned. But this would be doing violence to his language. He desired the accounts should be settled; and when they should be adjusted (by which I understand him to mean settled, and the balance struck) he would do all that justice to his creditors and himself would authorize. Words cannot be stronger, to shew that he then considered the accounts open and unsettled; and the implication is strong that he knew the items were controverted. This was immediately before the suit, and long subsequent to the rendering of the account.

Viewing it, then, as the defendant himself viewed it, as an unsettled account, there is no difficulty as to the 202 \*jurisdiction; and the burthen of proving his disputed items of credit devolves on the defendant. So considering it, I should concur with the commissioner and the court below, in rejecting such items of charge against the plaintiff as were entirely unsupported by proof.

In regard to the uncollected debts, I should hold the agents responsible for all which they discounted or passed away for their own use. They were not bound to make advances; and though an auctioneer may be authorized to take notes, when he sells on a credit, payable to himself, he is still but a trustee for his principal; and he should not so treat them as to deprive his principal of his control over them. After he has negotiated the notes, his principal cannot reclaim them; the proceeds go to the bona fide holder. In the meantime, if the auctioneer becomes insolvent, the loss falls on his principal; who should not be subject to the double risk of the insolvency of the debtor, and of the agent too. When the agent has dealt with the subject for his own benefit, his liability is fixed. He is then the only debtor of the principal, and that relation cannot be changed without the consent of the principal, his creditor. One of the notes, the commissioner states was endorsed and used for the benefit of Townes & Webb. That it was discounted, may be fairly presumed from the endorsement; but whether used for the benefit of Townes & Webb, may depend on the question, whether they were in advance to the plaintiff at the time or not. As the case is to go back, I have made no calculation to see how the fact is. As to the other notes, I think the mere endorsement of them by Townes & Webb, not sufficient to raise the presumption that they were discounted and used for the benefit of the auctioneers; and unless there should be other evidence on this point, the defendant should be credited with the amount.

On the other points raised in the argument, I concur with the president.

203 \*The decree entered by this court declared—That the court was of opinion, that there was error in the decree

of the circuit superior court, in subjecting the appellant, without further evidence, to the loss of the four sale notes (the uncollected debts) in the proceedings mentioned, since it did not satisfactorily appear, that the note of Morton & Co. which was discounted, was used by Townes & Webb for their own purposes, and since it did not satisfactorily appear, that the other notes were discounted at all, or applied by them to their own use, their mere endorsement thereof not being sufficient to raise that presumption. That the majority of the court was further of opinion, that the account rendered by Townes & Webb to Birchett in October 1827, and retained until 1831, without any evidence of objection to any item thereof, ought to have been considered and held to be a stated account, subject indeed to be surcharged and falsified by Birchett, but to be taken as true except in so far as it might be disproved by him, the onus probandi, in such cases, being always on the party seeking liberty to surcharge and falsify. That the court was further of opinion, that there was no sound objection to the jurisdiction in this case, or to the omission to revive against Webb's representative, or to the decree in favour of Robert Birchett the younger, the trustee, who, though a defendant in form, was a plaintiff in fact in the cause, and entitled by the appellee's consent to receive the avails of the decree. Therefore, the decree was reversed so far as it was above declared erroneous, with costs, and in those respects in which it was declared there was no error, affirmed. And the cause was remanded to the circuit superior court, with instructions to consider the account rendered by Townes & Webb to Birchett as a stated account, and as prima facie true, unless satisfactory evidence be adduced that it was objected to by Birchett within a reasonable time after it was presented; and with further instructions 204 to exonerate Townes & \*Webb from responsibility for loss of the sale notes, unless further evidence be adduced of their appropriation of them to their own purposes, it being the opinion of the whole court, that if such misappropriation should appear, they should be held responsible, but otherwise not.

#### Ross v. Milne & Wife.

April, 1841, Richmond.

[37 Am. Dec. 646.]

(Absent STANARD, \*J.)

**Contracts—Indenture for Benefit of Third Person—Who May Sue.**—Upon an indenture between S. and R. wherein R. covenants to pay money to M. a daughter of S. within two months after S.'s death, the

\*He had been counsel in the cause.

**Indenture for Benefit of Third Person—Common-Law Rule.**—At common law, no action could be maintained upon an indenture or deed *inter partes*, by one not a party to the deed, although the covenant therein was for his benefit; the right to sue on a covenant was limited to the parties to the deed or their privies. In support of this proposition, see the principal case cited in Johnson v. McClung, 26 W. Va. 662, 663; Nutter v. Sydenstricker, 11 W. Va. 547; Willard v. Worsham, 76 Va. 397; Newberry Land Co. v. Newberry, 95 Va. 120, 37 S. E. Rep. 890;



representative of S. only can maintain an action against R. for breach of the covenant, and M. cannot maintain either covenant for the breach or debt for the money.

**Same—Parol Contract for Benefit of Third Person—Who May Sue.**—So, upon a parol contract between S. and R. whereby R. upon a consideration moving entirely from S. promises to pay S.'s daughter M. a sum of money after S.'s death, M. cannot maintain either debt or assumpsit for the money; the representative of S. only can maintain an action at law.

**Same—Same—No Valuable Consideration—Executory Gift.**—A parol contract is made between S. and R. whereby R. for a consideration proceeding entirely from S. promises to pay S.'s daughter M. a sum of money after S.'s death; and the daughter gives S. the mother no valuable consideration for such provision for her: **Held**, this is a mere executory gift of a chose in action on the part of the mother, who may at any time countermand the payment, and such gift vests no right to the money in the daughter.

**Jeoffails—No Right of Action Alleged.**—Upon a declaration which shews the plaintiffs have no right of action, and on the contrary that the right of action is in another, verdict is found for plaintiffs: **Held**, the statute of jeoffails of Virginia, 1 Rev.

Clemmitt v. Ins. Co., 76 Va. 300; Jones v. Thomas, 21 Gratt. 101.

**Same—Statutory Rule.**—But the statutes in Virginia and West Virginia now provide that "if a covenant or promise be made for the sole benefit of a person with whom it is not made, or with whom it is made jointly with others, such person may maintain in his own name any action thereon, which he might maintain in case it had been made with him only, and the consideration had moved from him to the party making such covenant or promise." Va. Code 1887, sec. 2415; W. Va. Code, ch. 71, sec. 2, p. 679. This statute has been construed in Newberry Land Co. v. Newberry, 95 Va. 119, 27 S. E. Rep. 899; Johnson v. McClung, 26 W. Va. 659.

See foot-notes to Jones v. Thomas, 21 Gratt. 96; Stuart v. James River & Kanawha Co., 24 Gratt. 304, and monographic note on "Contracts" appended to Enders v. The Board of Public Works, 1 Gratt. 364.

**Same—Same—Effect on Equity Jurisdiction.**—See the principal case cited in Ralphsnnyder v. Ralphsnnyder, 17 W. Va. 38, to the point that equity still has jurisdiction in these cases, notwithstanding a remedy at law is given to the beneficiary under the above statute.

It was said in Willard v. Worsham, 76 Va. 397, that in the principal case, the court expressly declined to pass upon the question, whether such a trust or interest was created for the beneficiary as would entitle her to sue in equity.

**Jeoffails—No Cause of Action Alleged.**—Where the declaration sets forth no cause of action whatever, the defect is not cured by the statute of jeoffails, but the judgment will be reversed, and judgment entered in the appellate court for the defendant *non obstante veredicto*. The principal case is cited, in support of this proposition, in Boyles v. Overby, 11 Gratt. 202; Davis v. Com., 13 Gratt. 151; Pulliam v. Aler, 15 Gratt. 61; Robrecht v. Marling, 29 W. Va. 774, 2 S. E. Rep. 831; Mason v. Bridge Co., 28 W. Va. 653; Holliday v. Myers, 11 W. Va. 288, 289. The principal case is distinguished in Spengler v. Day, 15 Gratt. 397, 398; Holliday v. Myers, 11 W. Va. 290.

See foot-notes to Boyles v. Overby, 11 Gratt. 202; Mason v. Farmers' Bank, 12 Leigh 84. See monographic note on "Amendments" appended to Snead v. Coleman, 7 Gratt. 300.

Code, ch. 128, § 103, does not apply to the case, and cures no such defect.

**Debt, in the circuit superior court of Spotsylvania, by Milne and wife against Ross for £500. sterling.** The declaration was in these words:

205 \***"Alexander Milne and Jane Milne his wife complain of James Ross in custody &c. of a plea, that he render to them the sum of £500. sterling money, which he owes to and unjustly detains from them. For that whereas, in the lifetime of a certain Janet Smith, the mother of the said Jane Milne, to wit, on the 7th day of September 1816, at London in G. Britain, to wit, at &c. by a certain indenture then and there made between the said Janet Smith of the one part and the said James Ross of the other part, and sealed with the seals of the said Janet and James, (which said indenture, bearing date the same day and year aforesaid, is in the possession of the said James, by reason of which the plaintiffs are unable to make proffer thereof,) the said James, for the consideration therein mentioned, did, among other things, agree and oblige himself to pay to the said Jane Milne, her executors &c. the said sum of £500. sterling, within two calendar months next after the decease of the said Janet; and the said A. Milne and Jane Milne his wife aver, that on the 18th day of March in the year 1832, at &c. the said Janet departed this life, whereof, afterwards, to wit, on the same day and year last aforesaid, at &c. the said James had notice; and that since the decease of the said Janet as aforesaid more than two calendar months have long ago elapsed; whereby action hath accrued to the said A. Milne and Jane Milne his wife, to demand and have of the said James the said sum of £500. sterling above demanded. And whereas also, afterwards, in the lifetime of the said Janet Smith, to wit, on the 7th day of September 1816, at &c. in consideration that the said Janet, at the special instance and request of the said James Ross, and upon his agreement, among other things, to pay to the said Jane Milne, her executors &c. the sum of £500. sterling money within two calendar months next after the decease of the said Janet, had then and there assigned, transferred and set over, unto the said 206. James, his \*executors &c. all the share, proportion and interest of the said Janet of and in the estate and effects of a certain Colin Ross, who had theretofore died intestate, and was a brother of the said Janet, he the said James undertook, and then and there agreed, to pay to the said Jane Milne, her executors &c. the said sum of £500. sterling money, within two calendar months next after the decease of the said Janet; and the said A. Milne and Jane Milne his wife aver, that afterwards, to wit, on the 18th day of March in the year 1832, at &c. the said Janet departed this life; whereof, afterwards, to wit, on the same day and year last aforesaid, at &c. the said names had notice; and that since the decease of the said Janet more than two calendar months have long ago elapsed; whereby action hath accrued to the said A. Milne and Jane Milne his wife to demand**



and have of the said James the said sum of £500. sterling money above demanded. Nevertheless, the said James, though often requested so to do, hath not as yet paid the said sum of £500. sterling money above demanded, to the said A. Milne and Jane Milne his wife, or to either of them, but he to do this hath hitherto wholly refused, and still doth refuse; to their damage £500. sterling money. And therefore they bring suit &c."

Ross put in pleas of payment and set-offs, and filed an account of his payments and set-offs. And issues were made up on the pleas.

At the trial, Ross's defence was entirely on the merits. The court ruled several points of law against him; and he filed two bills of exceptions to its opinions. But as the points presented by the exceptions were not decided or considered by this court, it is unnecessary to state them.

There was a verdict and judgment for Milne and wife, for £500. sterling, with 5 per centum per annum interest thereon from the 1st July 1832, to be levied in current money of Virginia at a rate of exchange fixed by the court.

And upon the application of Ross, this court allowed him a supersedeas to the judgment.

The counsel for the plaintiff in error mentioned the points presented by his two bills of exceptions to the opinions of the circuit superior court given at the trial; but they said, there was a preliminary question to be considered—Whether Milne and wife could maintain this action on either of the contracts alleged in their declaration? whether any action lay but for the representative of Janet Smith, upon the deed alleged in the first count, or upon the parol contract alleged in the second count? Whereupon, the court suggested that this preliminary question ought to be first discussed and considered.

Morson and Moncure, for the defendants in error. If either count in the declaration shew good cause of action in Milne and wife, it is enough; 1 Rev. Code, ch. 128, § 104, p. 512; Hall v. Smith & al., 3 Munf. 550. Now, 1. the second count upon the parol agreement is certainly good. Dutton & wife v. Poole, 2 Lev. 210; 1 Vent. 332, S. C. is an authority directly in point; a case which was decided upon great consideration by the court of King's Bench, and afterwards affirmed in the Exchequer Chamber, T. Raym. 303, and it has ever since been recognized in elementary treatises, Bull. N. P. 133, 4; 1 Com. Dig. Case on Assumpsit (E. a.) p. 309, and note (new edition) p. 310, and in many judicial opinions, Martin v. Hind, 2 Cowp. 437, 443, Shemerhorn v. Vanderheyden, 1 Johns. Rep. 139; Felton v. Dickinson, 10 Mass. Rep. 287. Dutton & wife v. Poole was the case of a promise made to a father to pay money to a daughter; and it was held, that the daughter and her husband might sue for the money in their own name: the court said (Ventriss's report) "it might have been otherwise if the money had been to have been paid to a stranger;" but (Levinz's report) "there was such an apparent consideration of affection

from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children." And, in our case, the promise was made to a mother to pay money to her daughter. Indeed, in Shemerhorn v. Vanderheyden, the rule is laid down generally, that where one person makes a promise to another for the benefit of a third person, that third person may maintain an action on such promise. In Marchington v. Vernon, 1 Bos. & Pull. 101, in notis, Buller, J., states the rule in the same terms. And there are many other cases, in which a consideration moving from a stranger, no less than from a parent, has been regarded as sufficient to entitle the party to whom the money is to be paid, to sue in his own name: thus, in Martin v. Hind, before cited, Lord Mansfield regarded the rule as general; it was taken for granted in Fruhling v. Shroeder, 2 Bing. 77, 29 Eng. C. L. R. 260, and it was so regarded by the supreme court of N. York in Weston v. Barker, 12 Johns. Rep. 276. The same general rule is stated in the note on Pigott v. Thompson, 3 Bos. & Pull. 149, where the cases are collected. So the rule is stated, 1 Chitt. Plead. 5, that "when a contract, not under seal, is made with A. to pay B. a sum of money, B. may maintain an action in his own name;" for which the authorities we have cited are referred to, and some others. But it is enough for us, that where a promise is made to a parent to pay money to a child, the child may maintain an action for the money. It is true, that in the cases we have mentioned, the form of the action was assumpsit, not debt: but wherever indebtedness assumpsit can be maintained, debt will lie; per Ashhurst and Buller, J., in Walker v. Witter, 1 Doug. 6, and Buller, J., added, that "till Slade's case," (4 Co. 93, a.) "a notion prevailed, that on a simple contract for a sum certain, the action must be debt; but it was held in that case, that the plaintiff has his election either to bring assumpsit or debt."

209 \*2. The first count, on the indenture, is good also; or, if it would have been bad on demurrer, it must be taken to be good after verdict. It is true, that according to the English practice, founded however on reasons merely technical, upon an indenture strictly inter partes, none but a party can maintain an action; but upon a deed poll, any person to whom money is thereby promised to be paid, may sue for it; and even upon an indenture, one who in fact seals it, though he is not formally named as a party, may sue: Platt on Covenants, p. 7. Therefore, if Milne and wife had averred in this count, that Mrs. Milne had sealed the indenture declared on, the count would have been good, according to the strictest technical rules of English practice; and under our statute of jeofails, 1 Rev. Code, ch. 128, § 103, p. 511, 512, it will, if necessary, be presumed after verdict, that it was proved or admitted at the trial, that Mrs. Milne did seal the indenture; for, by the provision of that statute, no judgment, after verdict, shall be reversed, "for omitting the averment of any matter without proving which the jury ought not to

have given such verdict?"—"or for any mistake or misconception of the action, or for any other defect whatsoever, in the declaration or pleading, whether of form or substance, which might have been taken advantage of by a demurrer, and which shall not have been so taken advantage of." In *Vaiden v. Bell*, 3 Rand. 448, it was held, upon this statute, that the omission in a declaration in replevin to aver property or possession in the plaintiff, or that the defendant took the property from the plaintiff or from any body else, was cured by the verdict. Again, the technical rule of the English practice is only that covenant will not lie upon an indenture inter partes for any but a party to the indenture; and there may be reason for confining the action of covenant (which, in its theory, is founded on privity of contract) to the covenantees: but there is no reason

why the action of debt should be  
210 \*denied to any person to whom an indenture provides that the money shall be paid; for debt lies for all legal liabilities, and in many cases where there is no privity of contract. On general principles, debt may be maintained wherever money is to be paid, or a debt is actually due. Here, certainly, there is money to be paid, there is a debt actually due, by Ross to Milne and wife, and to no one else. If Ross had paid the money to them, and the representative of Mrs. Smith had sued for it, Ross might have pleaded the payment to Milne and wife, as an exact performance of his covenant, and it would have been a bar. And if Mrs. Smith's representative had sued for and recovered the money, he would have been bound to pay it to Milne and wife: he would have been a naked trustee; a mere instrument through which a recovery was had for the actual beneficiaries. To allow Milne and wife to sue in their own name, prevents security of action, consults convenience and justice, and consists well with the principles of the action of debt. And unless Milne and wife can bring debt, no one can; for if Mrs. Smith's representative is to sue, covenant, not debt, must be the action, since the money is not to be paid to Mrs. Smith or her representative, but to Mrs. Milne.

Patton and R. C. Stanard\* for the plaintiff in error. The first count upon the indenture certainly cannot be maintained. That count alleges an indenture inter partes, in the strictest sense of the phrase; "an indenture made between Janet Smith of the one part and James Ross of the other, sealed with the seals of the said Janet and James;" a description that excludes the idea, which the ingenuity of counsel has suggested, that the deed might have been sealed by Mrs. Milne, though she was not formally named as a party in it. Now, according to all the authorities, and the very passage in *Platt's treatise on Covenants*, p. 7-8, cited for the defendants in error,

none but a party to such a deed can  
211 maintain \*an action upon it. And suppose any thing so improbable and repugnant could be presumed, as that Mrs. Milne sealed the indenture, not being in any way a party to the deed otherwise than by sealing it; yet she could not maintain

an action upon Ross's covenant to Mrs. Smith. It is true, that if in an indenture between two parties, a third person covenants that one of the parties to the deed shall perform his contract with the other, and seals the deed, an action will lie against this third person upon his covenant; which was the case of *Salter v. Kidgley*, Carth. 76, cited in the note in *Platt on Cov.* p. 7, and there are many other cases to the same point. But it does not follow, that a third person, who, not being a party to an indenture inter partes, yet seals it, may maintain an action on the indenture, against a party to it, on his covenant to the other party, to pay money to the third person who is not a party. It is well settled, that where there is a sealed contract between parties, containing a covenant for the benefit of another person not a party, the beneficiary cannot maintain an action upon the contract, but the right to sue is confined to the parties to the deed; *Storer v. Gordon & al.*, 3 Mau. & Selw. 308, 332; *Barford adm'r v. Stuckey*, 2 Brod. & Bing. 333, 6 Eng. C. L. R. 139, even though the covenants in the deed are made, in terms, directly to the beneficiary, and not to the other party to the instrument; *Berkeley v. Hardy*, 5 Barn. & Cress. 355, 11 Eng. C. L. R. 251. As to the distinction taken between the action of covenant and the action of debt—that though the beneficiary may not maintain covenant, he may maintain debt; no authority for any such distinction was referred to; and there is direct authority against it. *Barford adm'r v. Stuckey* was debt on an indenture brought by the administrator of a beneficiary not a party to the indenture, to recover money thereby contracted to be paid to his intestate; and the court held, that that action could not be maintained:  
212 and \*Park, J., expressly said, "that the deed there being inter partes, it made no difference whether the action was in debt or covenant."

Then, is the second count, upon the parol contract, good? That count alleges, that Ross, for a valuable consideration moving from Mrs. Smith, undertook and agreed to pay Mrs. Milne (a daughter of Mrs. Smith) £500. sterling, within two months after Mrs. Smith's death; and upon this promise Milne and wife demand this money. To sustain their right to recover upon this count, it was insisted, that in every case of a promise made to a parent, upon a consideration moving from the parent, to pay money to the child, the child may maintain an action for the money in his own name: for which proposition *Dutton & wife v. Poole* was mainly relied on: and to fortify the authority of that case, it was shewn, that it has been cited with approbation, as well in several judicial opinions, as in approved elementary treatises. The case is a very peculiar one; and if it established the general proposition for which it is now cited, it would be difficult to reconcile it with many other adjudged cases; see them collected 1 Vin. Abr. Actions of Assumpsit, Z. p. 333-7, and 1 Com. Dig. note in new edition, p. 309-312. But granting that *Dutton & wife v. Poole* was rightly decided, it establishes no such

general proposition, and is clearly distinguishable from our case. There, the action was *assumpsit*; a form of action in which it is necessary to shew a consideration moving from the promisee; and accordingly, such a consideration was substantially alleged in the declaration; the allegations of which, collected from the several reports and notices of the case, 2 Lev. 210, 1 Ventr. 318, 332, T. Raym. 303, T. Jones 102, 8 Mod. 117, stated the plaintiff's case thus: The father of Dutton's wife, being entitled to timber trees growing in a park, and intending to cut down and sell the same to raise portions for his children, the defendant, his son and heir

213 apparent, \*having notice of this intention and purpose, in consideration that the father, at his instance and request, would forbear cutting the trees, and leave the same to descend with the land to him, promised the father, that he would pay the daughter £1000. The father accordingly forbore to cut the trees; and the action was brought by the daughter and her husband, to recover the £1000. The defendant pleaded non *assumpsit*; there was a verdict for the plaintiffs, a motion in arrest of judgment, and judgment for the plaintiffs. According to Levinz's report, Scroggs, C. J., said, "that there was such apparent consideration of affection from the father to his children for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children;" meaning, that the daughter might well be regarded as party to the consideration and promise: Jones and Wyld, J., who had at first hesitated, concurred in the judgment, because "the son had the benefit by having the wood, and the daughter lost her portion by this means." It is upon the reasoning of Chief Justice Scroggs, not upon the case itself and the judgment of the court, that the counsel for Milne and wife rely, for authority to maintain their action. The case amounts to no more than this: that the defendant having, for his own advantage, prevented the father from applying his timber to the purpose of raising a portion for his daughter, and so deprived her of the bounty her father intended for her, by his promise, that if the father would forego his purpose he himself would pay her £1000. and the daughter having lost, in consequence of the defendant's promise, the money which, but for the promise, her father would have given her; this loss, effected by the defendant, constituted a sufficient consideration moving from her, to entitle her to demand the fulfilment of the promise. This, then, is the true reason of the judgment in Dutton & wife v. Poole; and the only view of it in which it

214 can be reconciled with general \*principles established by numerous adjudications. Comyn, in his treatise on Contracts, part I, ch. II, 10, p. 21, considers the case as an instance in which a promise is valid, though the consideration on which it is made proceeds in part from another; and then lays down the general principle, that the consideration on which the promise is founded should proceed from the party in whose favour it is made; for which he

refers to *Bourne v. Mason*, 1 Ventr. 6; *Crow v. Rogers*, 1 Stra. 592, and *Pigott v. Thompson*, 3 Bos. & Pull. 147. As we understand the explanation of Dutton & wife v. Poole, given in Buller's Ni. Pri. 134, the consideration of the defendant's promise was the surrender to him, by the father, of the fund out of which the daughter's portion was to be raised, which portion was a kind of debt the father owed her. So, in Buller's view, the consideration proceeded from the daughter, and therefore she was entitled to sue upon the promise in her own name. In *Barford v. Stuckey* (before cited) Park, J., having remarked, that he found it "difficult to understand the reasoning of Dutton v. Poole, or to see exactly how the parties in that case stood;" Burrough, J., said he thought it was rightly decided: that "it was the case of a father who wished to raise a portion for his daughter; the son promised the father to pay the daughter this portion, if the father would forbear to cut down a certain quantity of timber" (out of which, it should be added, the father was about to raise the portion); "and the question was, if this amounted to a sufficient consideration to entitle the daughter and her husband to sue: undoubtedly, it was sufficient." Thus explained and understood, the case of Dutton & wife v. Poole may well be approved. But so understood, that adjudication is no authority to maintain the case of Milne and wife against Ross, as it is pleaded in the second count of their declaration. It is not there alleged, that Mrs. Smith being

215 entitled to a share of Colin Ross's estate, and intending to give a \*portion of £500. to her daughter Mrs. Milne out of that fund, the defendant Ross, having notice of that intention, promised the mother, that if she would forbear to execute that purpose, and would assign the fund to him, he, in consideration of the assignment, would pay the daughter the £500. The allegation is, that, in consideration that Mrs. Smith, at Ross's request and upon his agreement to pay her daughter Mrs. Milne £500. within two calendar months after the mother's death, had assigned to Ross her share in Colin Ross's estate, he undertook and promised to pay Mrs. Milne £500. within two calendar months &c. No present purpose of the mother to give the portion to the daughter out of the fund is alleged; no knowledge of such purpose, no design to prevent the execution of it, by procuring an assignment of the fund out of which it was to be accomplished, is imputed to Ross: the agreement is not alleged to have been made with, or the promise to, the mother, or to the daughter, or any body in particular; but the whole consideration is stated to have moved from the mother. It was an executory contract, on Ross's part, made with Mrs. Smith, to pay the money to Mrs. Milne; and on Mrs. Smith's part, it was an executory parol gift of the money to her daughter, which she might have revoked at pleasure. Not the daughter, therefore, but the representative of the mother only, is entitled to sue upon the agreement or promise. Suppose the daughter is the beneficiary, and the representa-

tive of the mother but a trustee for her, yet the legal title is in him, and he alone can maintain an action at law upon it: the daughter has, at the most, but an equitable right. From the other cases that were cited, the argument for the defendants in error can derive no support. *Martin v. Hind*, 2 Cowp. 437, was assumpsit brought by Martin, curate for Hind, who was rector of the parish of St. Ann's Westminster, to recover the salary or stipend due to him:

and to prove Hind's undertaking to 216 pay it \*the plaintiff offered in evidence a certificate addressed by the defendant to the bishop of London, wherein he certified to the bishop, that he, Hind, did thereby appoint Martin to perform the office of curate in the church of St. Ann, and did promise to allow him a yearly sum of 50 guineas for his maintenance in the same &c. And one objection taken for the defendant was, that it appeared by this certificate, that the promise to pay the curate's salary was made, not to the curate, but to the bishop, and therefore the curate could not maintain the action for the salary: and Lord Mansfield said, that the certificate imported no promise to or contract with the bishop, but merely information of a matter of fact; the contract was with the curate; therefore, there was no shadow of objection to his maintaining the action. *Shemerhorn v. Vanderheyden*, 1 John. Rep. 140, went off upon another ground; and, therefore, though this point arose, it was not necessary to examine it, and it manifestly was not examined, with any care. In *Felton v. Dickinson*, 10 Mass. Rep. 287, the father of the plaintiff, when he was about fourteen years old, placed him in the defendant's service, upon an agreement that he should remain in that service till he should arrive to the age of twenty-one years; during which time the defendant promised to find him food and clothing, and at the end of the term of service, to pay him 200 dollars; the plaintiff served out his time, and brought this action to recover the 200 dollars: it was objected, that the promise, as proved, was made to the father, not to the plaintiff. The court held that the plaintiff might maintain an action on the contract in his own name; and rightly, without doubt; for the whole service had been performed by the plaintiff, in other words, the whole consideration moved from him. Here again, the case itself is no authority to the purpose for which it was cited; and it is the general reasoning of the court in giving judgment, which is relied on. There, indeed, the court

217 stated the \*broad proposition, that "when a promise is made to one for the benefit of another, he for whose benefit it is made may bring an action for the breach of it:" and the same proposition is stated by the supreme court of N. York in *Shemerhorn v. Vanderheyden*, and is imputed to Buller, J., in the brief note of *Marchington v. Vernon*, 1 Bos. & Pull. 101. So Chitty (Plead. 5-6,) says, that "when a contract not under seal is made with A. to pay B. a sum of money, B. may sustain an action in his own name." But the leading authority always referred to for the proposition, is the case of *Dutton & wife v. Poole*;

which does not warrant it, but by the plainest inference establishes the reverse of it. And though there is some contrariety in the older cases, they will be found, on examination, to result in the principle, that, upon a parol contract, none but the party to it or promisee, or the person from whom the consideration moves, can maintain assumpsit, much less debt, in his own name. A stranger both to the promise and the consideration can maintain no action. *Bourne v. Mason*, 1 Ventr. 6; *Crow v. Rogers*, 1 Stra. 592; *Ward v. Evans*, 1 Ld. Raym. 928; *Israel v. Douglass*, 1 H. Blacks. 329; *Weston v. Barker*, 12 Johns. Rep. 276; *Price v. Easton*, 4 Barn. & Adolph. 433, 24 Eng. C. L. R. 96.

As to the statute of jeofails, it may cure all defects in the manner of pleading a title, when it can be collected from the pleading that there is a title; but if a declaration shews that the plaintiff has no right of action, much more if it shews that the right of action is in another, the statute cannot cure such a defect in the plaintiff's case; for that would be, not to cure defects either of form or substance in the pleadings, but to confer a right of action where none exists; which, certainly, is not the purpose or the effect of the statute.

TUCKER, P. The preliminary question in this case is, whether the plaintiffs can recover under either of the 218 \*counts in this declaration? The first is upon an indenture between Janet Smith and the defendant, in which he promises to pay Mrs. Milne £500. sterling. To this indenture Mrs. Milne is no party, and therefore, upon well established principles, she cannot sue upon it at law. Whether such a trust or interest is created for her benefit, as will enable her to sue in equity, it is not necessary in this case to enquire. It is sufficient that she cannot sue at law. The right to sue under an indenture inter partes is confined to the parties to it. *Platt on Cov. 7*, 8, 1 Chit. 4, and the cases here cited. *Salter v. Kidgley*, Carth. 76; *Offly v. Ward*, 1 Lev. 235; *Gilby v. Copley*, 3 Lev. 138. In *Barford v. Stuckey*, 2 Brod. & Bing. 333, the defendant, by indenture between himself and N. Pitts, agreed to pay him an annuity for twenty-one years, and if he died within the term, then it was agreed and promised, that he should pay the annuity to his child or children: the administrator of his only child brought debt for the annuity. *Dallas, C. J.*, said, "It is a general principle, that the right to sue under a contract is confined to the parties to the deed. The consideration did not move from the child, but from the father, and the obligation arises out of the contract itself. It is admitted that an action might have been brought by the administrator of N. Pitts, and if he had recovered, he would have been a trustee for the child; and if he had refused to sue, he might have been compelled by the court of equity to lend his name." He then declares, that the suit ought to have been brought by N. Pitts's administrator, and was improperly brought by the administrator of the daughter of N. Pitts; and so the court decided. A distinction, however, has been taken between the action of covenant

and the action of debt, and it is supposed that the latter may lie, though the former will not. For this distinction we have no authority, nor do I think it can be sustained. The right of the administrator to sue in covenant cannot be  
219 \*denied; and if the beneficiary could also sue in debt, the defendant would either be twice charged, or, as Dallas, C. J., says, the court would be called upon to stay one of the actions. And thus, by the informal proceeding of a rule, the rights of the plaintiffs in the two causes would have to be determined. Such a course cannot be commended. It is better to adhere to the distinction of jurisdictions and of the forms of action, than to encounter the confusion which would ensue from departing from them. Therefore, I am of opinion, that the count upon the indenture is naught, and that no judgment upon it can be rendered in favor of the plaintiffs.

The second count sets forth the contract as a parol agreement between Janet Smith and the defendant Ross, by which, in consideration of the transfer of her interest in Colin Ross's estate, the defendant promised to pay the plaintiff Mrs. Milne £500. sterling in two months after Janet's death. Waiving the question, whether there is not a misjoinder of action, or whether this count be in debt or assumpsit, I shall proceed to these positions: that Mrs. Milne had no rights whatever under the contract as laid; that if she had, they could not be asserted at law; or if they could be so asserted, it could not be by action of debt, but only by special action on the case in assumpsit.

First, Mrs. Milne had no rights under this alleged parol contract. To give her any right whatever, there must either have been an executed gift, or a valuable consideration. A gift without consideration confers a right, provided it is complete by delivery; and a grant, though incomplete, will confer a right if there be a valuable consideration. Thus, not only does a gift to a child, accompanied by possession, pass the title, but if one give chattels by deed, and deliver the deed to the use of the donee, though a volunteer, the goods and chattels are immediately in the donee. *Butler &*

*Baker's case*, 3 Co. 26, b. For the deed  
220 is an executed contract: it \*passes all title out of the grantor, even without the delivery of possession. And if, in such case, the transfer is to one person for the benefit of another, the whole title passes at once by the deed from the grantor to the grantee. Of consequence, the grantor's rights are gone, and as the grantee gave no value, he holds as trustee for the third person, who thus becomes invested with the right by the declaration of trust in his favour, even though he has paid no consideration. On the other hand, though there be no deed, yet if there be a valuable consideration, the rights of the third party may be irrevocable. Thus if A. owes £100. and delivers that sum to B. to pay over to C. his creditor, A. cannot countermand it, and C. may sue for it as money had and received for his use, *Farmer v. Russell*, 1 Bos. & Pul. 296; though this seems to have been otherwise decided

on the ground that the party may have subsequently paid the debt, *Turberville v. Porter*, Dyer 49, a. in note. And see also *Surtees v. Hubbard*, 4 Esp. Rep. 203. It is, however, on this principle, that the case cited in argument of *Weston v. Barker*, 12 Johns. Rep. 276, must rest. That was the case of a trust, in which the grantors had conveyed certain securities for discharging certain debts, and the balance to be held subject to their order: for that balance they gave the plaintiff on order, he being a creditor of theirs, and the defendant had notice of the order. The acceptance of the trust was held equivalent to an express promise by the trustee to pay to the grantor's order, and the order being given for payment of a debt, and the funds being in the trustee's hands, it was held that assumpsit would lie for it. But where there is no consideration, and the contract is by parol, nothing passes to the third person by the promise to pay to him. That promise is at all times revocable before payment. Thus if a sum of money be delivered to J. S. to the use and behoof of a woman, to be delivered to her at her day of marriage,  
221 and before the marriage \*the bailor revokes it, it seems to be the better opinion, that the order was countermandable, notwithstanding the money had passed out of the hands of the grantor, and the gift therefore seemed executed as to him. *Lyte & ux. v. Penny*, Dyer 49, a. The reasoning of *Shelley* in that case, shews the principles on which the case was decided: he said, "that gifts, though commenced, are of no force if they be not completed"—"For when a man makes such a sort of conditional gift of his mere will and good pleasure, and delivers the thing into indifferent hands to keep for the use of a stranger, still, before the condition is performed, the bailment is revocable. For if a man deliver to his servant on new year's day a golden cup, to give as a new year's gift to a stranger, clearly he may countermand this, notwithstanding the gift, for this was not a gift perfectly executed. And there is a difference, when a man makes a gift or bailment to give to a stranger upon a consideration or former duty"—"And the law is the same when a thing is delivered in consideration, satisfaction, or recompense of another thing; there, he cannot countermand. And so here, if the case had been, that the bailor had been to be bound by covenant, in consideration of a marriage precedent, to pay such a sum, then could he never revoke it; for this alters the property immediately; but it is otherwise of a mere gift without any cause precedent." There is indeed no proposition more clear, than that personal property can only pass by deed, or delivery of possession; and it is not less true, that choses in action are not assignable at all at common law, though the delivery of the documentary evidences of debt, for value received, may pass an equitable title to it. In this case, there is neither valuable consideration, nor delivery of any documentary evidence of the debt. It cannot therefore amount to a gift, or even to a promise to give. For there is no promise to Mrs. Milne, either from the defendant Ross

222 or from Mrs. \*Smith. It was but an order to her debtor to pay money due to her, to her daughter, which order she had a right to countermand, and of course there was no vested right in the plaintiffs which they can enforce against any one. If a gift of personal chattels without deed, or delivery of possession, is inoperative and void, the gift of a chose in action, without delivery and assignment of some documentary evidence of the debt, would seem to be even yet more clearly nugatory. For at common law even a bond could not be assigned, because it is but a chose in action. In equity, indeed, the assignment is held good, but even there, not without a valuable consideration; 1 Bac. Abr. Assignment, 249; Perkins v. Parker, 1 Mass. Rep. 117. And courts of law now permit suits in the name of the obligee for the benefit of an assignee for value. Upon these principles, it is not perceived how an oral chose in action can be assignable, so as to give the assignee, even for value, a right to sue in his own name; and the objection is a fortiori, where there is no consideration. There is nothing of which even a symbolical delivery can be made, and therefore there can be no valid, binding and executed gift. As in this case, Ross was the debtor of Mrs. Smith, and if by the oral agreement with her, that he would pay the money to Mrs. Milne, the latter acquired a right to sue for this chose in action, without consideration, without a promise or agreement with her, and without any act amounting to a transfer of the debt, then it would seem, that the principles of the law which inhibit the assignment of choses in action are unsubstantial and deceptive. For my own part, (with Lord Kenyon, 1 East 104), I think it safest to resist the overthrow of the principle which forbids such assignment.

Fink v. Fink's ex'or, 18 Johns. Rep. 145, is a case which involves some of these principles. Alexander Fink, in his lifetime, executed his promissory note to his son for 1000 dollars payable at sixty 223 days; declaring, \*when he did so, that he intended to give it to him absolutely; but there was no valuable consideration: an action by his son against his executor having been brought, it was decided, that it could not be maintained. Spencer, J., said "A promise to pay money as a gift, is no more a ground of action than a promise to deliver a chattel as a gift."—"There is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held to be sufficient. In such case, the consideration must be a valuable one, for the benefit of the promiser, or to the trouble, loss, or prejudice of the promisee. The note here manifested indeed an intention to give the 1000 dollars. It was, however, executory, and the promiser had a locus penitentiae. It was an engagement to give, and not a gift." In our case, there was not even a promise or engagement to give. There was only an oral promise by the debtor to the creditor, that he would pay the debt to the third person;

and this promise the creditor had, at all times before payment, a right to release or countermand.

This case, however, has been attempted to be supported upon authority; and the case of Dutton & wife v. Poole (which may be considered as the foundation on which others rest) has been confidently relied on. It was an action on the case, and appears to have been in assumpsit. The declaration is rather more at large in *sir T. Raymond's* report than elsewhere, but even there no assumpsit from the defendant to the plaintiff is laid: which, however, does not seem to have been a litigated point. The plaintiff declared, that his wife's father being about to cut down timber to raise £1000. for her, the defendant his son and heir promised the father, if he would forbear, he would pay the £1000. He did forbear, and the son failing to pay, this suit was brought; and it was decided, that the right to sue was in her, and not

224 in the \*father or his executors. The propriety of this judgment I am not disposed to controvert. The father had kept his timber and suffered no loss: but he had designed to provide his daughter a portion, and the son's promise prevented. To refuse to fulfil his promise was a fraud upon the sister, and the loss to her was a sufficient consideration to sustain a special action on the case. But in the case at bar, there was no loss shewn or averred, which could constitute a consideration to support an action by the daughter. The cases of *Dutton & wife v. Poole*, therefore, is not an authority in point to that before us. *Felton v. Dickinson*, 10 Mass. Rep. 287, was also cited. There, a father bound his son to a trade, and the master agreed in consideration of his services to pay him a certain sum at his full age. The son served out his time, and at maturity brought and maintained the action. His services were the consideration; and as it moved from him, and the promise to his father was for him, he being a minor, it was in effect a promise to himself. As to *Shermerhorn v. Vanderheyden*, 1 Johns. Rep. 139, the decision, as to the point now before us, was extrajudicial; for the case went off on another point, and instead of being decided in favour of the plaintiff, was adjudged against him; so that this point seems to have been but little considered. The case of *Pigott v. Thompson*, 3 Bos. & Pull. 147, contains but an obiter dictum of Lord Alvanley, in which his brethren differed from him; though I am ready to admit the correctness of his proposition, wherever the promise to pay to the third person is on valuable consideration, or where the consideration moved from that person himself, as was the case in *Louther v. Kelly*, 8 Mod. 115. All the other cases which have been reviewed or referred to by the bar, in which the action by the third party has been sustained, will be found, I think, to be cases in which a valuable consideration moved from him, or the money was directed to be paid over in discharge of a debt due 225 to him. Such was the \*case of *Ward v. Evans*, 2 Ld. Raym. 928; *Israel v. Douglas*, 1 H. & Black. 239; *Weston v. Barker*, 12 Johns. Rep. 276, in which last,

however, Spencer dissented in a strong opinion. The whole of these cases depend upon these legal principles: that choses in action are not assignable; and that no executory contract has any force unless sustained by a valuable consideration. The first is a rule of law adopted for the prevention of maintenance; and though it has, in modern times, been somewhat relaxed, it is still a ruling principle. It was early admitted, that an assignment for value was good is equity; and the assignee is now also permitted to sue at law in the name of the assignor, but he cannot sue in his own name. Nor can the assignee sue at law or in equity, unless he is an assignee for value, as has been already shewn. The second principle is universal. No executory contract has any force, unless it be for value; and moreover, wherever a valuable consideration is essential to an agreement, the legal interest in the simple contract resides with the party from whom the consideration moves, notwithstanding it may enure for another's benefit, or even is to be performed to another person. From want of attention to the true principle of the cases, there is some apparent conflict among them, some having gone farther than others in encroaching upon the established rules against the assignment of choses in action. Thus, if I deliver a sum of money to B. to pay over to C. who is my creditor, the money may be sued for by C. as money had and received to his use. *Wheatley v. Low*, Cro. Jac. 668. Contra, *Crifford v. Berry*, 11 Mod. 241. And if I have money belonging to B. and promise to pay it for him to C. he C. may sue for it in his own name, since by the agreement the money had changed owners, and I have become C.'s agent as I was B.'s before. *Surtees v. Hubbard*, 4 Esp. Rep. 203. This is all clear enough; but not content with going thus far, it has been decided,

226 \*that if I give goods of the value of £10. to B. to pay to C., C. may sue, the parties having considered and treated the goods as money. 1 Roll. Abr. 32, pl. 13. And where A. was indebted to B. and B. to C. and B. gave an order to A. to pay C. and the order was accepted by A.—C. was admitted to sue A. for the amount. This case has indeed been questioned, though I think without sufficient reason, since A.'s acceptance formed a new contract, for which the transaction furnished a sufficient consideration.

Upon the whole, therefore, I am of opinion, that Mrs. Milne had no right under this supposed contract. But if she had, I am still of opinion they could only be enforced in equity. For it is not perceived, that Mrs. Smith's representative has no concern or interest in the matter: he represents her with whom the contract was made by Ross, and from whom the consideration moved. Accordingly, in one case where the right of the beneficiary to sue was sustained, the right of the promisee to sue was also admitted; *Bell v. Chaplain*, Hardr. 321. But this leads to one of two consequences; either that the recovery here would not be a bar to the suit of the representative of Mrs. Smith, or it would be a bar. If it would not be a bar, then the

defendant would be twice charged: if it would be a bar, then the representative of the promisee would be concluded by a proceeding to which he is no party. If then Mrs. Milne has rights, it is safest that they be asserted in equity, where all the parties can be convened; or that, at least, the suit should be brought in the name of Mrs. Smith's administrator, that, by being a party upon the record, any controversy between him and Mrs. Milne, as to her rights, may be collaterally decided by the usual proceedings in similar cases.

Lastly; admitting Mrs. Milne's right to sue at law, I do not think she can maintain debt. *Dutton & wife v. Poole*, and all the cases founded on it, were in assumption sit. \*If entitled to sue, she must sue upon the special promise only; for Ross was never her debtor. This distinction, which prevails in many cases, is strictly applicable here. Thus, debt will not lie against the acceptor or endorser of a bill of exchange (except by statute) but the action lies upon the special undertaking. Nor will it lie on any collateral contract, as on a promise to pay the debt of another in consideration of forbearance. *Anon Hardr.* 486; *Bishop v. Young*, 2 Bos. & Pull. 78, 83; *Hard's case*, 1 Salk. 23. Nor will it lie for a wager. *Bovey v. Castleman*, 1 Ld. Raym. 69. In this case, it is clear, that if Ross was liable at all to Mrs. Milne, it was upon the express contract, and not as her debtor, which he never was.

It only remains to observe, that the want of title in Mrs. Milne cannot be cured even by the omnipotent act of jeofails. That act never could have been designed to enable a plaintiff to recover what by his own shewing belongs to another person. The judgment, then, in this case, should have been for the defendant, non obstante verdicto.

The other judges concurred. Judgment reversed, and judgment for Ross, defendant below.

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\*Hunter v. Matthews.

April, 1841, Richmond.

**Mills and Milldams—Competency of Jurors—Former Service in Same Case\*—Case at Bar.**—Petition for leave to build mill and dam across water course: ad quod damnum awarded, and inquisition returned: motion, by a person appearing by the inquisition to be interested, and admitted defendant to oppose the application, to quash the inquisition, on the ground, that two of the jurors empaneled on the inquest, had been of the jury who had found an inquisition on a former ad quod damnum in the same case: though it appeared, that the points now in controversy could

**\*Jurors—Competency—Member of Grand Jury Finding Indictment.**—The principal case is cited in *Dilworth v. Com.*, 12 Gratt. 691, to the point that, it is a principal cause of challenge to one called as a juror on a trial for felony, that he was of the grand jury who found the indictment against the prisoner. The principal case is distinguished in *Muire v. Smith*, 2 Rob. 466, 467. See monographic note on "Jurors" appended to *Chahoon v. Com.*, 20 Gratt. 738; and monographic note on "Mills and Milldams" appended to *Calhoun v. Palmer*, 8 Gratt. 88.



not have been presented for consideration of the jury on the first inquest, yet HELD, that the inquisition ought for that cause to be quashed. Dissentiente CABELL and STANARD, J.

**Same—Appellate Practice—Remanding Cause after Reversal—Case at Bar.**—In a mill case, county court overrules motion to quash the inquisition, proceeds to hear the cause on the merits, and gives leave to build mill and dam; upon appeal to circuit superior court, judgment reversed, inquisition quashed, and judgment for defendant without prejudice to a future application for a new ad quod damnum: HELD, the circuit superior court ought to have remanded the cause to the county court for further proceedings to be there had.

Upon the petition of Hunter to the county court of Campbell, setting forth that he was the owner in fee simple of the lands on both sides of Archer's creek in that county, on which he wished to erect a water grist mill and a saw mill, and a dam across the streams, the county court, in pursuance of the statute concerning mills (2 Rep. Code, ch. 235, § 1, 2, 4, p. 225-6), at January term 1837, awarded a writ of ad quod damnum, commanding the sheriff to summon twelve good and lawful men, freeholders of his bailiwick, to meet upon the lands of Hunter on the 24th of the same month, at the place where he proposed to erect a water grist mill, saw mill, and dam; which freeholders the sheriff should charge, impartially and to the best of their skill and judgment to view the land on which the mills and dam were proposed to

be erected, and also to examine the  
229 lands above \*and below, the property of other persons which might probably be overflowed, and say what damage it would be of to the several proprietors; whether the mansion house of any such proprietor, or the offices, curtilage or garden thereunto immediately belonging, or orchards, would be overflowed; whether and in what degree fish of passage, or ordinary navigation would be obstructed; and whether, in their opinion, the health of the neighborhood would be annoyed by the stagnation of the waters: and that the inquisition so made, and sealed by the jurors and the sheriff, should be returned to the next court. The writ was, in substance such as the statute prescribes.

The jury of freeholders summoned by the sheriff, of whom there were two jurors named William Dinwiddie and Rees Evans, met at the time and place appointed by the writ; and being duly sworn and charged, an inquisition was made and sealed by the jurors and the sheriff, stating that the jurors, having viewed the land upon which Hunter proposed to erect his mills and dam, and also the lands above and below, the property of others, found, that Hunter might erect a dam at the place where &c. twenty-four feet high, and that no person's mansion house, offices, curtilage, garden or orchards, would be overflowed, that fish of passage or ordinary navigation would not be obstructed, that the health of the neighbourhood would not be annoyed by the stagnation of the waters, and that no lands other than those of Hunter himself, and about an eighth of an acre of land of James Shannon of no value, would be over-

flowed or damaged in any manner whatever.

The writ and inquisition being returned, the county court, at March term 1837, made an order, that Hunter's mills should be established according to the inquisition of the jury.

Hunter proceeded to erect his dam, to the height, however, of only twenty-  
230 two (instead of twenty-four) \*feet; and it was found, by the actual experiment, that the waters of the stream were thrown back to a much higher point than the jury in their inquisition had apprehended, so that it overflowed several acres of land belonging to Edwin Matthews. And, in February 1838, Matthews exhibited a bill in chancery against Hunter in the circuit superior court of Campbell, wherein, after setting forth the writ of ad quod damnum and the inquisition, and the order of court founded thereon of March 1837, and that Hunter had erected his dam twenty-two feet high, he shewed that the waters of the mill pond overflowed several acres of valuable bottom and woodland and a farm road belonging to him, which the jury, not having founded their inquisition on an actual level taken, did not foresee; and that, moreover, the stagnation of the waters in the mill pond would prove a grievous annoyance to the health of his family, which consequence also the jury had not foreseen, as they had not foreseen any such stagnation of the waters; and he insisted, that the order of court giving Hunter leave to erect his mills and mill dam pursuant to the inquisition, did not entitle Hunter to erect a dam which would drown any of his land: therefore, he prayed an injunction to restrain Hunter from using the water in his mill pond for the working of his mills, till he should so far reduce the height of his dam as would ensure the entire withdrawal of the water of the mill pond from Matthews's land. The court awarded the injunction; and directed, that unless Hunter should, before the 10th March 1838, so reduce his dam, that it should not cause the water of the mill pond to flow back upon Matthews's land, the sheriff should enter on the premises, and restrain Hunter from using the water of his mill pond for working his mills. Hunter put in his answer to the bill in April 1838; in which he admitted, that his mill pond overflowed part of Matthews's land, and that this had not been  
231 foreseen by the jury; \*but he denied that the land overflowed was valuable, as the bill represented; and he insisted that there was no danger of annoyance to the health of Matthews's family from the stagnation of the waters in the mill pond. He objected to the jurisdiction of the court of chancery to grant the relief prayed in the bill. And he stated that, since the injunction had been awarded, he had applied to the county court of Campbell for a new writ of ad quod damnum, under which another inquisition had been taken (at the taking of which, he said, Matthews was present) whereby the whole damage which Matthews would sustain by the overflowing of his land was found to be 170<sup>0</sup> dollars, and it was found that the



health of his family would not be endangered. It did not appear, that any further proceedings were had in the suit in chancery.

In March 1838, the county court of Campbell had, upon the petition of Hunter, awarded another writ of ad quod damnum, commanding the sheriff to summon a jury of good and lawful men, being freeholders, to meet on the lands of Hunter at the place where he proposed to erect his mills and mill dam, on the 20th of that month, and to ascertain the damages that might be thereby sustained by the owners of lands in the neighbourhood, above and below &c. Two of the jurors summoned and impaneled upon this second inquest, were the same William Dinwiddie and Rees Evans who had been jurors upon the first inquest of January 1837. The second jury met at the place appointed, on the 20th March 1838, and an inquisition was made and sealed by the jurors and the sheriff: wherein it was stated, that by the erection of Hunter's proposed dam across the stream to the height of twenty-two feet, they (the jurors) supposed, that a half acre of land of Sam. Wheeler (formerly Shannon's) would be overflowed and drowned, and they assessed Wheeler's damages at five dollars—that they were of opinion, that nine  
232 acres \*of the land, and a farm road, of Edwin Matthews, would be overflowed and drowned, and they assessed Matthews's damages at 170 dollars—that no person's mansion house, offices, curtilage, garden or orchards would be overflowed; that fish of passage, or ordinary navigation would not be obstructed; that the health of the neighbourhood would not be annoyed by the stagnation of the waters—and that no other lands than those of Hunter himself, Shannon, and Matthews, as before mentioned, would be overflowed or any way damaged.

Upon the return of this second writ and inquisition, at April term of the county court 1838, Matthews, with leave of the court, entered himself as defendant, to contest Hunter's application; and on his motion the case was continued. It came on for hearing at June term 1838; when Matthews moved the court to quash the inquisition, on the ground that two of the jurors impaneled upon this inquest, Dinwiddie and Evans, were the same persons of that name, who were impaneled as jurors upon the first inquest of January 1837. The court overruled the motion, and Matthews filed a bill of exceptions, setting forth all the facts as they are above stated. The court then proceeded to hear the case upon the merits, and made an order, that Hunter should have leave to build his mills and mill dam pursuant to the inquisition, and that "he should be seized in fee simple of the land condemned by the jurors in their inquisition," upon his paying the defendant (Matthews) the damages assessed to him by the jury; and that the defendant should pay Hunter his costs.

From this order, Matthews appealed to the circuit superior court of Campbell; which held that the county court erred, in refusing to quash the inquisition of March 1838 on the ground on which Matthews

moved that it should be quashed. Therefore, the order was reversed with costs. And the circuit superior court, proceeding to give such judgment as the county  
233 court ought to have \*given, quashed the inquisition; adding, that this judgment was not to bar Hunter from prosecuting any other writ of ad quod damnum he should be advised to sue forth.

Hunter applied to this court for a super-seedeas to the judgment of the circuit superior court; which was allowed.

Grattan and R. C. Stanard, for the plaintiff in error.

Robertson for the defendant.

ALLEN, J. The statute concerning mills provides, that the clerk shall issue a writ, to be directed to the sheriff, commanding him to summon and impanel twelve fit persons. In this case, the person applying for leave to build the mill was the proprietor of the lands on both sides of the stream. The party contesting owned lands above, which were overflowed. The statute does not require that notice shall be given to him; because, until the inquisition is taken, it cannot certainly appear that he will be injured by the erection of the dam. He is, therefore, no party to the first proceedings, nor can he regularly make himself a party until the return of the inquisition. On the return of the inquisition, Matthews appeared, and moved to quash it, because two of the jurors had served on a former inquest respecting the same dam; and, in support of his motion, he shewed by the record, that the jury in the last inquest were required to act on the same matter involved in the first. Was this a good cause of principal challenge, which left no discretion on the part of the court? and if so, was it made in time?

A principal cause of challenge is "so called, because if it is found true, it standeth sufficient of itself, without leaving any thing to the conscience or discretion of the triors;" and it is a principal cause of challenge propter affectum, "if the  
234 juror has given a verdict for \*the same cause." Co. Litt. 156 b., 157, b.; 21 Vin. Abr. Trial. A. d. 3, p. 252, 3. A challenge concluding to the favour, when either party cannot take a principal challenge, must be left to the conscience and discretion of the triors upon the evidence. The authorities make it perfectly clear, that wherever a principal cause of challenge exists, all discretion is at an end. The juror must be set aside ex debito justitiæ; and all the books concur in declaring, that if the juror has given a verdict for the same cause, it is a principal cause of challenge.

As a general rule, such challenge must be made before the juror is sworn. But this rule must be confined to cases, where there is a party to the record, who can challenge before the juror is sworn. The proceeding, so far as the party objecting here was concerned, was, at the time the jury was sworn, entirely ex parte; and even if we could suppose he was present, there was no tribunal before which he could take the challenge. The sheriff, in holding an inquisition, acts ministerially, and no excep-

tion could be taken to his decision, if he improperly overruled the challenge. The earliest opportunity which offered to take the exception, was upon the return of the inquisition.

It is contended, however, that this varies from ordinary cases of trials before the courts, where the verdict of the jury is conclusive as to the facts: that the inquisition here does not conclude the parties, but the court, all the circumstances being weighed, may give or refuse the leave to erect the dam. This is correct to some extent. The court, notwithstanding a favourable inquisition, may refuse the leave. But the inquisition is the foundation of all the subsequent proceedings. If the inquisition finds that the health of the neighbours will be annoyed, or the mansion house &c. of any proprietor be overflowed, the court shall not give leave to build the mill: so far,

then, the petitioner would be concluded. \*Again, the party obtaining the leave is to pay the damages which will be done by overflowing the lands above or below. If the damages assessed be excessive or inadequate, the court may set aside the inquisition; but it would not be pretended, that the court could substitute itself for the jury, and proceed to assess the damages: upon that question, the finding is at least conclusive; for the damages to be paid must be assessed by a jury. In these important particulars, the parties are concluded by the inquisition. And in reference to all other matters submitted to their enquiry, the inquisition, regularly taken, will have an imposing effect upon the court. The mere opinions of witnesses, giving the subject a slight examination, would weigh but little in comparison with an inquisition taken on the spot, by jurors charged with the particular enquiry, and acting under the responsibility of an oath.

Reasons of public policy too, so far from sanctioning any relaxation of the rules of law intended to secure in all cases impartial jurors, would seem, in this particular instance, to demand a rigid adherence to them. A court of record, with the parties and their counsel before it, can more easily guard the purity of the jury trial. But these proceedings take place in the country, with no person present to watch over the conduct of the party or of the jury. And yet important rights are absolutely decided or materially influenced by their verdict.

It may be said, that it appears here that the former jury did not contemplate the reflux of the water so far as to injure the appellee Matthews, and that, as to this question, the first jury had not pronounced an opinion. I doubt whether it is competent, on this record, to enquire into that matter. The second writ was not to enquire merely into the damages which were sustained by Matthews. The jury was required to respond to the same enquiries, to which the jury had responded on the former inquest. Matthews was, by the last inquisition, \*shewn to be a party seriously affected by the dam, and was entitled to an inquisition taken by disinterested jurors, and to their finding upon all the questions submitted to

them. The proceedings in chancery, made a part of the record in the cause, shew that he objected, because the proposed dam would seriously annoy the health of his family. Upon this point two of the jurors had prejudged the case, and the inquisition returned by them and their fellows may have determined the judgment of the court to which it was submitted.

I think, that the inquisition ought to have been quashed, and approve the judgment of the circuit superior court, reversing that of the county court, for refusing to quash it.

STANARD, J., (after stating the proceedings on both writs of ad quod damnum, and in the suit in chancery, with great precision) said—The question in this case, which has chiefly engrossed the attention of counsel, is, whether the fact that two of the jurors impaneled on the writ of ad quod damnum of March 1838, were of the inquest upon the writ of January 1837, vitiated the second inquisition? Which involves an enquiry, in the first place, into the general principle which should govern the decision of the question; and then, how far the particular case presents a fit occasion for the application of such general principle.

Does the law of challenge apply to a jury making inquisition in a mill case? so that every objection, which can be urged as a principal cause of challenge to a juror about to be charged with the trial of an issue between litigant parties, may be urged as a disqualification of a juror summoned upon such an inquest, and if such an objection be shewn to exist in fact, the inquisition is in law vitiated, and ought to be quashed. The counsel for the defendant in error contends for the affirmative; and if he be right, a general principle is supplied for the \*decision of the question in controversy. My opinion is, that the proposition is not warranted by the principles of law.

The principal causes of challenge are indicated by, or deduced from, the terms of the venire facias, which commands a summons "of good and lawful men, by whom the truth of the matter may be better known, and who are nowise of kin either to the plaintiff or the defendant;" which words include all causes of objection for partiality or incapacity, consanguinity or affinity; and by force of them, it is a principal cause of challenge to a juror, that he has tried the same issue, and has declared his opinion upon the matter in issue. 3 Bac. Abr. Jury, E. 5, p. 756. Now, no such words are in the writ of ad quod damnum. The right of challenge, where it exists, must be exercised before the jury shall be sworn, and if not so exercised, the objection is unavailing to set aside the verdict. The defendant's counsel was, therefore, obliged to admit, that there is no right of challenge to jurors called upon an inquest in a mill case; for if it existed, it has been lost, in the present case, by the failure of the party to make the challenge before the inquisition was made. Why has not the law provided for a challenge in such a case? The reason may be found in the nature of the proceeding. It is not a

proceeding inter partes; it is not final or definitively binding; it is only initiative. It is not (technically speaking) a trial, but only a precautionary measure, which the policy of the law requires, before the case, as it affects individual rights, can be subjected to a judicial decision binding those rights. It has a much closer analogy to the inquest by a grand jury, than the trial by a venire; and my researches have been fruitless to find a single decision quashing, or even an attempt made to quash, an indictment, on the ground that some of the grand jurors had expressed an opinion on the matter of the indictment, or would have been liable to

238 \*challenge, if they had been called on the venire, for one of the many causes of principal challenge that might affect their perfect indifference. There are cases in which, though no formal issue be joined, yet the finding of the jury not being in its nature for information, or merely introductive of a litigation between individuals, but partaking more of the nature of a trial which may conclusively bind the rights of the parties, the law allows a challenge; as a writ to enquire of waste, or a propertate probanda. Harg. Co. Litt. 158, b. note 3. In cases in which the challenge is excluded (such as the case under consideration confessedly is) the law manifestly proceeds on the ground that public justice does not require, and public convenience forbids, that the privilege should be allowed. And whenever it is allowed, it must be exercised before trial, or the benefit of it is lost. To permit the challenge for cause to be used as the sole ground on which the inquisition shall be quashed, would produce the gross and palpable incongruity of making such cause more available to a party to whom the right of challenge is denied, and in respect to a proceeding by which nothing is finally decided, that it is to a party to whom the challenge is allowed, and in a proceeding acting directly on, and determining, the rights of the parties. It would not only introduce this incongruity in the law, but it would destroy equality and mutuality of right in the parties. A party apprised that a juror has expressed some opinion on some one of the several questions to which the inquisition must respond, may attend the execution of the writ of ad quod damnum, keep his information to himself, forbear to intimate to the other party, or to the sheriff, the objection to the juror, and silently acquiesce in the impaneling him on the inquest; and then, if the inquisition accord with his views, he may suppress the objection; or if it should be made known, it would be unavailing to the other party,

239 since he could not complain with effect, that the juror had, \*before he was impaneled, expressed opinions favourable to his cause. Such results as these are not accidental in a particular case, but the invariable effect of the joint operation of absence of right (and consequently of duty) to challenge, and of the right to use the cause of challenge as peremptory cause to quash the inquisition. In my opinion, such a right would be in direct conflict with the analogies, reason and

consistency, of the law; and is not sustained by any one decision, or even dictum, that my researches have brought under my notice.

While I am undoubtedly of opinion, that the existence of a cause of challenge, not affecting the qualifications which the writ requires the jurors to possess, namely the qualifications involved in the description of "good and lawful men freeholders of the bailiwick," does not necessarily vitate the inquisition, I am equally clear, that any such cause may be properly brought under the notice of the court, on the main question, whether leave shall be granted to build the mill and dam, or not: that it will, then, be entitled to more or less weight, as it may be affected by the circumstances of the case, and other matters that may be introduced in evidence; and that, thus weighed, if there should appear just cause to believe that justice has not been done by the inquisition, the court may quash it, and award another, or, in a proper case, refuse the leave sought. This, however, would be an appeal to the court, in the nature of a motion for a new trial; in deciding which, all the evidence in the circumstances of the case should be weighed, and the decision made according to the sound discretion of the court. Estimating the objection to the inquisition that one or more of the jury had been of a jury which made a former inquisition, at its true value, as on a motion for a new trial, it would not of itself be sufficient cause for quashing the inquisition, and directing a melius inquirendum. All the matters

240 found by the inquisition are open to the investigation of the \*court, on the testimony and the opinions of witnesses; and from these sources, cause should be manifested to the court, to believe, or at least to suspect, that the inquisition was imputable to some bias or prepossession of the jurors or of some of them, in order to justify the court in quashing it. Four matters are specially submitted to the enquiry of the jury: two of them interesting to the community at large, namely, whether fish of passage or ordinary navigation will be obstructed by the dam, and whether the health of the neighborhood will be annoyed by the stagnation of the waters; and two affecting the rights of individuals, viz. what lands will be overflowed, or other damage done, and then the value of such lands, and the amount of such other damage. If the party complaining of the inquisition, can adduce no proof to impeach the opinion of the jury on these enquiries, what ground can there be for suspecting that the inquisition was in the slightest degree influenced by any improper bias of the jurors? and without such ground, what good reason can there be to grant a new trial? In a case where good cause of challenge existed, and the right of challenge was not exercised because the cause was unknown at the time the jury was impaneled, I doubt not it may be brought to the notice of the court upon a motion for a new trial, and in a doubtful case it may turn the scale. But surely, if the case were free of all reasonable doubt, and the verdict clearly warranted

by the evidence, the court ought not to set it aside, because there was cause of challenge, unknown, and therefore not urged, when the jury was impaneled. The absence of all proof to bring in question the judgment of the jury, must leave the objection of presumed bias utterly powerless, by reason of the cogent implication it affords that such presumed bias had no effect. In this case, no effort was made to shew, and no circumstance appears even tending to the conclusion, that the inquisition was in the slightest degree affected by any previous bias of any of the jurors.

241 \*The efficacy of the objection to the jurors, addressed to the sound discretion of the court, insulated from, or coupled with, evidence tending to indicate, or to impeach their inquisition, would depend in some degree on the conduct of the party objecting. If he was not present at the inquest, or if he had no information of the fact till after the inquisition was made, a readier audience would be given to the objection, and more weight allowed to it. But if he was present, and had full notice of the ground of objection to the jurors summoned on the inquest, and forebore to intimate it to the officer or to the juror, the objection, thus withheld at the proper time, would, when afterwards urged to the court, be entitled to very little if any weight. Such was the case here. Matthews was well apprised of the first inquisition, for he exhibited it with his bill in chancery; and (as Hunter in his answer to the bill alleges) he was present when the second inquisition was made: and though he had no right of challenge to the jurors, he had full opportunity to know, and to make known, the ground of objection, and doubtless would have urged it, if he had supposed that the jurors had imbibed opinions, from their participation in the former inquisition, which would obstruct their exercise of an impartial judgment in making the latter.

But, if it were conceded, that the existence of a principal cause of challenge to one or more of the jurors making such an inquisition, should be as effectual to sustain a motion to quash it, as it would be to exclude a juror returned on a venire facias, I should still think the judgment of the circuit superior court in this case erroneous. If the right to quash be coextensive with the right to challenge, then its exercise should be subjected to a like limitation: as the right to challenge must be exercised in limine, so soon as the occasion to do so offers, such should be the limitation on the right to quash. Now here, the

242 opportunity offered, when \*upon the return of the second inquisition Matthews appeared, and entered himself defendant; and then, instead of moving to quash, he asked and obtained a continuance. Furthermore, in the finding of the first inquisition, there was, in truth, no prejudication of the matters involved in the second, and then brought into controversy. The material enquiries on the second inquest, were the quantity of land which would be overflowed by the mill pond made by the dam, and the effect upon the

health of the neighbourhood likely to result from such stagnation of the waters. Now, upon these enquiries, the first inquisition left the minds of the jurors who found it, wholly free from any possible bias hostile to an impartial response: for on that occasion, the jury, without making an actual level, but merely on conjecture, supposed that the water would flow back to a certain distance short of the land of Matthews. The mistake in that conjecture, or the having proceeded on such conjecture, could nowise bias the jurors, in ascertaining the quantity of land that was overflowed by the mill pond, after the actual erection of the dam had shewn the extent of it, or in estimating the damage. If Matthews had brought an action for the injury, it would not, in my opinion, have been a principal cause of challenge to one of the venire in such an action, that he was one of the jury that found the first inquisition. And the opinion that a dam, which (it was supposed) would not cause any land to be overflowed, would not cause any annoyance to the health of the neighbourhood, did not interfere at all with the exercise of an unbiased judgment as to the effect of a mill pond which (it was ascertained) would overflow many acres.

The judgment of the circuit superior court has been vindicated by the counsel for the defendant in error on another ground: that, as Hunter had, by the leave of court to erect his mills and mill dam granted upon the first inquisition, title to erect his dam at the same place,

243 \*it was improper, or at least supererogatory, to sue out another writ of ad quod damnum. If it were open to the defendant to occupy such ground, it is not perceived, that it would be an adequate foundation of the judgment quashing the second inquisition. But I think it manifest that he cannot do so. He denied the validity of Hunter's title to raise a dam twenty-four or even twenty-two feet high, or any dam that would overflow his land; and his objection to the title was so far judicially sustained, as to procure for him an order from the judge of the circuit superior court, that the dam should be so reduced as that it should no longer cause the land of Matthews to be overflowed, and that, unless it was so reduced by Hunter, he should be restrained from using the water to work his mills; and the sheriff was charged to enforce the restraint. It was when that order was in full force, and (it is fairly to be presumed) after the dam had been accordingly reduced much below twenty-two feet, that the application was made by Hunter for the new writ of ad quod damnum; the applicant contemplating the erection of a dam twenty-two feet high. Submission to the order of the circuit superior court would reduce the dam below twenty-two feet; and the application for the new writ implied that there had been such submission to that order. Matthews denied that Hunter had title to a dam twenty-two feet high; Hunter's application for the new writ proceeded on the concession that Matthews was right in his denial of Hunter's title to erect such a dam; and Matthews cannot turn round, and object,

that Hunter already has title, and so his second application is supererogatory. The statute authorizes a new writ of *ad quod damnum* when the mill owner wishes to raise his dam; and the difference is merely verbal, between an application to raise a dam twenty-two feet high, without notice of an existing privilege to have a dam part of that height, and an application to raise a dam to the height of twenty-  
244 two \*feet, by an addition of four feet upon an existing dam of eighteen feet height. That the applicant is already entitled in part to the privilege he seeks, cannot place him in a worse situation than he would be without such title.

Upon the whole, my opinion is, that the judgment of the circuit superior court is radically erroneous. There was error also in that of the county court, in declaring that on payment of the damages assessed to Matthews, Hunter should "be seized in fee simple of the land condemned." The circuit superior court should have corrected that error, and entered judgment, that Hunter should have leave to erect his mills and mill dam pursuant to the inquisition, if there were no other objections to such leave than those which now appear on the record. But it appears that the question presented by the objection to the inquisition, which in the opinion of the circuit superior court warranted the quashing of it, was in its nature preliminary to the introduction of evidence upon the merits, and the decision of that point in Matthews's favour precluded the introduction of evidence, and, consequently, there was no decision of the circuit superior court on the merits. Therefore, if my opinion were to prevail, this court ought not to give final judgment in the case, but should reverse the judgment of the circuit superior court, and remand the cause to that court, for a hearing there on the merits, with directions, that if upon the merits it should appear proper to grant Hunter leave to raise his dam twenty-two feet, then so much of the judgment of the county court as granted him such leave on paying the damages assessed to Matthews should be affirmed, but so much of it as declared, as a consequence of the leave granted, that the land condemned should be vested in Hunter in fee simple, should be reversed.

In conclusion, I shall remark, that if it were conceded, that the circuit superior court was right in quashing \*the  
245 inquisition for the cause assigned, still its judgment is wrong, and ought to be reversed, because it did not provide for another writ of *ad quod damnum*, and for that purpose remand the case to the county court for such new writ, should Hunter think proper to ask one. By the judgment, the case is brought to an abrupt and final end, for the supposed error in executing the writ of *ad quod damnum*; and this I think is clearly wrong.

CABELL, J., concurred in the opinion of Judge Stanard, and BROOKE, J., in that of Judge Allen.

TUCKER, P. I am of opinion, that the objection to the jurors who served upon the inquisition of March 1838 was a valid one, and taken in due time. The objection was,

that two of the jurors had been sworn upon a former inquest, and found an inquisition, in relation to the same identical matter, and that they had therefore prejudged the case. The fact is undeniable; and the naked question is presented, whether a juror, who has already on a former trial made up and delivered his opinion upon a matter or matters in issue, is a competent juror to be sworn upon a new jury to try and decide the same matter? The negative of the proposition is not only obvious upon reason and principle, but it is sustained by all authority. I will take that which, though laid down in an elementary treatise, I regard as entitled to the highest estimation. Challenges (says sir W. Blackstone, 3 Comm. 363.) "may be proper affectum for suspicion of bias or partiality. This may be either a principal challenge, or to the favour. A principal challenge is such, when the cause assigned carries with it, *prima facie*, evident marks of suspicion of malice or favour: as that a juror is of kin to either party within the ninth degree; that he has been an arbitrator on either side; that he has an interest in the cause—that he has formerly  
been a juror in the same cause, &c.

246 \*All these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores*." Here, then, the question of competency is at once decided against a juror who has formerly been a juror in the same cause. This objection must, of course, in some shape or other, avail every person who is to be bound or affected by the juror's verdict. In some cases, it may indeed be impossible for the party to make the challenge before the jurors are sworn, he being no party to the proceeding until he is made so by the inquisition itself. Where this is the case, his remedy is to move to quash the inquisition. Thus, in the case of a grand jury: a party indicted is not bound to object to a grand juror for any disqualification before he is sworn; for he is no party to the selection and constitution of the grand inquest of the county. But when he is indicted he becomes a party, and it is competent to him to avail himself of the disqualification. *Commonwealth v. Cherry*, 2 Virg. Cases 20, 25; *Same v. Carter*, Id. 318. So in the case of any other inquisition to which he is not a party. When the verdict upon the inquest is found and he thereby becomes a party, it is then competent to him to avail himself of any vital objection to the jury, since before he was made a party, it was not in his power to obtrude himself in the case. These are, I think, obvious principles, and require no authority in support of them. To apply them to the present case. Hunter moved for a writ of *ad quod damnum*. Two improper jurors were sworn of the inquest. Matthews was no party to the proceeding. No notice had ever been given him, nor was it required; for it could not be known, until the inquisition was found, that he was to be affected by it. He could not, therefore, object before the jurors were sworn; and unless we should decide, that the omission to object is conclusive upon one who is not a party when

the inquest is impaneled, even though the jurors \*were parties in interest or bribed, we must concede that Matthews had a right to make the objection in this case, at the time he did make it. An inquisition has been found, in which certain damages have been assessed to him, for a certain estimated injury. By this finding he is conclusively bound, unless the inquisition be quashed; 2 Rev. Code, ch. 235, § 9, p. 228. However inadequate the damages may be, he can never recover more. Shall he then be absolutely bound by a verdict, forever concluding his interest, even though it should appear, that the whole jury had been bribed, or were the sons and near connexions of his adversary? I cannot think so.

I am therefore of opinion, that the objection was a valid one, and that it was taken in good time; and that the judgment of the circuit superior court should be affirmed, with this modification, that the cause be remanded to the county court for further proceedings to be there had.

Judgment affirmed, and costs adjudged to the defendant in error; and ordered, that the cause be remanded to the circuit superior court, and from thence to the county court, with directions to that court, to award Hunter a new writ of ad quod damnum, if he shall apply for the same.

#### 248 \*Cocke's Ex'or & Others v. Philips.

April, 1841, Richmond.

**Widow—Renunciation of Husband's Will—Construction of Statutes.**—A married man dies possessed of personal estate, leaving a will wherein he bequeaths his whole estate to his nephews and nieces, and makes no provision for or mention of his wife: **Held**, upon the construction of the statute 1 Rev. Code, ch. 104, § 26, 29, that, in order to entitle herself to a distributive share of her husband's personal estate, the widow must declare her dissatisfaction with the will and renounce all benefit under the same, within the time and in the manner prescribed by the statute; dissentiente BROOKE and STANARD, J.

**Dower—Estates in Expectancy.**—Husband dies entitled to a remainder in fee of real estate, expectant on an estate of freehold therein; his widow is not entitled to dower of the land when the remainder falls in.

Joseph Cocke being entitled to the remainder in fee in 141 acres of land in Hanover, and to the remainder likewise in three slaves, expectant on a life estate therein then held by his mother, by deed of trust, in his lifetime, conveyed his remainder in both the land and slaves to Philip Winston, upon trust to secure a debt of 318 dollars with interest to William Cocke; and being thus entitled to the equity of redemption of the remainder of the land and slaves, and some personal chattels in possession, of trivial value, he died in 1823. He left no children or other

issue. He was, however, a married man; but his wife had separated from him many years before his death, and was then still living apart from him; though, it seemed, the separation was imputable to his own misconduct, not to any fault of hers. He left a will, in which he made no provision whatever for his wife; but, after charging his whole estate with his debts, he devised and bequeathed the same, subject thereto, to his nephews and nieces, thirteen in number. And Joseph Wingfield, an executor named in the will, took upon himself the trust.

249 \*In 1824, after Cocke's death, but before the death of his mother the tenant for life, his remainder in the 141 acres of land was sold by Winston, the trustee, under the deed of trust to secure the debt of 318 dollars to William Cocke, upon the requisition of the creditor's administrator, who himself became the purchaser at the sale. The purchase money exceeded the debt; the bond for which was taken in by the trustee, but a large balance of the purchase money remained unpaid.

Cocke's mother, the tenant for life, died in 1827, and upon her death, the three slaves came to the possession of his executor Wingfield.

Cocke's widow married Thomas Philips, whom she also survived. She never made any renunciation of her first husband's will; and never during her first widowhood, or during the life of her second husband, set up a claim to any provision out of her first husband's estate, real or personal.

But in 1835, after the death of Philips, she exhibited a bill in chancery in the circuit superior court of Hanover, against Wingfield the executor of her first husband Cocke, his devisees and legatees, Winston the trustee, and the purchaser of the 141 acres of land under the deed of trust; wherein she claimed dower of that land, and the share allowed her by law of Cocke's personal estate; and prayed an account of Wingfield's administration, and a decree for her dower of the land, and for her distributive share of the personal estate.

The defendants, in their answers, admitting that the plaintiff was the relict of Cocke, denied, nevertheless, that she had any claim to dower of the land, her husband never having been seized of any estate in possession therein during the coverture, but only entitled to an estate in remainder; and as she had never renounced his will, they also denied, that she had any right to a distributive share of his personal estate; or, if she ever had a just claim thereto, they insisted that she ought

250 \*not, after such a lapse of time, to be allowed now to assert it.

The court directed Wingfield to render an account of his administration of Cocke's estate before a commissioner; and the account was accordingly stated and reported; by which it appeared that there was a balance in the executor's hands, of 1477 dollars, principal and interest, of which all but 113 dollars arose from the hires of the three slaves, accrued since 1827; and that only two of the slaves were now living.

\*Widow—Renunciation of Husband's Will—Statutes.—As to when and how the widow must renounce provisions under her husband's will, see Va. Code 1827, ch. 113, sec. 2559; W. Va. Code, ch. 78, sec. 11, p. 718.

†Dower.—See monographic note on "Dower" appended to Davis v. Davis, 25 Gratt. 587.

It further appeared, by evidence, that of the purchase money of the land sold under the deed of trust, after paying the debt of 318 dollars with interest to William Cocke for which it was mortgaged, there remained still due from the purchaser, a balance of 909 dollars, principal and interest.

Upon the hearing, the court declared, that the plaintiff was entitled to one third of the slaves of her first husband Cocke's estate, to be held for her life, and to one-half of his other personal estate in absolute property; and decreed, in part, that Wingfield the executor should pay her one half of the balance reported to be in his hands; but as to the two slaves which now remained, as they were not divisible in kind, the court, for the present, made no decree as to them. And the court ordered, that the purchaser of the land should deposit the 909 dollars, the balance of the purchase money thereof yet due from him, in the bank of Virginia, subject to future order; and, in case he should fail to deposit the same within sixty days from the date of the decree, that the land should be sold by a commissioner appointed for the purpose, and the proceeds be brought into court.\*

251 \*Upon the petition of the defendants, Wingfield the executor, and the devisees and legatees, of Cocke, this court allowed them an appeal from the decree.

The cause was argued here, by Lyons for the appellants, and R. T. Daniel for the appellee, upon several objections taken by the former to the principles and the details of the decree; but the court considered only two of them, viz. That the widow was not dowable of the land, because her husband was never seized thereof, but was only entitled to a remainder expectant on a freehold estate; and that, as she had not renounced her husband's will, within the year after his death, she was not, upon the true construction of the statute,† en-

titled to any distributive share of the personal estate.

ALLEN, J. The testator Joseph Cocke made no provision by his will for his wife; she never renounced the will; and the question arises, whether, under these 252 circumstances, \*she is entitled to any portion of his personal estate?

The phraseology of the statute is ambiguous; and I was at one time inclined to think, that no renunciation was necessary, where the will is silent as to the widow. If "the widow shall not be satisfied with the provision made for her by the will of her husband," she is to declare she will not take or accept it, "and renounce all benefit she might claim" under the will. It would, at first view, seem to be a useless act, to refuse that which had not been given, to renounce a benefit where none was conferred. But, upon the supposition that no renunciation would be necessary in case the will contains no provision for the widow, the question still presents itself, to what would she be entitled? It is not a case of intestacy; the deceased has made a will disposing of the whole of his estate. Where a will is made, and the widow renounces, she is entitled to but a third of the slaves for life; but in case of intestacy, if the deceased leaves no child, the widow is entitled to a moiety. How would she take, where the will makes no provision for her? the moiety, as in case of intestacy? or the third, as in case of renunciation? If a moiety, as in case of intestacy, it would defeat the statute, which, in case the husband has made a will, intended, if the widow does not take under it, to give her one third only of the slaves, whether the husband left a child or not; and if she takes a third, then she must take under the statute, and must be bound by its provisions, which look to the case of renunciation alone, and declare that "thereupon, she shall be en-

253 \*modes of providing for her, that prescribed by the will, and that which is to take place on her renunciation.

There seems to have been some contrariety of opinion, as to the extent of the husband's power of disposing of his personalty at common law. According to Blackstone (2 Comm. 492,) by the ancient common law, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another

\*It will be observed, that while the decree declared the plaintiff entitled to only one third of her husband's slave property for her life. It gave her one half of the profits thereof, accrued since his death, in absolute property; and that the debt due to William Cocke was treated as a charge upon the land mortgaged for it, instead of being charged upon the personal estate in exoneration of the real.—Note in Original Edition.

†The statute of wills, Intestacy and distributions, 1 Rev. Code, ch. 104, § 26, 29, p. 381-2, the peculiar provisions of which must be borne in mind, in order to understand the point, and the opinions of the judges upon it.

§ 26. "When any widow shall not be satisfied with the provision made for her by the will of her husband, she may within one year from the time of his death" (in manner prescribed by the statute) "declare, that she will not take or accept the provision made for her by such will or any part thereof, and renounce all benefit which she might claim by the same will; and thereupon, such widow shall be entitled to one third of the slaves whereof her husband died possessed, which she shall hold during her life, and at her death, they shall go to such person or persons, to whom they would have gone if such declaration had not been made; and she shall moreover be entitled to such share of his other personal estate, as if he had died intestate, to

hold as her absolute property: but every widow not making a declaration within the time aforesaid, shall have no more of her husband's slaves and personal estate than is given her by his will."

§ 29. "When any person shall die intestate as to his goods and chattels, or any part thereof, after funeral debts and just expenses paid, if there be no child, one moiety, or if there be a child or children, one third, of the surplus shall go to the wife, but she shall have no more than the use for life of such slaves as shall be in her share," &c.

Thus, if the husband die testate, whether he leave children or not, the widow, on renouncing the will, is entitled to only a third of the husband's slave property for life: but if the husband die intestate leaving no children, she is entitled to half of his slaves for life.—Note in Original Edition.



to his wife, and the third was at his own disposal. And this he seems to think continued to be the law, as late as the reign of Charles I. If this were so, it was the law in force at the settlement of Virginia, and it might be argued was the common law brought over by the colonists. "This law" (Blackstone says) "is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels, though we cannot trace out when first this alteration begun." But Sir Edward Coke (Harg. Co. Litt. 176 b., note 6,) considers, that this was never the general law, but only obtained in particular places by special custom. The correctness of this opinion is controverted by Blackstone; but in a note in 1 Wms. on Ex'ors 2, it is said, the learned discussion of Mr. Somner on this subject, which tends to confirm the correctness of Coke's opinion, seemed to have escaped the notice of Blackstone. The question was discussed in *Lightfoot's ex'ors v. Colgin & ux.*, 5 Munf. 66, where Judge Brooke, after advert- ing to the difference between Coke and Blackstone, proceeds to shew, that when the legislature of Virginia first took up the subject, the common law was understood to be as laid down by Coke: that, at that day, Coke upon Littleton and the Institutes were the oracle of the law in this country, and the text books of lawyers and legislatures; that the law, as laid down by Coke, was in the mind of the legislature, when the acts of 1673 and 1705 were passed; and that those statutes were intended to restrain the husband, in the

254 \*exercise of a preexisting right to dispose of his whole estate by will. If this view of Judge Brooke was correct (and it strikes me as being so), the husband, by the common law as understood in Virginia, could dispose of the whole of his personal property, as he still may in England, without making any provision for his wife: and we must look to our statutes, to ascertain what limitations have been imposed upon this general power, and what remedy has been provided for the widow.

The statute of 1673, 2 Hen. Stat. at large 303, was the first. It makes provision for the wife in case of intestacy; and then proceeds, "and in case the husband make a will, that he hath it in his power to devise more to his wife than what is above determined, but not less." This statute provided no mode by which the widow was to assert her claim.

In 1705, another statute was passed, 3 Hen. Stat. at large 373. The fourth section provided, that when any person dies testate, leaving no more than two children, one third part of his estate, at least, should be given to his wife; if more than two children, she should have at least a child's part; and if there were no children, not less than a moiety: and if any person should leave a will, wherein a lesser part of his estate should be given to the wife than was directed therein, such will, as to so much thereof as related to the wife, upon her petition to the court where the same should be proved, should be declared null and void; and thereupon she should be

empowered to sue for and recover such part of her deceased husband's estate, as was therein before directed to be given to her. This statute is silent as to the case where no provision has been made for the wife. What, in such case, under that statute, would have been her condition? The phrase lesser part would seem to imply, that the legislature only intended to provide for the case, where something, but less than she was entitled to, had been given. The literal meaning of the 255 \*phrase would require that construction as strongly, as the existing statute would seem to require that the will should contain some provision which the widow was to renounce. But if we adopt that construction, we must come to the conclusion, that the legislature intended to give her a remedy, where the will made some provision for her, but left her as at common law, when nothing was given. The common law (as then understood) authorized the husband to dispose of the whole estate. She would, therefore, by this construction, be in a worse condition when the will gave her nothing, than when it gave her something, but less than what she had a right to. The statute shews an intention to alter the then existing law; to limit the authority of the husband, and afford a remedy to the widow. To effectuate that intention, the phrase used (lesser part) must be construed to extend to and include, not only the case of a partial, though an inadequate, provision, but the case also of a total omission to give any thing. If the last case was embraced in the scope of the statute, a petition to the court was the proper remedy, to declare the will null and void as related to her. The fifth section of the statute seems to confirm this view; it provided that if the wife should die before distribution, her representatives should be empowered to sue for and recover so much of the estate as shall be given her by the will, and no more. This excludes the idea that she had any rights other than those given by the will, or conferred upon her by the statute, or setting aside the will by petition. If any such right, other than that under the will, or acquired by renunciation, existed, it must have vested at her husband's death, and would therefore have passed to her representatives, though she died before distribution: but the statute limited the recovery of her representatives, when she died before distribution, to the property given by the will, and no more.

256 \*Another difficulty would occur, if she took in any other way than by renunciation: what would have been the extent of her claim? We have seen, that she was entitled to a third of the slaves in the case of a will when she renounced, whether the husband left a child or not; but in the case of intestacy, there being no child, she was entitled to a moiety: which rule would govern, where the will was silent, and she did not renounce? So, in regard to the other personal estate; by the common law, according to Blackstone, and supposing it to have been in force in Virginia, she took a third if a child, but a moiety if no child, was left. Under the



statute of 1705, she was entitled to a child's part only, where there were more than two children.

All these difficulties are obviated by holding, that in the case of testacy, there are but two classes of claims provided for, the claim under the will, and the claim by renunciation. I therefore think that notwithstanding the use of the word lesser in the statute of 1705, the legislature intended to apply the law to the case where nothing was given, as well as to the case where less was bequeathed than she was entitled to; and that it was incumbent on the widow in both cases to petition, and have the will declared null and void as to her, before she could be let into any thing.

Doubts arising whether the statute of 1705 had any relation to the disposition of slaves, and what right the widow had in the slave property of her husband, in case of his dying testate, the statute of 1727, ch. 11, § 21, 4 Hen. Stat. at large, 228, provided, that when a widow was not satisfied with the provision made by her husband's will, she might, within nine months after his death, renounce, and she should thereupon be entitled to one third of his slaves for life, and moreover to such share of his personal estate, as by the said act (the statute of 1705) was directed. This statute had two objects in view; 1. to remove  
257 the doubts as to slaves and \*to define the widow's interest; and 2. to furnish her a more convenient remedy; her renunciation in court or by deed, being substituted to the petition and judgment of the court declaring the will null and void as related to her. This statute did not operate upon her rights as to the personal property generally; they remained as defined by the statute of 1705. And if I am correct in supposing that, under that statute, a petition to declare the will null and void was necessary, whether it gave her less than she was entitled to, or nothing, the renunciation, substituted for the petition, by the statute of 1727, was equally necessary in both cases.

The statute of 1727 has been incorporated in the subsequent revisals, and, with very slight alterations, is the law as it now stands in the code.

It seems to me, therefore, that as the widow made no renunciation, she can claim no part of the slaves or personal estate. This construction of the statute will be attended with the least inconvenience. A widow, for family considerations, may choose to acquiesce in such a disposition of her husband's estate; it may have been made with her concurrence; or she may be satisfied with her dower, or with her own separate estate. If it be held, that no renunciation is necessary, where the will makes no provision for her, she, or after her death her representatives, may come at a distant day, and set up her claim; and the executor who may have delivered the property to the legatees, and the legatees who may have dealt with it as their own, may be called to account. By requiring the renunciation within the time prescribed, in all cases, this inconvenience is avoided: if it be not made within the

time, her claim is at an end, and the legatees may rest in security.

The widow has no claim to dower of the land in which her husband died entitled only to an estate in remainder expectant on his mother's life estate. To entitle a widow to dower, the husband must  
258 have been \*seized in fact or in law.

"If the husband maketh a lease for life of certain lands reserving rent, and he taketh wife and dieth, the wife shall not be endowed; neither of the reversion (albeit, it is within the word tenements) because there was no seisin in deed or in law of the freehold; nor of the rent, because the husband had but a particular estate therein, and no fee simple." Co. Litt. 32 a.; *D'Arcy v. Blake*, 2 Scho. & Lef. 387; *Blow v. Maynard*, 2 Leigh 29, 56.

BROOKE, J. I concur with Judge Allen in the opinion, that the widow is not dowable of the real estate, in which her husband, during his life and at his death, was only entitled to the remainder in fee expectant on a life estate. But I differ with him on the other point. It is in my judgment quite clear, that the widow is entitled to the distributive share of the husband's slaves and other personal estate, to which she would have been entitled, had he made some provision for her by his will, and she had renounced it. The 26th section of the statute of wills &c. authorizes the widow, if not satisfied with the provision made for her by the will of her husband, to declare, that she will not accept the provision made for her by the will, or any part thereof, and renounce all benefit which she might claim under it. I cannot see how, upon any fair construction of the statute, she can be required to declare that she will not take the provision made for her by the will, when the will makes no provision for her, and to renounce all benefit under it, when no benefit is conferred; or why, if the widow, in this case, had gratuitously renounced the will, she would thereby have bettered her claim to the provision, which our laws intended to secure to her out of her husband's personal estate, in spite of any testamentary disposition he might make of it.

My opinion in *Lightfoot's ex'or v. Colgin* & ux. has been relied on, to establish  
259 the proposition, that, by the \*common law, according to the authority of Coke in opposition to that of Blackstone, a husband had an absolute right to dispose of his whole personal estate, by deed or by will, and that neither his wife nor his children had any legal claim to a reasonable part, which could defeat his disposition: that, at any rate, the common law as laid down by Coke, was understood to be the true doctrine by our jurists when the colonial legislature first acted on the subject, and was in the mind of the legislature when it enacted the statute of 1673 and 1705. I adhere to the opinion as to the principle of the common law, which I intimated in that case; but I adhere also to the opinion I expressed at the same time, as to the intent and effect of our statutes—that they were intended to restrain the husband in the exercise of his preexisting

common law right to dispose of the whole estate by will.

The case of *Lightfoot's ex'or v. Colgin & ux.*, and the question it presented, were widely different from the case and the point now before us. There, a married man, by deeds absolute and irrevocable though merely voluntary, had settled his whole personal estate upon his children by a former marriage, making no provision out of it for his wife, with intent to defeat the claims of the wife to that portion of the estate to which she would have been entitled, if, without executing such deeds, he had died intestate, or had left a will which she might have renounced. It was held, that the wife acquired not, by the marriage, any right in the personal estate of her husband, that impaired his absolute right to dispose thereof by deed in his lifetime, since the statutes only restrained him from cutting her off by will, from a suitable provision out of the estate he should be possessed of, that is, entitled to, at his death. It was contended, that the deeds were a fraud upon the wife; that they were,

in their nature, testamentary instruments, a will in "disguise, in truth a will. The question was, whether the deeds were, in effect, a will or no? But supposing them to be a will, there was not a suggestion in the argument at the bar, or in the opinions of the court, that her renunciation of such will was necessary to entitle her to the provision allowed her in such case by law. Here, we have the case of a husband dying entitled to personal estate, and leaving a will, in which he has made no provision whatever for his wife, and bequeathed the whole to his nephews and nieces; and the question is, whether she was bound to renounce such a will, bound to declare that she would not take under the will what was not given her by it, in order to entitle her to the provision which the law makes for her?

In my opinion, the policy, intent and effect, of all the several statutes on the subject, from the first to the last, was to restrain the husband from making any disposition of his personal estate by will, which should deprive the wife of what the law deemed a reasonable provision for her. The statute of 1673 simply imposed such restraint upon him. The statute of 1705 again simply imposed a like restraint upon the husband, to dispose by will, of more than particular portions of his personal estate (varied according to the state of his family) to any other person than his wife; and then gave her a summary remedy by petition to the court of probat, to have the will declared void as to her, in case her husband thereby left her a lesser part of his estate. The remedy was provided for her, only in case the will gave her a lesser part, because she might be content with that, though the law declared it inadequate: no remedy was provided for her, where the husband's will made no provision for her, because it was not presumable she could be content without some provision; and, in that case, without applying to the court by petition to correct the injustice, she was entitled to claim of the executor

261 \*the distributive share allowed her

by law. The statute of 1727 defined the widow's rights in the slave property her husband died possessed of; and instead of putting her to her petition to the court of probat, to avoid his will, where she was not satisfied with the provision thereby made for her, this statute enabled her to redress herself, by a declaration within nine months, that she would not accept the legacy or legacies bequeathed to her by the will, and a renunciation of all benefit under it. Here again, she was required to make such declaration and renunciation, only in case the will made some provision for her, with which it might be presumed she was satisfied unless she declared her dissatisfaction; and her declaration and renunciation was required to be made within nine months, in order that the husband's executor might know, within a reasonable time, whether he should, as to her, administer the estate according to the will, or according to the statute: but no such declaration and renunciation of the will was required of her when it made no provision at all for her. The statute of 1785 (1 Rev. Code, ch. 104, § 26), was dictated by the same policy, and (with some variations in the details not necessary to be noticed) provides for the same case for which the former statutes provided; imposes a like restraint upon the husband's power of disposition of his personal estate by will, so as to secure to the wife an adequate provision; and requires the widow's renunciation of the will, in case, and only in case, some provision is made for her.

I think the decree of the circuit superior court in this case was right in the principle, that the widow was entitled to her distributive share of her husband's personal estate, though it might require some correction in the details.

STANARD, J., concurred in the opinion of Brooke, J., and CABELL, J., concurred with Allen, J.

262 \*TUCKER, P. I am of opinion, that the decree is erroneous in all the particulars complained of by the appellants: but there are fatal objections, in principle, to the appellee's claims, which render an examination of errors in the details of the decree unnecessary.

It is objected, and properly, that the widow had no title to dower in the land of her husband, because he had no seisin whereof she could be endowed. He had but a remainder after a life estate, which had not fallen in at this death; and of such an estate a woman cannot be endowed.

It is moreover objected, as to the slaves and personal estate, that the wife is not entitled to distribution thereof, as the husband has devised them all away, and she has never renounced the will as required by the statute. And this is, I think, undeniable. By the common law (according to the better opinion) the husband's power of disposing of his personal estate by will, was unrestricted by any rights on the part of his wife. The restriction existing with us, grows out of the clause of the statute, 1 Rev. Code, ch. 104, § 26. A widow must bring herself within this statute, or her husband's will and power over his estate are absolute. Now, the statute

pre-scribes the mode in which a widow may renounce her husband's will; and proceeds to declare, that a widow not making her renunciation accordingly, "shall have no more of her husband's slaves and personal estate than are given her by the will." In this case, nothing was given her. Therefore, she takes nothing under the will. But she has not renounced the will, in the manner prescribed by the statute: by the terms of the statute, then, she is expressly excluded from any portion of her husband's estate. The same consequence would follow even if the statute did not contain those strong negative words. For as there is no other restraint upon the husband's power than that created by this clause, she must bring herself within the clause by renouncing, "or it cannot apply to the case. It is said indeed, that the clause does not contemplate the case of a will in which there is no provision whatever for the wife, but applies only to the case of a partial provision. But if this be admitted—if the clause does not apply, then there is no limitation upon the husband's power of disposition. Under any view of the case the widow is entitled to nothing.

This point has never been settled by this court;\* but it arose in the case of *Rayan v. Rayan* in the chancery court of Winchester, in 1824; and I decided it according to the opinion I have now expressed, and there was no appeal taken. The reasons for the opinion then given, would be found in *Tuck. Comm. book 2, ch. 27; Wills p. 391-2; (Edi. of 1831)..*

Decree reversed, and bill dismissed.

## 264 \*Wheatley's Heirs v. Calhoun.

April, 1841, Richmond.

[87 Am. Dec. 654.]

**Partnership—Purchase of Real Estate—Dower Right of Partner's Wife.**—By articles between C. and W. they agree to join in purchase of mills and 200 acres of land adjoining, and that in case the purchase shall be effected, C. shall keep the mills at a salary to be paid out of the joint concern, and that "the improvements, privileges, expenses and profits, shall in all respects be equal to both parties and their legal representa-

\*The point can hardly be regarded as settled now: the judge of the circuit superior court and two judges of this court being of one opinion, and three judges of this court of the other.—Note by Reporter.

—Note in Original Edition.

†**Partnership—Real Estate—Immaterial in Whose Name Legal Title Stands.**—As a general rule, real estate purchased with partnership funds, for partnership purposes, and appropriated to those purposes, becomes partnership property; and it matters not, in equity, in whose name the property may stand, as owner of the legal title: the party in whose name it stands being treated as a trustee of the partnership, and accountable accordingly. In support of this proposition, see the principal case cited in *Hancock v. Talley*, 1 Va. Dec. 443; *Diggs v. Brown*, 78 Va. 295; *Cunningham v. Ward*, 30 W. Va. 579, 5 S. E. Rep. 660; *Brooke v. Washington*, 8 Gratt. 266. See *Hardy v. Norfolk Mfg. Co.*, 80 Va. 404; *McCully v. McCully*, 78 Va. 159. See also, *Davis v. Christian*, 15 Gratt. 11, and *note; Brooke v. Wash-*

*ington*, 8 Gratt. 248, and *note; Christian v. Ellis*, 1 Gratt. 306, and *note; 4 Va. Law. Reg. 312.*

**Dower—Transitory Seizin—Deed of Trust to Secure Purchase Money.**—Where a husband purchases land during coverture, which is conveyed to him, and at the same time he gives back a mortgage or deed of trust to secure the purchase money, the two instruments will be regarded as parts of the same transaction, investing the husband with a transitory seizin only, and therefore his widow will not be entitled to dower in the land against the vendor, though she did not join in the execution of the mortgage or deed of trust, but she will be entitled to dower in the surplus after the payment of the purchase money so secured. *Rough v. Miller*, 39 W. Va. 641, 20 S. E. Rep. 664; *Coffman v. Coffman*, 79 Va. 508; *Hurst v. Dulaney*, 87 Va. 445, 12 S. E. Rep. 800; *Summers v. Darne*, 31 Gratt. 801; *Randall v. Jacques*, 30 Fed. Cas. 233. (The above cite the principal case.) *George v. Cooper*, 15 W. Va. 606. See *foot-note* to *Robinson v. Shacklett*, 29 Gratt. 99, and monographic *note* on "Dower" appended to *Davis v. Davis*, 26 Gratt. 567.

**Dower—Seizin of Husband—Purchase Money Mortgage.**—Two persons purchase real estate jointly,

*ington*, 8 Gratt. 248, and *note; Christian v. Ellis*, 1 Gratt. 306, and *note; 4 Va. Law. Reg. 312.*

**Dower—Transitory Seizin—Deed of Trust to Secure Purchase Money.**—Where a husband purchases land during coverture, which is conveyed to him, and at the same time he gives back a mortgage or deed of trust to secure the purchase money, the two instruments will be regarded as parts of the same transaction, investing the husband with a transitory seizin only, and therefore his widow will not be entitled to dower in the land against the vendor, though she did not join in the execution of the mortgage or deed of trust, but she will be entitled to dower in the surplus after the payment of the purchase money so secured. *Rough v. Miller*, 39 W. Va. 641, 20 S. E. Rep. 664; *Coffman v. Coffman*, 79 Va. 508; *Hurst v. Dulaney*, 87 Va. 445, 12 S. E. Rep. 800; *Summers v. Darne*, 31 Gratt. 801; *Randall v. Jacques*, 30 Fed. Cas. 233. (The above cite the principal case.) *George v. Cooper*, 15 W. Va. 606. See *foot-note* to *Robinson v. Shacklett*, 29 Gratt. 99, and monographic *note* on "Dower" appended to *Davis v. Davis*, 26 Gratt. 567.

**Same—Same—Deed of Trust Executed Ten Months after.**—And though the deed of trust to secure the purchase money was not executed at the same time with the deed conveying the land to the husband, but ten months after, yet if it was contracted for at that time, the same principle applies, as equity regards that as done which ought to be done. *Wheatley v. Calhoun*, 12 Leigh 274.

**Same—Same—Same—Third Parties.**—The principle above stated applies equally in favor of a third person who advances the purchase money, and at the time of the conveyance takes a mortgage on the land for his indemnity, for example, where the deed of trust is for the benefit of an assignee of the vendor. *Cowardin v. Anderson*, 78 Va. 91; *Hurst v. Dulaney*, 87 Va. 444, 12 S. E. Rep. 800; *Roush v. Miller*, 39 W. Va. 641, 20 S. E. Rep. 664.

**Same—Same—Same—Presumption.**—Moreover, if both instruments are executed on the same day, the presumption is they were executed at the same time, and are parts of the same transaction, unless it be proved that they were separate and independent acts. *Hurst v. Dulaney*, 87 Va. 445, 12 S. E. Rep. 800, citing *Gilliam v. Moore*, 4 Leigh 30; *Wheatley v. Calhoun*, 12 Leigh 264; *Wilson v. Davison*, 2 Rob. 384; *Robinson v. Shacklett*, 29 Gratt. 99; *Summers v. Darne*, 31 Gratt. 791; *Coffman v. Coffman*, 79 Va. 504.

**Priority of Lien—Cotemporaneous Execution of Deed of Trust.**—So, where a purchaser cotemporaneously with delivery of conveyance of the purchased land executes a deed of trust to secure the purchase money, he acquires a transitory seizin only, and

and one of the terms of their purchase is, that, on receiving a conveyance from vendor, they shall, at same time, execute a mortgage of the property to secure payment of the purchase money; vendor makes the conveyance to the purchasers; but their mortgage is not then executed, owing to a difference between vendor and them as to the provisions to be inserted therein; but the mortgage is executed ten months afterwards, in fulfilment of the original contract of sale and purchase: **Held**, the rights of the mortgagee are paramount, in equity, to the dower rights of the purchasers' wives; and upon the death of one of them, his widow is dowerable of his equity of redemption of his moiety, but of that only.

**Partnership—Purchase of Realty—Payment of Another's Share—Subrogation to Mortgage—Dower.**—C. and W. make a joint purchase of a real estate, one of the terms of the purchase being that, on receiving a conveyance of the property from vendor, purchasers shall mortgage same property to secure payment of the purchase money; vendor executes conveyance to C. and W. and they execute a mortgage of the property according to the agreement; C. dies, leaving unpaid three fourths of the purchase money with interest thereon, all of which W. pays, except a trivial balance: **Held**, W. is

entitled to be subrogated, <sup>265</sup> "in equity, to the rights of the mortgagee, and to have satisfaction out of the mortgaged subject, for the excess of the debt paid by him above his just proportion, namely, a moiety thereof; and, as the rights of the mortgagee were paramount to the right of C.'s widow to dower, so are the rights of W. by subrogation, likewise paramount to her right of dower.

**Dower—Rescission of Contract for Sale of Land—Effect on Dower of Vendee's Widow.**—By articles between C. and W. they agree to make a joint purchase of land, and to divide the same between them by a designated line. W. to pay the whole purchase money of the whole land to the vendor thereof, and C. to pay W. the purchase money for his part, at a certain appointed time; within the time, C. pays W. the greater part, but not the whole, of the purchase money for his part of the land; and then, also within the time, the contract between C. and W. is rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. shall have credit on another account, for the money he has paid; and C. dies, never having been let into possession of the land so by him agreed to be purchased and paid for: **Held**, (upon the construction of the statute, 1 Rev. Code, ch. 90, § 81,) that as the contract between C. and W. was wholly executory, and was rescinded before C. had completed payment of the purchase money, and he had never had legal or equitable posses-

sion, he had no such equitable estate as that his widow was dowerable thereof.

Upon a bill in chancery, exhibited in the circuit superior court of Spotsylvania, by Mary Ann Calhoun, widow of John Calhoun deceased, against James Wheatley's heirs, claiming dower of real estate in Culpeper then held by them, the state of the case, collected from the pleadings and proofs, was as follows—

By articles between James Wheatley and John Calhoun, dated the 19th October 1822, it was agreed, that the parties should purchase jointly a parcel of about 557 acres of land; that, when the purchase should be made, the land should be divided by a designated line, so as to give Wheatley about 336 and Calhoun 221 acres; that Wheatley should make the arrangement with the vendor for the payment of the whole purchase money, at five and a half dollars per acre; and that Calhoun should pay for his part, at the rate of five dollars per acre, on the first June following. The whole of the

266 \*land was, it seemed, conveyed to Wheatley; but he never made any conveyance to Calhoun of the 221 acres which he was to have and to pay for; nor did it appear that Calhoun ever had possession thereof.

Robert Mackay having conveyed certain property in Culpeper, called The New Mills, and 200 acres of land thereto adjoining, to John Gray, upon trust to secure a debt due to John Scott; and Gray being about to sell the property under the deed of trust for the benefit of Scott; Wheatley and Calhoun entered into articles of agreement to make a joint purchase thereof, dated the 21st May 1823, in the following words—"James Wheatley and John Calhoun have this day agreed to unite in the purchase of the mill and its appendages, commonly called The New Mills, in Culpeper, belonging to Robert Mackay, provided it does not sell for a price exceeding 7000 dollars. In the event of the purchase being made, J. Calhoun and his man Daniel are to keep the mill for the sum of 300 dollars per annum, to be charged to and paid out of the joint concern, as well as the wages of any assistant miller. The improvements, privileges, expenses and profits, shall in all respects be perfectly equal to both parties and their legal representatives."

The trustee Gray made sale of the property on the 20th May 1823, and Wheatley and Calhoun purchased it for 7250 dollars. The terms of the sale were, that the purchase money should be paid in four equal instalments bearing interest from the date of the sale, and payable in one, two, three and four years, and that the purchasers should give bonds with surety for the instalments, and moreover execute a deed of trust mortgaging the property itself as collateral security; and that the conveyance to the purchasers, and their bonds and mortgage, should all be executed and delivered at the same time. On the 21st May 1823, Mackay and the trustee Gray executed and delivered a conveyance of the property to Wheatley and Calhoun, and they 267 (with their \*surety) gave their joint bonds for the four instalments: but their deed of trust to secure the payment

not such an interest in the land as becomes subject to the lien of a judgment against him in preference to the deed of trust. *Cowardin v. Anderson*, 78 Va. 68.

**§Partnership—Subrogation—Payment of Another Partner's Share.**—The principal case is cited in *Sands v. Durham*, 99 Va. 208, 38 S. E. Rep. 145, 6 Va. Law Reg. 256; *Blair v. Mounts*, 41 W. Va. 715, 24 S. E. Rep. 623.

See *foot-note* to *Buchanan v. Clark*, 10 Gratt. 164, and monographic *note* on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

See the principal case cited in *Rosenbaum v. Goodman*, 78 Va. 137.

of the purchase money, was not then executed and delivered, in consequence of a difference that arose between the parties as to the provisions to be inserted therein; namely, whether the deed of trust should authorize a sale of the trust subject to enforce payment of each instalment severally, or to enforce payment, after the last instalment should fall due, of the balance of the whole purchase money which should then remain unpaid. This point of difference was referred to and settled by the arbitration of mutual friends; in pursuance of which, Wheatley and Calhoun, by deed dated the 18th March 1824, conveyed the property to William Roberts, upon trust and with authority, if required, to make sale of the same, after the time appointed for the payment of the last instalment, for the purpose of raising and paying whatever balance should then be due and unpaid, of the whole purchase money, principal and interest.

Wheatley and Calhoun were both married men; but neither of their wives joined in their deed of trust of March 1824.

Under the agreement between Wheatley and Calhoun of October 1822, Calhoun had paid Wheatley 874 dollars, on account and in part of the purchase money of Calhoun's designated part of the land which they thereby agreed to purchase jointly; but by articles between them, dated the 21st May 1823 (the date of Mackay and Gray's conveyance of the New Mills &c. to them) Wheatley agreed to take back from Calhoun the 221 acres of land mentioned in their agreement of October 1822, upon condition that the 874 dollars, which Calhoun had paid on account of that land, should be applied to his credit on account of their joint purchase of the New Mills &c.

268 \*Wheatley and Calhoun, upon their purchase of the New Mills &c. commenced, and for several years carried on, the milling business there in partnership, but the partnership was at length dissolved: the precise date of the dissolution did not appear; it was certainly before, probably not long before, the 4th November 1829.

The first instalment of the purchase money of the New Mills &c. was paid on the 28th May 1824, amounting with interest to that date to 1923 dollars; and it seemed (it was not quite certain) that that sum, or at least the greater part of it, was paid out of the partnership funds of Wheatley & Calhoun. As the three other instalments fell due, they borrowed money of the banks at Fredericksburg to pay them, upon the credit of their own notes endorsed by several of their friends for their accommodation; and out of the money so borrowed, they paid all the instalments with interest thereon, except about 32 dollars, which remained still unpaid, and was charged by Scott, to whom the money was due, to Wheatley.

The notes discounted by the banks for the accommodation of Wheatley & Calhoun were renewed from time to time, and the accommodation continued, till the dissolution of the partnership; after which, Calhoun agreed, by letter addressed to the banks dated the 4th November 1829, that the notes should still be renewed, and

Wheatley should sign them, in the name of the firm of Wheatley & Calhoun, notwithstanding the dissolution. The notes were accordingly so renewed and discounted, from time to time, for the accommodation of Wheatley & Calhoun.

By deed dated the 1st May 1830, Wheatley and his wife and Calhoun joined in a deed conveying The New Mills and the 200 acres of land adjoining, to a trustee, for the purpose of indemnifying their endorsers at bank; authorizing the trustee, when required, to sell the property, and to apply the proceeds of sale to the payment 269 \*of the money, which they had borrowed of the banks to pay the three last instalments of the original purchase money to Gray the trustee, or rather to Scott, his cestui que trust, to whom the money was due. There were then two notes due at the banks, which were provided for by the deed of trust; one for 4040 and the other for 2460 dollars. Wheatley's wife joined in and duly executed this deed of trust of May 1830. Calhoun's wife did not join in it, but, on the contrary, positively refused to do so.

The two notes of Wheatley & Calhoun were still continued to be renewed and discounted for their accommodation, from time to time, till Calhoun's death, which happened in August 1831; and then, as they could no longer be renewed in the name of Wheatley & Calhoun, they were protested for non-payment.

In March 1832, The New Mills &c. were sold by the trustee under the deed of trust of May 1830, at public auction, in pursuance of the provisions of that deed; and, at that sale, Wheatley purchased the property for 6000 dollars. There was no reason to doubt, that the sale was fair, and that the 6000 dollars was the full value in the market at the time. The trustee conveyed the property to Wheatley. And in June and August following, he paid the debts due on the notes of Wheatley & Calhoun to the banks, then amounting, principal, interest and charges, to 7253 dollars; so that he paid 1253 dollars more than the price for which he had bought the property, besides the usual charges on the trustee's sale.

Wheatley had held sole and uninterrupted possession of all the land mentioned in the agreement between him and Calhoun of October 1822 from the date of that agreement, and of The New Mills &c. from the time of the dissolution of the partnership of Wheatley & Calhoun, until Wheatley's death, which happened in 1835; and thenceforth his heirs held possession of both parcels of property.

270 \*The widow of Calhoun had exhibited her bill against Wheatley in his lifetime, and after his death she exhibited a bill of revivor and supplemental bill against his heirs; wherein she claimed dower of her deceased husband's moiety of The New Mills and the 200 acres of land thereto adjoining, and she insisted that, if it should be held that she was not entitled to dower of that property, then she would be entitled to dower of the 221 acres of land mentioned in the agreement between her husband and Wheatley of October 1822, in which (as she claimed) her husband had

acquired such an equitable estate as that she was dowerable thereof (under the statute 1 Rev. Code, ch. 99, § 31). And she prayed a decree for her dower out of one or the other parcels of land, an account of the profits accrued since her husband's death, and a decree for her share thereof.

The defendants, in their answers, controverted the plaintiff's claim to dower in either parcel of property; resting their defence chiefly on points of law.

There were some contested questions of fact: however, the facts of the case, as above stated, appeared to be very clearly established by the evidence.

Upon the hearing in October 1837, the court, declaring that the plaintiff was entitled to dower of one undivided moiety of The New Mills and the 200 acres of land adjoining,—decreed, that she should be let into possession of a full third of the undivided moiety, as tenant in common with the defendants, and awarded her a writ of habere facias seisinam to obtain possession of the same; reserving liberty to her to resort to the court for a partition of the property, or such other relief as should be necessary to give her the full benefit of the decree. And the court declaring also that she was entitled to the arrears of the profits of her dower, but leaving it open for future consideration, whether the account of such profits should be carried back to the death

of her husband, or only to the commencement of this suit, directed \*an account of the profits from each period, distinguishing the profits which had accrued during Wheatley's life, from those which had accrued and been received by his heirs since his death.

The defendants, by petition to this court, prayed an appeal from the decree; which was allowed.

The cause was argued here, by Morson for the appellants, and Moncure and Robinson for the appellee, upon the following points of objection taken by the former to the decree: That the appellee was not entitled to dower in The New Mills and 200 acres of land adjoining, 1st, because that property was purchased by Wheatley and Calhoun, with a view to a partnership between them, in which it was to be put in as stock, was to be paid for by the partnership, and had been paid for out of partnership funds; and, therefore, it ought to be regarded as personal property. Or, even if it was real, yet it was real property belonging to the partnership, and liable to all the partnership debts; so that the plaintiff could only claim dower of the surplus after the partnership debts were all paid: and, in that view of her rights, an account of the partnership ought to have been taken, in order to ascertain whether there was any surplus, and if any, the amount of it. 2ndly, Because this property having been mortgaged by the deed of trust of Wheatley and Calhoun to Roberts of March 1824, to secure the payment of the purchase money thereof to the vendor Gray, and so mortgaged in pursuance of the terms of their purchase from Gray, that mortgage, though it was executed ten months after Gray's conveyance to them, overreached the right of Calhoun's wife to

dower; the legal title of the property was still in the trustee Roberts; and Wheatley, having paid the money secured by the mortgage, and paid a greater amount than the whole present value of the subject, was entitled to be subrogated to the rights of the mortgagee, which were 272 \*paramount to the appellee's claim of dower. 3rdly, Because, under the circumstances of the case, the deed of trust executed by Wheatley and Calhoun of May 1830, was only ancillary to their deed of trust of March 1824, since the latter deed mortgaged the same property to secure the same debt for which it was already mortgaged by the prior deed; so that the deed of trust of May 1830 likewise overreached the appellee's claim to dower. And as Wheatley had fairly purchased the whole property, at a full price, under the deed of May 1830, and had applied the proceeds of the sales to him towards the satisfaction of the debt due from Wheatley and Calhoun on account of their original purchase of the property, for which it had been mortgaged from the beginning; therefore, Wheatley and his heirs were entitled to hold the property exempt from the claim of dower which the appellee asserted in her bill. As to her claim to dower of the 221 acres of land mentioned in the contract between Wheatley and Calhoun of October 1822, Calhoun had but an inchoate equity in that land, which was extinguished before he ever had a right to call for the legal title of the same; therefore, he never held any such equitable estate therein, of which his widow was dowerable.

TUCKER, P. This cause has been argued with very great ability by the counsel on both sides, and the court is much indebted to them for the light which has been shed upon the various points in the case.

The appellee's claim of dower in the New Mills &c. is contested, first, because, as is alleged, the property was purchased, held, used and paid for, as partnership property; and therefore was chargeable with partnership liabilities, and properly to be regarded as personal estate, not liable to any dower right of Calhoun's widow. Whatever doubts may have heretofore existed, as to the light in which real property is to be 273 considered, when \*bought and used by a commercial partnership for the purposes of the concern, it is now well settled, that it is to be looked upon as forming a part of the partnership funds. Such is, at present, the received doctrine in England; Phillips v. Phillips, 1 Mylne & Keene 649; Broom v. Broom, 3 Id. 443; Randall v. Randall, 7 Sim. 271; 7 Cond. Eng. Ch. Rep. 208; 91 Id. 118; 10 Id. 52, and so, this court has decided; Pierce's adm'r v. Trigg's heirs, 10 Leigh 406. In the present case, however, I look upon the partnership as not comprehending the mills and land: I consider Wheatley and Calhoun as joint owners of the realty, and partners only in the milling business carried on upon the property. There may, indeed, be partnerships in the business of milling, or mining, or farming; but unless the intent of the joint owners to throw their real estate into the fund as partnership stock,

is distinctly manifested, or unless the real property is bought out of the social funds, for partnership purposes, it must still retain its character of realty. Considering the partnership as a third person, the titles of the individual partners cannot be passed to it, perhaps, without violating the statute of frauds, unless it be by express agreement in writing, or unless, by purchasing with partnership funds, an implied trust is raised in its favour. In this case, I see nothing from whence to infer, that there was any design on the part of these joint purchasers, to convert their real estate into partnership stock; nor am I better satisfied, that the property was purchased with, or paid for out of, partnership funds. To raise a trust by such purchase, it must have been made at the time with partnership funds, or on partnership responsibility. The payment, incidentally, out of those funds, of an instalment due upon an antecedent contract on individual responsibility, cannot raise such a trust, or give title to any thing but reimbursement. Now, here, the purchase was on individual responsibilities. The parties gave

274 their bonds, which bound each \*and his heirs for his own part, as between themselves, though both were bound for the whole to the vendor. The payments, therefore, if they had been made with the partnership funds, would not have converted the land into partnership property. But the payments were, in fact, ultimately made by Wheatley himself, whose right to reimbursement rests on principles wholly different.

This brings us to the second point; and here, I think it clear, that the deed of trust of Wheatley and Calhoun to Roberts of March 1824, was paramount to the widow's right of dower. Though it does not appear to have been executed at the same time with the deed of conveyance to them, yet it was so contracted for, and the two instruments must, therefore, in equity, be regarded as parts of the same transaction. *Gilliam v. Moore*, 4 Leigh 30. The dower right of the wife must therefore be subordinate to the deed of trust.

Next, it is to be seen whether that deed of trust is yet in force. It would seem to be so in the strictest sense, for the whole purchase money has not even yet been paid. But even if it had been, I should be clearly of opinion, that it was kept alive for the benefit of Wheatley, so far as he has made payments beyond his just proportion of the debt. Admitting (what I am not yet disposed to concede) that when a surety pays off a bond, there is nothing to which he can be substituted, as the security is gone, yet the same inference cannot be drawn in relation to a deed of trust. If the surety for the debt has paid it, still the title is outstanding in the trustee, and is in the power of a court of equity which will apply it to his indemnification. The technical objection that the remedy is gone, and there is nothing to assign, cannot prevail; and the court will act upon the conscience of the trustee, and compel him to execute the trust for the benefit of him who stands in the shoes of the creditor.

275 \*Had the sale, then, been under the

first deed of trust of March 1824, there would, I think, be an end of the case. But it was not; and, of course, the equity of redemption under that deed has never been foreclosed, as to any rights of the widow. She was, without question, entitled to dower in that equity of redemption, to the extent to which her husband Calhoun, had made payment of his proportion of the purchase money. In other words, if upon a sale, there should be an excess over and above the debt secured, that excess, being the measure of the equity of redemption, would belong to Calhoun and Wheatley in the proportions in which they have paid the purchase money, and Calhoun's widow would have her dower in her husband's portion.

With this view of the case, I am of opinion, that if Mrs. Calhoun shall ask a resale of the trust property, she will be entitled to it; and if there be an excess over and above the purchase money, she will be entitled to her dower interest out of Calhoun's portion of it. In the event of such claim being asserted, accounts should be directed to ascertain what proportion of the purchase money has been paid by Calhoun, what out of the partnership funds, and what by Wheatley, it being obvious, I think, that Wheatley, if he has over paid, is entitled, by substitution, to resort to the deed of trust for reimbursement.

The other judges concurred.

The decree of this court declared, that on the joint purchase by Wheatley and Calhoun of The New Mills and 200 acres of land, a contingent right of dower in a moiety thereof accrued to the wife of Calhoun, subordinate, however, and subject to the lien for the purchase money; and had that lien been discharged by the payment, by the purchasers respectively, of moieties of the purchase money, the dower 276 right would have prevailed \*over any claim of the surviving partner for a general balance on the settlement of the partnership accounts. That the lien for the purchase money, being an express term of the contract of purchase, was paramount to the claim of dower, the efficacy of which lien in overreaching the dower right, was in no degree impaired by the delay in executing the deed of trust, whereby the purchase money was stipulated to be secured; and that deed being executed in fulfilment of one of the stipulations of the contract, has, in respect to the dower right in question, the same effect in equity, to all intents, as if executed *uno flatu* with the conveyance to Wheatley and Calhoun. That so far as either of the joint purchasers, Wheatley or Calhoun, shall have paid more than a moiety of the purchase money, or so far as the purchase money may have been paid by the partnership of Wheatley & Calhoun, the deed of trust to secure the purchase money stands as a security for the partner or the partnership; and the partner, or the partnership, is entitled to be subrogated thereto, for reimbursement; and to these rights, so far as Wheatley is interested in them, the dower right is subordinate; so that it attaches only to one moiety of the surplus after satisfying the claim of Wheatley for pay-



ment of the purchase money made by himself, or by the partnership of Wheatley & Calhoun. That this claim of dower in property of the nature of an equity of redemption, has not been foreclosed by the sale under the deed of trust of May 1830, to indemnify the endorsers of the notes of Wheatley & Calhoun, which were originally given to provide the means of paying the latter instalments of the original purchase money; and the appellee has still the right to have a resale, should she think proper to claim it, and to have dower of the moiety of excess of the sum produced by such resale, above the amount which, on the taking of the proper accounts, may appear to be necessary to discharge the claims of Wheatley for the payments

277 on account \*of the purchase money, made by himself or the partnership of Wheatley & Calhoun. And that the appellee is not entitled to dower in the 221 acres of land her husband contracted to purchase of Wheatley by the articles of October 1822, the contract therefor never having been carried into effect, and the same having been rescinded and abandoned, while it was yet wholly executory, and before the payment of the purchase money was completed, or the legal or equitable possession or seisin of the land acquired by the purchaser. And that the decree of the circuit superior court was erroneous. Therefore, it was reversed with costs &c. And the cause was remanded for further proceedings to be had therein according to the principles above declared; and in case the appellee should not, within a reasonable time, choose to assert her claim to dower on those principles, and to that end, ask a reference to a commissioner to take the proper accounts, then her bill to be dismissed, but without costs.

278 \*The James River and Kanawha Company v. Anderson & Others.

April, 1841, Richmond.

(Absent STANARD,\* J.)

**James River and Kanawha Company—Right to Occupy Streets—Construction of Charter.**†—Upon the construction of the charter of the J. R. and K. company, passed March 1832, Supp. to R. C. ch. 377, § 39, 34, 35. HELD,

1. That the company has a right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, liable to make compensation in damages to any party injured.
2. **Same—Same—Same—Previous Ascertainment of Damages.**—That the company may lawfully enter and occupy such streets for its works, and proceed with its works, before instituting proceedings to ascertain the damages that may result to others.
3. **Same—Injunction to Proceedings of—When**

\*He had been counsel in the cause.

†**James River and Kanawha Company—Right to Occupy Streets—Construction of Charter.**—The principal case is cited in *Hodges v. Seaboard & Roanoke R. R. Co.*, 88 Va. 657, 14 S. E. Rep. 380; *Richmond Traction Co. v. Murphy*, 98 Va. 108, 34 S. E. Rep. 982.

**Proper.**—That it is not competent to a court of chancery to award an injunction to stay the proceedings of the company in the prosecution of its works of any kind, unless it be manifest, both that it is transcending the authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur, to warrant a court in awarding such process.

**Same—Right to Occupy Streets of Richmond for Basin.**

—It seems, that the company would have the same right to occupy the streets of the city of Richmond for its basin, as it has to occupy such streets for its canal, liable to compensate any party injured in damages, but not liable to be restrained by injunction:

**Same—Same—Power of City Authorities.**—And that the city authorities have a right to sanction such use of the streets by the company.

The first James River Company was incorporated by an act of assembly passed at the October session 1784; which, reciting "that the clearing and extending the navigation of James River, from tide water upwards to the highest parts practicable on the main branch thereof, would be a work of great public utility," and that "it might be necessary to cut canals, and

279 to erect locks \*or other works on the sides of the river," incorporated a company by the name of The James River Company, giving it full powers to accomplish such improvement of the navigation, authorizing it to receive compensation by way of tolls on boats &c. for the work, and making it the condition on which it should be entitled to demand and receive tolls, that it "should make the river well capable of being navigated in dry seasons by vessels drawing one foot water at least, from the highest place practicable to the Great Falls beginning at Westham"—"and should, at or near the said falls, make such cut or cuts, canal or canals, with

†**Railroad Company—Injunction to Proceedings of—When Proper.**—In *N. & W. R. R. Co. v. Smoot*, 81 Va. 504, the court said: Conceding that the plaintiffs can establish that they are entitled to compensation, that the injury they complain of is such that it cannot be adequately compensated in damages, and that it is therefore proper for a court of equity to grant the relief to which they may appear to be entitled; yet it is not proper for the court, pending the enquiry into their right to compensation, and before its assessment by law, to interfere by injunction, or otherwise, to stay the proceedings of the defendant railroad company, in laying or using the tracks on the land in respect to which the injury is alleged to be done or threatened, unless it be manifest that the company is transcending its authority, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages, citing Va. Code 1873, ch. 56, § 18: *Tuckahoe Canal Co. v. Tuckahoe Railroad Co.*, 11 Leigh 43; *James River & Kanawha Co. v. Anderson*, 13 Leigh 278; *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 514. The principal case is cited in *Supervisors of Culpeper v. Gorrell*, 20 Gratt. 514. See monographic note on "Injunctions" appended to *Claytor v. Anthony*, 15 Gratt. 518.

**Railroads in Streets—Rights of Lot Owners to Compensation.**—See *foot-note* to *Talbott v. Railroad Co.*, 31 Gratt. 686. The principal case is cited in *Spencer v. Railroad Co.*, 23 W. Va. 432.



sufficient locks, if necessary, each eighty feet in length and sixteen in breadth, as would open a navigation to tide water, in all places at least twenty-five feet wide (except at such locks), and capable of conveying vessels or rafts, drawing four feet water at least, into tide water,—or should render such part of the river navigable in the natural course." The company was authorized to agree with the owners of any land, through which the said canal was intended to pass, for the purchase thereof; and, in case of disagreement, to sue out writs of ad quod damnum, for the purpose of having the value of the lands necessary for its work assessed by a jury, and the lands condemned for its use, so that the same should not exceed in any case the width of one hundred and fifty feet. And it was provided, that the river, and the works to be erected thereon, in virtue of the act, when completed, should forever afterwards be deemed and taken to be navigable as a public highway, free for the transportation of all goods, commodities or produce whatsoever, on payment of the tolls imposed by the act: and that the canal and works of the company, and the profits thereof, should be vested in the stockholders, their heirs and assigns, as tenants in common, exempt from taxes, &c. Acts of October session 1784, ch. 19, § 1, 2, 11, 17; 11 Hen. Stat. at large, p. 450, 457, 461.

280 \*Under this charter, The James

River Company cleared away obstructions in the bed of the river, from the highest point from which it deemed the navigation practicable, to the commencement of the Great Falls at Westham (about five and a half miles above the city of Richmond), and from Westham, cut a canal on the north side of the river (with locks, to let boats up and down, of the dimensions required by the charter) opening into a basin made in the city of Richmond. The canal crossed diagonally six lots, intersected the streets designated in the plan of the city as B and C streets, 6th and 7th streets, and opened into the basin at the intersection of C and 7th streets. The basin was formed between 7th street on the westward and 12th street on the eastward, and between D street on the northward and C street on the southward, by a high artificial embankment on the northern and eastern sides, and on the southern, by the natural banks of a ravine. The basin covered six entire lots of the city and parts of several others; it covered also parts of 8th, 9th, 10th, and 11th streets, and (which was the principal subject of this controversy) a part of C street. For the ravine crossed C street in two places; and its banks, widening and diverging to the eastward and westward from the points of its intersections with that street, were included in that part of the street which fronted the basin, namely, along nearly the whole length of the basin. And so deep was the ravine, and so irregular the proclivity of its banks facing to the northward, that, in the natural state the ground, the northern line of C street descended at some points to a depth of forty-five feet or more, and upon an average to a depth of sixteen feet, below the general level of the

southern line. Thus, the waters of the basin filled the ravine at the two places where it crossed C street, and, in other parts, overflowed the northern margin of the street, more or less according to the natural curve of the banks; and, according to the \*natural varying proclivity of them, the water, along that line, was at some places quite deep, and at others very shallow. C street was sixty-five feet wide; and the average width of those parts of it (lying above and below the points where the ravine crossed it) which were covered by the waters of the basin, was twenty-five feet, and the average width left uncovered forty feet. The street, where it bordered on the basin, in its natural state, was very broken ground, and impassable for carriages of any kind; and it remained wholly unimproved at the time the basin was formed; though it had been somewhat improved when this controversy commenced, partly (it seemed) by the city, and partly by the James River Company.\*

The lots and parts of lots covered by the waters of the canal and basin, or the right to make such use of them, and the lots on which the northern and eastern embankments to contain the basin were formed, had, it seemed, been acquired by the James River Company, by agreements with or purchase from the owners thereof, or by condemnation under writs of ad quod damnum: but as to the parts of

282 the streets of the city which were \*overflowed, there was neither any agreement with the city authorities or with the owners of lots on the streets, nor any condemnation of them for the use of the company.† Probably, the benefit of

\*It is very difficult to describe the localities, to persons unacquainted with them, without the aid of a map: which the reporter has yet endeavoured to do. It may afford some aid to the explanation of them, to state, that the city of Richmond is situated on the north side of James River, and is divided into two parts by Shockoe Creek, which runs from north to south into the river. The basin is in that part of the city which lies west of the creek. According to the plan of the city, the longitudinal streets run from S. E. to N. W. in a direction parallel to the general course of the river there, and are designated by letters of the alphabet from A to L—A being the front street nearest the river, and L the back and most northern street. These longitudinal streets are intersected by thirty-one cross streets, running from N. E. to S. W. so as (almost all of them) to make right angles with the others: first street being the most westward, and thirty-first street the most eastward. The natural surface of the ground, from the brow of the river hills to the banks of Shockoe Creek and of the river, was very broken: and that part of C street bordering on the basin was especially so.—Note in Original Edition.

†That part of the city of Richmond which lies west of Shockoe Creek, was laid off in town lots and streets, by William Byrd, the proprietor of the land, or by trustees to whom he conveyed the land for the purpose, and the lots were disposed of by a lottery, some years before the revolution. To this lottery, all the titles of real estate in this part of the city are traced. It has been a question (though one of little or no interest) whether the right to the soil of the streets remained in Byrd, or in his

the work to the public, and especially to the city, was so great and so obvious, that its interference with the streets above mentioned (which were then, indeed, hardly used) was not thought of, or was disregarded. The canal and basin were completed about the year 1795, and thenceforth, till the commencement of this controversy, the James River Company, and its successor companies, exercised absolute control over its canal and basin, subject to the public right to use them as a highway, without interruption, question or complaint, from any quarter, and enjoyed the whole profits of the work.

The commonwealth was a principal stockholder of the company, owning indeed a very large portion of its capital stock.

The profits were large. In February 283 \*1820, the legislature passed an act, making great alterations in the charter of the company, upon condition that it should assent to the same. The purpose was to provide for a very extensive improvement, in addition to that which the company had already accomplished; the improvement, namely, of the navigation of James River as high as the mouth of Dunlap's Creek (many miles beyond the Blue Ridge of mountains); the making of a convenient road from thence to the great falls of the Kanawha; and the making of the Kanawha navigable, from the great falls thereof to the Ohio. In making this additional improvement, the company was to begin by making the Kanawha navigable from the great falls to the Ohio; then, to improve the navigation of James River from tide water to Pleasant's Island, by locks and navigable canals, (in other words, to extend its existing canal from the head thereof at Westham, to a point twenty-five miles higher up, and to connect its basin with tide water); next, to make the road from the mouth of Dunlap's Creek to the great falls of the Kanawha; and last, to make navigable canals and locks from Pleasant's Island to the mouth of Dunlap's Creek. The additional improvements were to be made under the superintendence of commissioners to be annually appointed by the legislature. To enable the company to accomplish these additional improvements, it was authorized to borrow money, the legislature providing and pledging

trustees, and is yet in his or their heirs, or is vested in the corporation of Richmond; but the streets are, without doubt, public and common highways. The legislature has often authorized the city authorities to widen or to narrow them. It has enclosed parts of 10th, 11th and 12th, and of F and G streets, in the capitol square, and appropriated them to public use. And by the charter of the corporation of Richmond (conferred and frequently altered and amended by acts of the legislature), the superintendence of the streets is unquestionably vested in the common council of the city; which has, and exercises, the undoubted right to improve them, or leave them unimproved, at its absolute discretion, and to improve such parts of them, in such manner, and at such times, as it thinks proper, though it is believed, that it has never, in any case, shut up any of them, or claimed the power to do so without special authority from the legislature.—Note in Original Edition.

funds to pay the interest; additional tolls were given to the company, in proportion to the additional improvements, as sections thereof should be completed; and all the profits of the then existing as well as of the additional improvements, exceeding 12 per cent. per ann. for twelve years, and 15 per cent. per ann. forever afterwards, on the existing capital stock of the company, which was secured to the stockholders, were to be applied to the additional improvements, and to the payment of the interest of the money borrowed, \*and to be accounted for to the legislature.

284 And the company was authorized to acquire the lands necessary for its purposes, namely, two acres for each abutment of a dam or bridge, the same for any lock, the same for any tollhouse, and the width of one hundred and fifty feet the whole length of its canal, by purchase from the proprietors; and in case the necessary lands could not be acquired by contract, then the company was authorized to proceed to have the quantities of land, abovementioned, or less, at its discretion, condemned for its use, in the manner prescribed by the statute "prescribing certain general regulations for incorporating turnpike companies," for condemning land for the use of any turnpike road,—changing the forms of the proceedings, as the nature of the case should require. And it was provided, that the company should have the right to enter on lands for laying out their canals, dams and other works, and in making examinations as to the best mode of improvement, in like manner as was allowed to turnpike companies in the statute referred to.\* See the act of February 1820, Supp. to Rev. Code, ch. 348. The James River Company assented to the alterations of its charter made by that act; and the additional improvements were commenced, and some progress made in the work.

But the legislature finding it necessary to provide a more effectual method of making the additional improvements, passed another act in February 1823, whereby the existing president and directors of the James River Company were superseded, and all their rights, powers, duties and privileges, were transferred to the governor, lieutenant governor, treasurer and first and second auditors, of the commonwealth for the time being, who were constituted ex officio president and directors of the company. Ample funds were appropriated and pledged \*for payment of the interest upon loans previously contracted by the company under authority of former laws, and of the dividends (12 per cent. per ann. for twelve years and 15 per cent. per ann. forever afterwards) on the stock of the company, to the holders thereof. New provisions were made for prosecuting the extended systems of improvement projected by the act of February 1820. In particular, it was provided, that two commissioners should be appointed annually by the legislature, one for the James River canal, and the other for the Kanawha road and navigation, to superin-

\*The statute referred to was that of February 1817, 2 Rev. Code ch. 284, § 7-13, p. 213-216.—Note in Original Edition.

tend and direct the execution of the works, with all the powers and rights that had been vested in the James River Company for the purpose. And it was enacted, "that, whenever it should become necessary to subject the lands of individuals to the purposes provided for in the said act," (the act of February 1820) "and the consent of the proprietor could not be obtained, it should and might be lawful for the said commissioners, within their respective precincts, to enter upon such lands, and proceed to the execution of such works as may be requisite; and the pendency of any proceedings in any suit in the nature of a writ of ad quod damnum, or any other proceedings, should not hinder or delay the prosecution of the work; and no order should be made, or injunction awarded, by any court, by which the progress of the work shall be arrested; it being the true intent and meaning of this act, that all lands should be liable to condemnation, and that the proprietor should be compensated in damages." See the act of February 1823, Supp. to Rev. Code, ch. 351, p. 433, 441, 2.

Under this act, further progress was made in the projected improvement; but the work not fulfilling the expectations or wishes of the public, the legislature, on the 16th March 1832, passed "an act incorporating the stockholders of The James River and Kanawha Company," Supp. to Rev.

286 Code, ch. 377, p. 474, under "which that company was formed, and the act is its charter. It provided, that books of subscription should be opened for the purpose of raising a capital stock of 5,000,000 dollars, in shares of 100 dollars each, and that the state should be regarded as a subscriber for 10,000 shares, to be paid for by a transfer to the New Company, of her whole interest in the works and property of the old James River Company; and that, if the capital of 5,000,000 dollars should be found insufficient to complete the works required of the new company, it should be at liberty to enlarge its capital to any amount that should be found necessary to that end. The James River and Kanawha Company was to take the property thereby transferred to it by the state, subject to the payment of 15 per cent. per ann. forever, to the stockholders of the old company, and subject, moreover, to the pledge of the surplus tolls of the company, made by former laws, for the security of the public creditors, who, on the faith of that pledge, had lent money to The James River Company, for the use of the commonwealth; but the legislature pledged the faith of the commonwealth to the new company, that it should be protected from the payment of any part of the principal or interest of the debt contracted by such loans; for which purpose funds were provided and pledged. (The effect of which provision, taken in connexion with the provisions of former laws, was, that all the property, and all the rights of every kind, which belonged to the old James River Company, were purchased by the commonwealth at a fair and full stipulated price, and transferred to and vested in the new company.) The affairs of the new company were confided

to the care and superintendence of a president and seven directors, to be annually appointed by the stockholders, in general meeting; who were charged with the making and execution of all the contracts of the company, with the construction and preservation of its works, with the  
287 custody and preservation of all its property, and the control and direction of all its agents. The James River and Kanawha Company was (by § 22, of the charter) charged with the duty of connecting the tide water of James River with the navigable waters of the Ohio, by one of the three following plans of improvement, at its election—either, 1. by a continuation of the lower (the then existing) James River canal, to some suitable point on this river not lower than Lynchburg, a continued railroad from the western termination of such canal to some convenient point on the Great Kanawha below the great falls thereof, and an improvement of the Kanawha from thence to the Ohio, so as to make it suitable for steamboat navigation; or 2. by a continuation of the James River canal as aforesaid, and a continued railroad from its western termination to the Ohio river; or 3. by a continued railroad from Richmond to the Ohio. Whichever of those plans the company should elect, it was required to complete the works in a substantial and durable manner, and to keep them in good repair, free and fit for public use; and the works it should construct and the property it should acquire by purchase or condemnation, under authority of its charter, were vested in it and its successors forever, for its own use and benefit, exempt from all public taxes &c. And (§ 23) if the company should elect to continue the lower James River canal to or beyond Lynchburg, as part of its improvement, then the charter required, that such canal, in all its parts, from Richmond to its western termination, should be at least forty feet wide at the top, and twenty-eight feet wide at the bottom, with not less than four feet depth of water at all seasons of the year, and should be provided with a convenient towpath, and adapted throughout its whole extent to the navigation of boats of not less than thirty-five tons burden; and that the canal at its lower termination should be connected with tide water, so as to enable such boats with their cargoes,  
288 to pass conveniently "at all times into tide water, and descend the river or return. As the dimensions of the new canal prescribed by the charter, far exceeded, in the width as well as depth, those of the canal which had been constructed by the old James River Company, and the canal was to be extended much farther up the river, and so it might be necessary to acquire more land for the purpose of the improvement, than that which the old company had acquired and occupied; therefore, it was provided (§ 29) that "the president and directors" (of the James River and Kanawha Company) "their officers, agents and servants, should have full power and authority to enter upon all lands and tenements through which they should desire to conduct their road or canal,

or any feeder of the canal, or against which they should desire to abut any dam, and to lay out their road, canal, feeders and abutments, according to their pleasure, so that neither the dwelling house, yard, garden nor curtilage, of any person should be invaded without his consent; that they should describe by certain limits, the lands which they should desire to occupy for the purposes aforesaid, and such contiguous land as they should desire to occupy, as sites for tollhouses, warehouses, stables and other buildings, for the necessary accommodation of their officers, agents and servants, their horses, mules and other cattle, and for the protection of the property entrusted to their care; provided, that the lands so laid out on the general line of the road, canal and its feeders, should not exceed one hundred feet in width; that the adjoining land for the sites of buildings, should not exceed one acre in any parcel or one hundred acres in the whole, and that the land for an abutment should not exceed one acre;" that "it should be lawful for the president and directors to purchase the land so laid out, or any part thereof; and, if they could not agree with the owners on the terms of purchase," then a process was authorized and prescribed (§ 29, 30, 31,

32, 33), whereby the company should  
289 \*have the lands condemned for its use, and damages assessed to the owners, to be paid them as compensation. And then, there were the following provisions (§ 34, 35), "While these proceedings are depending for the purpose of ascertaining the damages to the proprietor for the condemnation of his land, and even before they shall have been instituted, the president and directors, if they shall think that the interest of the company requires it, may, by themselves, their officers, agents and servants, enter upon the lands laid out by them as aforesaid, and which they desire to condemn, and apply the same to the uses of the company"—"In the mean time, no order shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the company in the prosecution of their works, unless it be manifest, that they, their officers, agents or servants, are transcending the authority given them by this act, and that the interposition of the court is necessary to prevent injury that cannot be compensated in damages." But (§ 36), if the president and directors should take possession of any land, before the same should have been purchased by them or condemned and paid for according to the provisions of the act, or should fail for forty days to institute proceedings for its condemnation, or should not prosecute with due diligence the proceedings commenced for that purpose; then "the proprietor of the land" was authorized to institute proceedings for the assessment of damages "to the owner from the condemnation of his land for the use of the company," and the court was required to render judgment for him against the company for the damages assessed to him and double costs. When the improvements in the navigation of the rivers authorized by the act should be made, it was declared, that their navi-

gable waters should be deemed public highways, free for the use of all persons whatsoever, paying the lawful tolls  
290 (allowed and \*prescribed by the charter), and conforming to the lawful rules and regulations of the company.

In making the improvement of the navigation of James River required by its charter, The James River and Kanawha Company widened and deepened the old James River canal, so as to make it forty feet wide at the top and twenty-eight feet at the bottom, with not less than four feet depth of water, and thus to adapt it to the navigation of boats of thirty-five tons burden, according to the provisions of the charter. And, in doing this, the company deemed it necessary, in order to give a passage to boats of such dimensions, from the canal into the basin; to cut off a projection of C street, which made an abrupt bend in the old canal, at the point where that street was intersected by 7th street, and where the canal entered the basin, and to excavate a part of C street at that point, which had not been occupied by the old canal, and to include the same in the enlarged and improved canal. The company proposed so to widen and straighten the canal at its entrance into the basin (having already widened it above to that point) and to build a broad bridge across the canal at the intersection of C and 7th streets, which should keep the passage along both streets uninterrupted. The company proposed also to make a stone wall on both sides of its improved canal, and all around its basin, whereby the adjoining lands and streets should be saved from being encroached upon by the waters of either, the canal preserved of the uniform width and depth required by the charter, and the basin (without enlarging or diminishing its actual dimensions and capacity) made a more commodious harbor for boats, and its banks more commodious wharves. On the northern and eastern margin of the basin, it proposed to make a public way thirty feet wide, bordering on the stone wall on that side.\* And,

291 \*as on the southern margin of the basin, its waters covered a part of C street in a waving line, leaving upon an average only forty feet of that street fronting the basin uncovered, it proposed to make a straight wall on that side, from 7th to 11th street, which should include twenty-five feet of C street in the basin, and leave the street uniformly forty feet wide; and then to excavate the bed of the basin within and along that wall, in places where the water had hitherto been shallow, so as to afford a sufficient depth of water all along the wall, for boats of any dimensions that could navigate the canal, to lie along side the wall, and discharge and receive their cargoes.

The president and directors of the company thought (sincerely, without doubt), that their projected improvement along the lines of their basin, would be highly beneficial to the city, and especially to the

\*This way, thirty feet wide, except where it crossed streets, was to be made on land belonging to the company.—Note in Original Edition.

owners of property on the southern side of C street, fronting the basin; and in October 1837, they ordered, that the plan of their projected improvement should be laid before the common council of the city, in order to obtain its approbation of and assent to the same, and to ascertain how much of the expense of the improvement the city would contribute.

Whereupon, on the 8th January 1838, the common council of the city Resolved, that it would sanction the plan of improvement submitted to it by the James River and Kanawha Company from the east line of 8th street eastwardly round to 11th street—or further (meaning, along C street) if the owners of property would consent thereto; and that if the company should proceed to make the projected improvement, the city would contribute one half of the expense, provided the same should not exceed 7000 dollars for the entire improvement: provided that a portion of the northern and eastern bank of the basin thirty feet wide should be left open and ceded as and for a public highway to the city forever;

292 \*and provided further, that nothing in the resolution contained should be construed as ceding or surrendering any right of the city to any part of the streets thereof, or to prevent the future improvement of them by the city.

This resolution of the common council having been communicated to the president and directors of The James River and Kanawha Company, the board, on the 25th April 1838, Resolved, That the company would proceed to make the projected improvement of its basin and canal, on the following terms and conditions, viz. that the company, with a view of enclosing the basin with a substantial stone wall, would erect such wall, commencing on the eastern line of 8th street upon the neck of the basin, and running thence eastward and around the eastern end of the basin, to C street on the southern side thereof, and as much further along C street to its intersection with 7th street as the owners of lots on C street opposite the improvement would consent to, leaving C street forty feet wide including the wall as part of the street; of the expense of which improvement the city should contribute one half, provided the expense of the whole improvement should not exceed 7000 dollars; and that the company would keep open and in good repair, on the northern and eastern bank of the basin from 8th street around to C street, a space thirty feet wide, free for the use of the inhabitants of the city, as a public way, for the convenience of lading and unlading boats and other vessels on the basin, and for the transaction of all other business connected with the basin, subject, however, to such regulations of police, as the company should from time to time adopt for the protection and preservation of its improvements, and for preventing interruption to the lading and unlading of boats and other vessels, and to the other proper business of the basin: and that the foregoing resolution, conditions and

293 terms, should be submitted \*to the common council of the city for its approbation: It being, however, to be

distinctly understood, that while the common council, by adopting its former resolution, or approving this resolution of the company, would not cede to the company any right which the city might have to any of the streets or parts of streets within the limits of the proposed improvement, or debar itself of any right hereafter to improve the same, the James River and Kanawha Company, on its part, did not, by the adoption of this resolution, concede to the city, any right, present or future, over any street or part of any street which had been heretofore continually covered by the waters of its canal and basin, but the rights of the parties respectively, in regard to such streets, should remain to them in like manner as if the resolutions of the common council, and of the company, had never been adopted.

In the interval between the adoption of the resolution of the common council of the 8th January 1838, and that of the president and directors of the company of the 25th April following, the company drew off the waters of the canal and basin, for the purpose of making the projected improvement of the basin, and of the canal at its entrance into it. And after the waters had been drawn off, and while the canal and basin were empty, Richard Anderson, David Anderson, James Walthall and Nicholas Mills, inhabitants and corporators of the city of Richmond, who were the owners of lots with warehouses and other valuable improvements thereon, upon the south side of C street fronting the basin, some distance below the entrance of the canal into the basin (they owned no property upon the canal at that point), exhibited a bill in chancery, in the circuit superior court for the county of Henrico and city of Richmond, against The James River and Kanawha Company, and The Mayor, Aldermen and Commonalty of the city; wherein, after shewing, that the improvement pro-

294 jected by the \*company would include a part of C street in its canal, and another part thereof in the basin, and reduce the width of the street from sixty-five to forty feet,—they complained that the work would be very injurious to the owners of property on that part of the street which would be so narrowed; and insisted, that the street was a public highway, to the use of which as such, in its whole length, and full width of sixty-five feet, the plaintiff, and all the citizens of Richmond, and indeed the whole public, were entitled; that the common council of Richmond were bound by the charter of the city, to improve and keep in repair all the streets, and had no authority to cede any part or the use of any part of any street, to any person, or for any purpose incompatible with the use thereof as a highway; that The James River and Kanawha Company was not authorized by its charter, to take for the bed of its canal, or of its basin, or by the waters of either to encroach upon and overflow, any street or any part of any street of the city; and that great injury would be done to the plaintiffs and others similarly situated, by the projected work, if it should be completed, and such injury as could not be adequately compensated in

damages, and that the work would be a public nuisance. And, therefore, the bill prayed an injunction to restrain The James River and Kanawha Company from interfering with, diminishing the width of, or otherwise altering C street, and to restrain the company and the corporation of Richmond from carrying into effect, the agreement imported by the resolution of the common council of the 8th January 1838, so far as the same related to C street, or affected the rights, interests and privileges, of the plaintiffs and the other corporators of the city.

The court awarded an injunction, to restrain The James River and Kanawha Company from doing any act interfering with, diminishing the width of, or altering C

street, according to the boundaries and limits \*thereof, as laid down and established in the plan of the city, and from cutting away or excavating any part of the street, or removing the earth therefrom; and to restrain the company and the corporation of Richmond, from carrying into effect the agreement imported by the resolution of the common council of the 8th January 1838—upon condition, however, that the plaintiffs should enter into bond with surety, in the penalty of 2000 dollars, payable to the defendants, conditioned to pay and satisfy all such costs and damages as they should sustain by reason of the injunction. This order was understood (though, probably, it was not intended) to enjoin The James River and Kanawha Company from letting the water again into its canal and basin to the same level and extent as it had always before stood at and occupied.

The injunction bond was given, and the process sued out. Whereupon, the common council of the city, by resolution dated the 30th April 1838, rescinded its resolution of the 8th January preceding, "leaving the parties concerned to the assertion of their legal rights and privileges;" and thus put an end to the treaty between the corporation and The James River and Kanawha Company on the subject of the projected improvement. This was stated in the answer of The Mayor, Aldermen and Commonalty of Richmond to the plaintiffs' bill; and so the corporate authorities of the city, thenceforth, took no part in the controversy.

The James River and Kanawha Company in its answer, referred to the act of incorporation of the old James River Company of October 1784—the act of February 1820, whereby the charter of the old company was altered and amended, and a much more extensive system of improvement provided for—the act of February 1823, whereby the commonwealth took upon herself the execution of the work, and all the property, rights and privileges, of the James

River Company \*were, in effect, purchased by and transferred to the state—the act of incorporation of the present company of March 1832, transferring to and vesting in it, all the property, rights and privileges, of the old James River Company, and all the commonwealth's interests in the same—and the act of 1835-36, ch. 110, amending the charter. And then the

answer shewed—That the canal, and the basin, as originally constructed by the old James River Company, and completed as early as 1795, occupied parts of several public streets of Richmond; and that the waters of the basin overflowed a part of C street particularly, intersecting it in two places, and elsewhere overflowing the northern margin of it (as above described); and though some of the hollows in the street had been since filled up with earth, by the company itself or with its permission, so as to render it practicable as a highway (which it was not in its natural state), the waters of the basin still overflowed the northern margin of the street, in an irregular line, leaving only an average width of forty feet of the street uncovered: That the basin had been so constructed by the old James River Company, under its original charter, and under claim of right on its part; and, with the exception of so much of C street originally covered by the waters as the company had reclaimed, or permitted to be reclaimed, from the basin, the waters thereof had ever since occupied a part of C street, and the same part which they overflowed when the present company recently drew them off for the purpose of making its projected improvement: That thus, the old James River Company, and all who succeeded to its rights, had occupied and enjoyed the use of the part of C street in question, for the purpose of the basin, for thirty-eight years, without let, interruption, complaint or question, from any quarter: And that the present company was advised and insisted, that this long and uninterrupted enjoyment of the flow of the waters of its canal and basin over parts of the \*streets of the city, and particularly of C street, gave the company, if it had no other right, a perfect title to the continued flow of the waters to the same extent. That the company claimed no right now, to overflow any part of C street lying along the line of the basin, except so much thereof as had been before overflowed;\* it pretended no authority, under its charter, to extend its basin over that part of the street which had been hitherto left uncovered; and did not intend to do so, without the concurrence of the city authorities: all it had proposed was, that as the basin already covered the margin of the street, leaving uncovered a width in some places of more, in other less, than forty feet—an average width of forty feet; and as the basin upon the street was in many places so shallow, that boats of the smallest burden could not come to the shore and line along side of it, to receive and discharge their ladings; therefore, the company had projected the erection of a straight substantial stone wall along the whole length of the basin on that side, which should leave C street of the uniform width of forty feet, and to excavate the bed

\*It seems to the reporter, upon consideration of the act of 1835-36, ch. 110, § 1, amending the charter, that the company has the same right to occupy a part of C street which had not been before occupied, for the purpose of its basin, as it has to take a part of it not before occupied for its canal.—Note in Original Edition.

of the basin within the wall, where it should be necessary, so as to afford a sufficient depth of water for vessels of any burden that could navigate the canal, to lie along side the wall. That such an improvement upon that line of the basin would be very beneficial to the whole trade of the river, beneficial too to the city, and especially to the owners of property on the south side of C street fronting the basin. That it was competent to the common council of the city to authorize such an improvement; but it had no right now to

reclaim from the waters of the basin  
298 that part of C street which had \*been always covered thereby, and so to contract the dimensions of the basin, as hitherto and so long used and enjoyed by the company, a width of twenty-five feet along the whole length of the basin; but, supposing the common council had a right to reclaim the whole of the street upon the line of the basin, to the full width of sixty-five feet, yet the expense of such a work would be too great to be incurred by the city, since the wall which would be necessary for such an improvement of the street, must, in some part of the line, be seventy feet high. That, as to that part of C street which lies on the canal at its entrance into the basin, and which the company found it necessary to cut away, in order to straighten and widen the canal at that point, so as to afford a passage for boats of the enlarged dimensions mentioned in its charter, the company claimed a right, under the provisions of the charter (as amended by the act of 1835-36, ch. 110), to occupy and use any land it thought necessary for the purpose, not exceeding a width of two hundred feet, whether such land was the property of individuals, or was occupied by a public street or other highway, making compensation in damages to any party injured; that the company, however, proposed only to cut away a projection of C street which narrowed and made an abrupt bend in the old canal at its entrance into the basin, leaving the street still spacious enough for all the useful purposes of a highway; that, in this part of its projected improvement, it would not transcend the authority conferred by its charter, and would do no injury at all to any body; no injury, certainly, that might not be adequately compensated in damages; and that, therefore, by the express provision of the charter, the courts of justice were inhibited from awarding an injunction to stay the proceedings of the company in the prosecution of its work.

Maps were laid before the court, to explain the course and dimensions of the canal and basin, constructed by  
299 \*the old James River Company, and completed about the year 1795; and to shew, what part of the streets of the city, and especially what part of C street, had been, and was still, occupied by the canal and the basin, what part of C street would be included in the canal and basin by the projected wall along that line, and what part of it would be left uncovered thereby. It appeared, by actual measurement, that the average width of C street left uncovered, along the line of the old canal and basin (after all the improvements which had been

made on the street since the canal and basin were first constructed) was only forty feet; and that the wall projected by the company would leave the street uniformly forty feet wide.

The depositions of several witnesses were taken and filed by both parties, as to the effect upon the value of property on the south side of C street, or contracting the street to a width of forty feet along the line of the basin, by the projected stone wall. Some of the witnesses on the part of the plaintiffs, estimated the damages they would sustain by the projected work, as high as 4000 dollars; but their estimate was plainly founded on the supposition, that the city authorities had a right to reclaim the street from the waters of the basin to its full width of sixty-five feet as laid off in the plan of the city, was bound so to reclaim it, and to improve it, and would do it within some short time. The witnesses on the part of the company thought that no injury whatever would result to the plaintiffs, or others whose property was similarly situated, or to the city, from their improvement projected by the company, but, on the contrary, the work would be highly beneficial to all parties concerned; but their opinion supposed that the street, and the basin too, were to remain in their existing state, unchanged and unimproved, or, at least, unimproved for a long and indefinite term of years. And

upon this supposition, it was indeed  
300 most clear, that the \*projected improvement would be very beneficial to the whole trade of the river, and to the city, but especially so to the holders of property on the south side of C street fronting the basin: it would leave the street of the same uniform width which was now its average width; it would greatly facilitate the improving, filling up and levelling that part of the street left open, which would still be as wide as D street, the principal street for the transportation of produce and goods in the city; it would afford for the largest boats a near access to the lumber houses, warehouses and storehouses, on the south side of C street, fronting the basin, a nearer access, indeed, than boats of the least burden had ever had; it would afford a commodious harbor for boats, and a commodious wharf to which they could be securely moored, and upon which they could land and from which they could take in their cargoes, while room enough would be yet left for the passage of carriages of all kinds. As to the improvement of C street to its full width of sixty-five feet as laid off in the plan of the city, the northern line of the street, when covered by the waters of the basin, had been sounded; the depth of the water at one point was found to be forty-five feet, and the average depth was sixteen feet; the bottom was alluvial, so that if a wall was to be built upon that line of the street, it would be necessary to lay the foundation much deeper, or to build it on piles; and the expense of such a wall, and of filling up the street, would be (according to the estimate) 18000 dollars.

With regard to the straightening and widening the canal at its entrance into the basin, and taking off a part of C street and



including it in the canal for that purpose, it was proved, that that part of the projected improvement of the company, was absolutely necessary to afford a convenient passage from the canal into the basin, for boats of the enlarged dimensions for which the company was bound by its charter to adapt its improvement of the navigation.

301 \*Upon a motion of The James River and Kanawha Company to dissolve the injunction, the court, in November 1838, decreed, that so much of the injunction as could be understood or construed to restrain the company from introducing the water of James River through the canal into the basin, to the usual extent, and according to the usual flowing of the water before the injunction was awarded, and before the recent temporary withdrawal of the water from the basin by the company with a view to an enlargement of the canal, should be and was thereby dissolved; and that, as to every other purpose of the injunction, the motion to dissolve it should be overruled, and it should remain obligatory on all parties concerned.

The company presented a petition to this court, praying an appeal from the decree; which was allowed.

The cause was argued here by the Attorney General, Macfarland and Johnson for the appellants, and by Harrison for the appellees.

ALLEN, J. The 35th section of the act of March 1832, incorporating The James River and Kanawha Company, provides, that "no order shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the company in the prosecution of their works, unless it be manifest, that they, their officers, agents or servants, are transcending the authority given them by the act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages."

This provision of the charter seems to have been derived from a similar clause contained in the act of February 1823, which was an amendment to the act of February 1820; two laws which, taken together, superseded the old James River Company, converted it into a mere state agent, and

vested the whole control of the con-

302 templated \*improvement in the state authorities. The act of 1823 provided, that the pendency of any proceedings, in any suit of the nature of a writ of ad quod damnum, or any other proceedings, should not hinder or delay the progress of the work; and no order should be made or injunction awarded by any court, by which the progress of the work should be arrested; it being the true intent and meaning of the act, that all lands should be liable to condemnation, and that the proprietor should be compensated in damages. Under these laws, no court or judge is authorized to arrest the progress of the work, unless it is manifest that the company is transcending its authority, and that the interposition of the court is necessary to prevent injury which cannot be adequately compensated in damages. Both circumstances must concur. Remedy was provided for all

such damages as the legislature deemed necessary to compensate, where the company did not transcend its authority. Still it is apparent, that damages for which no adequate compensation could be made, might be sustained from the works of the company acting within the limits of its authority. For instance, the health of the proprietors in the immediate vicinity of the canal, or of the reflux waters of the ponds and reservoirs, might be seriously affected. For such injuries no adequate compensation could be made. But the legislature did not consider it proper, that a great public work, intimately connected with the wealth and prosperity of the whole state, should be arrested, in consequence of such partial and unavoidable inconveniences. If the company has not transcended its authority, and these injuries and inconveniences are the necessary consequence of such a work, its proceedings cannot be arrested.

The enquiry, then, is, has the company, in the work complained of, transcended its authority? If it has not, the question is settled. If it has transcended its authority,

it would then be proper to examine, 303 whether the \*plaintiffs below are likely to sustain such injury that it could not be adequately compensated in damages.

For the purpose of ascertaining whether the company has exceeded its authority, we must look to the first act incorporating a company to improve the navigation of James River, to discover what was the character of the improvement contemplated; enquire what was done by the old James River Company to effect that object; and then find out what rights belonging to the old company, are vested in the new, and the extent of its authority under the various laws which have passed on the subject. The first act, that of October 1784, incorporating the old James River Company, recites, that the clearing and extending the navigation of James River from tide water upwards to the highest point practicable on the main branch thereof, will be of great public utility, and that it may be necessary to cut canals and erect locks or other works on the sides of the river; and as it would be essential in the cutting of canals, to pass through the lands of individuals, the act provided for the condemnation of the lands necessary for the canal &c. and for the assessment of damages to the proprietors. The first act contemplated the extension of the navigation from tide water to the stream above. To accomplish this, canals round the falls would be necessary, and power was conferred on the company to acquire the land necessary for that purpose. The legislature could not have been ignorant, that if the improvement was made, in the manner contemplated, on the north side of the river, the canal must pass through the city of Richmond. It was legislating within view of the ground, and within hearing of the falls which created the greatest obstruction to the navigation of the stream. The charter did not restrict the company in the choice of the sides of the river; the public interest, indeed, required that it should conduct



the canal on the north side, if possible, for there was situated the seat of government, and a \*growing city, and one object of the work was to cherish and foster it. Under this act, the company had full power to pass through the city, and it commenced operations. At a very early day, it constructed a canal passing in part through C street, and terminating in a basin, which, on one side, bounded upon and overflowed a part of C street; a deep ravine occupied a part of the ground of that street, and constituted a portion of the basin. These works, so constructed, have continued in use ever since. If any doubt of the authority of the company to construct them originally, could have been entertained, the legislature has since recognized them as existing works of the company. Thus, in 1818, an act was passed authorizing Edward Trent to erect a toll-bridge across the basin of the James River Company, in the direction of 9th street in the city of Richmond, if the company should consent thereto, and securing to the company the right of purchasing the bridge upon paying the value of the materials and workmanship. And when, by the acts of 1820 and 1823, the company was converted into a state agent, the state in fact becoming the owner of the works and controlling the whole of them, the basin and canal were continued on the ground originally occupied, and were held and enjoyed by the state, in the name of its agent, The James River Company; the company itself then consisting of some of the chief functionaries of the government, who ex officio constituted the board of president and directors. Under this management, the works were extended; and by an act passed in February 1825, it was provided, that as soon as the lower section of the canal should be completed from the basin in the city of Richmond to Pleasants's Island, the company should be entitled to demand certain additional tolls. These various acts leave no doubt as to the authority of the old James River Company to conduct its improvements through the city; that, after it had done so, adopting the line through C street \*now complained of, its works, whilst it held them, were recognized as its property by the state; and that when the state became, in effect, the owner, they were by state authority kept up and enjoyed. In this condition of things, the act incorporating the present company passed. The whole interest of the commonwealth in the works and property of the then James River Company, was transferred to the new company, together with all tolls, rents and other emoluments, rights, privileges and immunities, which were then enjoyed by the James River Company. The preamble of the act incorporating the new company recited, that the measures hitherto adopted to connect the tide water of James River with the navigable waters of the Ohio, had been found inadequate to the object. The 22d section left it to the option of the new company, to adopt one of three modes of improvement; and if that of a canal should be adopted, the 23d section provided, that it should be not less than forty feet wide at the top,

twenty-eight feet wide at bottom, with not less than four feet depth of water at all seasons of the year. Under this charter, the present company has come into existence. It has adopted the mode of improvement by a canal, and to comply with the provisions of the charter, and accommodate the trade passing on a canal of such capacity, it has found it necessary to widen that portion passing through C street, and to build a wall along the southern margin of the basin on C street. By doing so, it is alleged, it encroaches on the street, though a width of forty feet is still left for the street. Was the company authorized by its charter to make this encroachment? for if it was, then, whatever injury may ensue to the property holders on the street, an injunction cannot be awarded. The history of the acts of the old company proves that it was authorized to pass along this line, that it did so, and that its works were recognized by the state, both before and after they became state property; 306 and we have seen, \*that every thing owned by the old company was transferred to the new. The new company, then, unquestionably by this transfer, was entitled to hold, occupy and enjoy the works, as they had been held by the old company and the state. But in the event of its adopting a particular plan of improvement, it was required to enlarge its canal. It has adopted this plan, and must of necessity be authorized to encroach on the street, to give its canal the increased capacity required by its charter. The increased capacity of the canal requires, in the judgment of the company, a wall along the basin, to give the proper depth, so that boats navigating the canal can approach the streets and wharves to receive and discharge their freight. It is not necessary for me to say, whether this judgment has been discreetly exercised; though from the facts developed, it would seem to have been exercised in this case, in a manner best calculated to promote the interests of these very property holders, the convenience of the public, and the welfare of the company. The only enquiry that I deem it necessary to make, is, whether the company was authorized under its charter and the laws taken in connection with it? An examination of those acts leaves no doubt upon the subject; and if any damage has been sustained, the parties injured must seek their redress elsewhere. The company has done and proposes to do nothing which the law did not authorize; and acting within the limits prescribed, it cannot be arrested by injunction.

It is argued, however, that the charter prescribes the mode of acquiring and condemning land when wanted for the purposes of the canal; and as there is no provision for the condemnation of the street, the law could not have contemplated any occupation of it for a canal. And this has led to a learned and able argument upon the subject of Highways, the Jus Publicum &c. I do not deem it important to discuss those questions. If the fee in the street is in the original proprietor, subject to 307 \*the easement, then there is a proprietor who is provided for by the

act. If it is in the city corporation (and I incline to think that there is, and from necessity must be, a difference between streets in cities and towns, and ordinary highways, and that the fee of the streets should be held to be in the city or town authorities), then the corporation is the proprietor, and can proceed under the act, for compensation; if it is the commonwealth, then the commonwealth has by law authorized the improvement, and requires the enlargement of the canal; and that necessarily leads to an encroachment on the street. For all the purposes of this case and argument, it is sufficient to say, the law authorizes the company to conduct the canal through the city, and to occupy any property not expressly excepted. Streets do not fall within any of the exceptions, and therefore the company has a right to occupy them. If, by doing so, it inflicts injury on any individual, his remedy is at law and in damages, but he cannot arrest the work.

TUCKER, P. In whatever light I have been enabled to view this case, I am perfectly satisfied, that the injunction never should have been granted, and that upon the hearing it should have been altogether dissolved.

At the very threshold of this enquiry is the question of jurisdiction; a question first to be disposed of, since, without jurisdiction, this court has no authority to decide the merits of the controversy, except so far as they are inseparably connected with, and lay a foundation for, the exercise of jurisdiction. I shall proceed, therefore, to enquire, whether the case presented furnished a proper ground for the exercise of equitable jurisdiction by way of injunction? And in doing this, I shall not find occasion to look into the decisions of the courts of chancery, as we are furnished by a higher authority, with a well defined rule which we are not permitted to disregard: I mean the act of

1832. By the 35th section of  
308 \*that act, it is provided, that "no order shall be made, and no injunction shall be awarded, by any court or judge, to stay the proceedings of the company in the prosecution of their works, unless it be manifest that they, their officers, agents or servants, are transcending the authority given them by the act, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages." Whether the jurisdiction of the courts of equity in reference to the company, be diminished or not, it may safely be assumed, that it is not extended; and we cannot therefore err, in either aspect, in making this section our guide.

The first question that has been made as to its construction is, whether a concurrence of both conditions is necessary to give the jurisdiction, or whether the existence of only one will not suffice? Upon this question, this court has already pronounced in the case of the Tuckahoe Canal Co. v. the Tuckahoe Railroad Co., 11 Leigh 42. In that case, it was declared, that it was not a sufficient ground of jurisdiction, either that the company was transcending its powers or that an injunction was necessary

to prevent irreparable damage. A concurrence of both was necessary to justify the restraining jurisdiction. The words are too clear to require or admit explanation. The copulative "and" leaves no doubt that both grounds must concur, or the power to injoin does not exist. We must do violence to the language, and impute to the legislature the use of "and" for "or," if we construe the clause otherwise. We should do more: we should violate the obvious spirit and meaning of the law. The whole course of legislation for years in relation to this and others companies incorporated for great public improvements, has indicated the legislative intention to prevent the suspension of operations, and leave the party injured to his *ad quod damnum*, or his action for damages.

309 This may \*be seen by the act of February 1823, § 22, and by the provisions of the act of 1832 (the charter of the present company) which we are considering; in which last, we find it provided, that even before proceedings for condemnation have been instituted, the company may enter upon the lands laid out by them and apply the same to the uses of the company; and that no injunction shall be granted to restrain them unless under the concurrent circumstances of violated power and irreparable damage. And can we doubt, that those provisions are wise and salutary? What public improvement could be successfully prosecuted without them? If every individual along the line of the improvement could be entertained on frivolous grounds, and permitted to arrest the works, what end would there be to the mischief? Did not the legislature foresee, and act upon the prescience, that whether the individual complaining sustained irreparable injury or not, the company was sure to suffer the infliction of such injury under the operation of the injunction? and not the company only, but the whole public upon the line of the canal? If the individual be cast, and victory declares for the company, yet by many such victories they will be undone. Have they the means of recovering adequate compensation in damages? Admitting adequate security to be given, instead of the paltry sum of 2000 dollars for arresting the works of this great and important company for three years, how are its damages to be adequately ascertained? They depend upon the tolls it may have lost, and the dead capital and unemployed labourers in its service. Nor is this all. Who can estimate the injury to others? Who can compensate the farmer and the planter for the mischief he sustains by every day's unnecessary obstruction of the improvement? Can he justly demand compensation from the company, whose hands are tied against its will? A breach in the canal occurs which a few days might remedy; but the repair is arrested by some captious

310 \*tittigant for months and years. Where is the redress of the whole population, who depend upon the canal for transportation, and are of course unprovided with any other? The basin is drawn off for repairs, which may require but a few weeks: but some dissatisfied person who cannot, or will not, see what is for his

own or the public advantage, ties up the company's hands for years. In the mean time the mills and manufactories dependant upon it for their supplies of water, are stopped in their operations and heavy losses are sustained: who shall indemnify them? The company? As to it, the act complained of is in invitum. The plaintiff in the injunction, for his improper and officious meddling? However he might deserve to be held responsible, it might be difficult to reach him by any form of action; and his surety in the injunction bond certainly could not be made liable to any other than the company. Considerations like these, besides the mischiefs to the commonwealth, ever consequent upon such ruinous injuries to her citizens, doubtless gave occasion to the provisions we have been considering. They are wise and salutary; and we should advance the objects of the legislature, instead of defeating them.

There is, however, a conclusive reason for the provision, that no injunction should be granted without the concurrence of the two circumstances of violated authority and irreparable damage. The requisition both of wrong and injury to sustain an action, is one of the most familiar principles in the law. Upon what ground could Anderson be permitted to enjoin the company, if they were pursuing the authority given them by law? Or, upon what principle could he be permitted to arrest their progress, if it did him no injury, and was likely to do him none? If not injured, he has no right to complain; and though injured, he must submit to what the law has authorized. There must, then, be an unlawful act, and danger of irreparable injury to himself, to constitute \*any claim to the interference of the court, by injunction.

Assuming then this construction of the law, let us next enquire, whether the two prerequisites exist in this case, which the law demands. I am of opinion that neither exist: I am satisfied, that the plaintiffs below are not injured, but are benefited by the operations of the company; and that it does not appear that the company is manifestly transcending its authority.

As to the first—that the plaintiffs are benefited by the operations of the company: this seems to me very obvious in relation to that part of C street which borders on the basin. That street is at present of only an average width of forty feet, the northern part of which shelves towards the water so as to make several feet of it unfit for the use of carts and wagons. Its northern boundary is waving, being indented by the water of the basin, which flows irregularly upon it, so that the narrowest part of the street may be fairly estimated as its present available width, and this is less than forty feet. The projected improvement will make the street of a uniform width of forty feet. It will be protected by the wall from washing away, and will be raised by it at its northern edge to a level with the rest of the street; thus affording a complete, convenient and permanent passway for the trade, and for every species of vehicle. Besides this improvement of the street, it will afford to the owners of the property

coterminous with it, an excellent wharfage or landing place immediately opposite their lots, where heavy loaded boats may lie along side and receive or discharge their cargoes, with great diminution of expense and labor; whereas, in its present condition, the greatest inconvenience and difficulty must often be experienced. With these views of the effect of the change, it is only matter of surprise, that any judicious lot owner should resist the projected improvement. One or two witnesses,

312 it is true, seem to "sustain the pretensions of the plaintiffs, but they can be understood only to speak with reference to the improvement of C street to the width of sixty-five feet, and not to its present condition. No one could venture upon the rash assertion, that the change from that condition to the proposed plan, would injure the parties to the amount of 4000 dollars; and the respectable witness who made the estimate of injury could not, I am persuaded, have intended to be so understood. But admitting that the extension and completion of C street to sixty-five feet would be more advantageous to the lot owners, provided its northern limit was bounded by a substantial wall, it still remains to be proved, that such completion and extension will be prevented by the present plan, or that there is the remotest probability of its ever being carried into effect by the city authorities. If the company has no right, under its charter, to cover part of the street with water, the common council of the city may proceed at its pleasure and discretion to fill up the twenty-five feet, and complete the extension to the legitimate limits. But this it is not obliged to do, and is not likely to do. It is not obliged, because, under its powers of regulating the streets, it is its province to determine in what manner it is most advisable to regulate them, and I know no power to control it where there is no wanton exercise of its discretion. It is not likely, I should imagine, to attempt the extension, from the situation of that twenty-five feet of street. It varies in depth from fourteen to forty-five feet; and a wall would be necessary of that elevation at least, to effectuate the object. It may, therefore, well be doubted, whether, in the exercise of a judicious discretion over the subject, the common council of the city would not decide, that it would be better that there should be a good and convenient street of earth of the width of forty feet, and that the residue of the width of the street, which never was available as a passway,

313 and could not be so "rendered without immense expense, should be brought into efficient and valuable use by the unexpensive operation of filling it with water, and using it as a roadstead for the convenience of the trade. Hitherto, the common council has manifested no desire to interfere. Though the hands of the company have been tied for three years, the common council has made no advances to extend and complete the street, but it remains in its pristine condition—covered to the extent of twenty-five feet, as it has been, with water to the depth of from fourteen to forty-five feet, and the residue of it

in a dilapidated state. If then the plaintiffs are injured by the narrowness of the street, it is of the common council only that they have reason to complain; but, in truth and in fact, these complaints are without foundation. The city authorities either approve or acquiesce in what has been done, and is proposed to be done; and wisely too, since it is judicious as it respects the public, and highly advantageous to the coterminous lot holders.

With respect to that part of the street occupied by the canal, it cannot be denied, that it could have been extended and improved with less expense than that which lies upon the basin; and it is also true, that it was not to the same extent covered with water. But on the other hand, it does not adjoin the plaintiffs' property. The property of the plaintiff Anderson lies in another square to the eastward, and that of Mills two squares off. As well might a lot owner at Rocketts complain of the narrowing of the main street on Shockoe hill, and bring his private action or bill for an injunction. Such remote injuries common to the whole population are to be remedied by the action of the constituted corporate authorities, or by prosecution for a nuisance. If Anderson and Mills can implead the defendants for narrowing a street not contiguous to their property, every man in the community might do so. To prevent this

evil, the law forbids an action by a private individual for a common nuisance, unless he can shew a special injury; and hence it would seem to follow, that an injunction will not lie for anticipated injury arising from a common nuisance. Be this as it may, I am of opinion, that the plaintiffs were not entitled to their injunction to restrain the company's operation along that portion of the street which does not join their property, but they should have been left to their special action upon the case for any injury sustained by them individually. It is not perceived that their damages, if any, could not have been easily ascertained, and adequately compensated.

If I am right in these views, it is clear, that one of the terms made essential as a prerequisite to an injunction against the company does not exist in this case. The other is equally wanting. It is "not manifest that the company is transcending the authority" given it by its charter. By the requisitions of the charter, the company was required to connect the upper navigation of James River with tide water. It was obvious that this could only be done by passing through the city of Richmond. For the purposes of its works, it is authorized to enter upon any lands and tenements through which it desires to conduct its canal, without any limitation or exemption, except of the dwelling house, yard, garden or curtilage of any proprietor. The streets and highways, which must obviously be encroached on, are not excepted. The streets of Richmond, therefore, are as much subject to be entered upon for the use of the company, as any other property. Moreover, it is provided that "even before any proceedings shall have been instituted" for the condemnation of the required property,

the company may enter upon the lands laid out by it, and apply them to its uses. The company is required, indeed, to proceed also to condemn. But if it fails, it is not to be arrested, but the proprietor may himself proceed. And this provision was judicious. \*It might be difficult, as it proves to be here, to ascertain the proprietor, and it would have been mischievous to arrest a great work till this could be done. The company, therefore, was authorized to take the property beforehand. This it has done. Its doing so is no barrier to the action of any person, whether private, public or corporate, who may have title to the property, except so far as public or corporate rights may have been yielded by the operation of the statute. On this subject I give no opinion, because it is unnecessary to do so in settling the question of jurisdiction. It is clear, however, that if the title is in the heirs of Byrd, or of his trustees, their proceeding is not barred or impeded by any act of the company. And so as to the plaintiffs, if indeed, under the 36th section of the charter, any proceeding can be had by a party claiming only an easement.

In no aspect of the case, then, can I perceive that the company has transcended, or is transcending, its authority; and on this point also the plaintiffs' case is radically defective.

The injunction ought never to have been granted, and should have been wholly dissolved.

BROOKE and CABELL, J., concurred.

Decree reversed; and ordered, that the injunction should be dissolved and bill dismissed, with costs.

### 316 \*Hansbrough's Ex'ors v. Hoor & Wife.

April, 1841, Richmond.

(Absent STANARD and ALLEN, J.)

**Legacies and Devises—Advancements—Ademption\*—Case at Bar.**—Testator, by his will, devises 2000 acres of land, and bequeaths twenty-eight slaves, and sundry bonds amount not mentioned, and one fourth of proceeds of sales of land not specifically devised, to his granddaughter Maria and five other children of his son John deceased, to be divided among them; and that one fifth part of the general residuum of his estate shall be equally divided among the same persons; and, by codicil provides, that Maria's part shall be settled to her separate use for life, remainder to her children if any, and if none, to the use of the other children of her father; after which, on the marriage of Maria, testator, by marriage contract, gives her 400 acres

**\*Legacy—Advancement—Ademption—Principal Case Distinguished.**—The principal case is distinguished in *Strother v. Mitchell*, 80 Va. 154, on the ground that the gift in that case was made *before* the making of the will, and is not charged therein as an advancement, whereas, in the principal case, the gift, which was held such an advancement as would work an ademption of the legacy, was made *after* the making of the will.

Upon this subject, see monographic note on "Legacies and Devises"; monographic note on "Advancements" appended to *Watkins v. Young*, 31 Gratt. 84, and extensive note appended to the principal case in 37 Am. Dec. 667.

not parcel of the 2000 acres of land, nine slaves parcel of the 28 slaves named in the will, and 1500 dollars in money, all to be settled on her for her use and the heirs of her body, but in case of her death without issue, or in event of such issue as she may have not arriving to 21 years of age or marrying, then to the heirs of her father: HELD,

1. All the legacies of personal property to Maria, were adeemed or satisfied by the gift to her in the marriage contract.

2. The devise of land to her is also adeemed or satisfied by the landed portion given her by the contract; dissentiente TUCKER, P.

Peter Hansbrough, the elder, late of Culpeper, by his will, dated the 8th November 1820, after devising lands to his sons James and Peter respectively, devised and bequeathed as follows: "I give and devise to the six children of my son John Hansbrough now deceased, and to their heirs forever, equally to be divided among them, namely, Marius, Maria, Hamilton, Peter, Julia and John, and their heirs, equally to be divided amongst them, all those tracts of land, lying on or near to Potowmac river and its waters supposed to contain 2000 acres, which several tracts of land I purchased at divers times from the several persons following (naming the persons); but should the

317 said tracts of "land above enumerated not contain 2000 acres, my will is, that so much be taken off from the adjoining lands which I bought of Smallwood's heirs, as will make the quantity hereby devised 2000 acres: this my executors are to see done in the most suitable and beneficial shape as respects the interests of both parcels of land. I also give and devise to the said six children and their heirs, equally to be divided among them, the twenty-eight slaves which I purchased of their father John Hansbrough, as will appear by his bill of sale to me for the same, recorded in the county court of King George, in or about the year 1814, together with all the increase of the said slave from the time I bought them, and their future increase. Also, I give and devise to the said six children, equally to be divided amongst them, and I do hereby assign to them, a bond given to me by my son James Hansbrough, for a sum of money, the proceeds of the sale of one of the above slaves purchased by me as aforesaid from my son John and sold by me, and the money loaned by me to my son James, for which I took his bond: also I hereby assign to them all the bonds given to the administrator of John Hansbrough by my sons James and Peter and my grandson Joseph Hansbrough, for the purchases of property respectively made by them at the sale of my son John's estate, which bonds are in my possession and will be found among my papers or with this will." Then followed a devise of lands to his daughter Amelia Bell; and the testator further devised and bequeathed: "It is my will and desire, that all the residue of my lands in the county of King George and elsewhere, not herein devised, shall be sold by my executors for the best price that can be had, and on such credit as they or a majority of them shall deem proper, and the proceeds to be equally divided between my sons James and Peter, my daughter Amelia Bell, and the six children of my son John,

that is, one fourth of the whole amount to be "allotted to the said six children to be equally divided among them, and one fourth of the whole amount to each of the others, viz. James, Peter and Amelia." Then followed other devises of lands to his sons Peter, James and William, and a bequest to his daughter Mildred Browne, and then the following residuary bequest: "After the payment of my just debts, I devise all the residue of my estate, real and personal, to my sons Peter, James and William, my daughter Amelia Bell, and my six grandchildren named above, and their heirs, to be equally divided amongst them, that is to say, one fifth part of the whole to my six grandchildren to be equally divided amongst them." — "And I do hereby discharge my children from all claims on them, for moneys paid by me to or for any or all of them at any time or on any account whatever. My will and desire is, that should any of the devisees named in this will depart this life before I do, then and in that case, the legal heirs and representatives of such devisee so dying shall take and inherit all the estate intended to be devised by me to such decedent, any law or risque concerning lapsed legacies to the contrary notwithstanding." And the testator appointed his sons Peter and James his executors.

By a codicil dated the 4th October 1821, the testator first provided, that the provision made by his will for his six grandchildren by his son John, should be a bar against any claim they might have against him on account of the estate of their father; and then added—"Since making my foregoing will, circumstances have occurred which induce me to think it to the interest and future happiness of my granddaughter Maria Hansbrough" (one of the six children of his son John) "that a change be made in the nature of the several devises in her favour contained in my said will: therefore, my will is, that all the property devised to her, real and personal, is hereby devised by me in trust 319 to my executors, to be "held by them for the sole use and benefit of the said Maria Hansbrough during her natural life, and at her death to be by my executors conveyed to such children as the said Maria may leave or to their representatives, and in default of such child or children or their representatives, then my will is, that the same shall be equally divided and conveyed as aforesaid to the other children of my son John or their representatives."

In May 1822, the testator's granddaughter Maria, being about to be married to John Hooe, he Hooe made the following proposition to the testator: "My friend Mr. Hooe is authorized to receive from Mr. Hansbrough the following terms, viz. Mr. Hansbrough to settle on his granddaughter and children 500 acres of land in King George county, and ten negroes, provide a house for us to live in, and then to give me 2000 dollars, or, if to him more convenient, any property that will cover that sum. (Signed) John Hooe."

This paper was presented by Nathaniel Hooe to Hansbrough, the testator, in company with G. S. Thom and the testator's

son Peter; and he, at first, positively and warmly refused to listen to the propositions therein contained, assigning as a reason (among others) for such refusal, that he had provided for his granddaughter Maria by his will, and he produced the will, and read the clause providing for her. But by the persuasion of Mr. Thom and his son Peter, he at last gave a written promise in the following words:

"I will give my granddaughter Maria Hansbrough, in the manner above proposed and for the purpose in contemplation, the following property and money, viz. 400 acres of land, nine negroes (naming them) and 1500 dollars in good bonds or property, to be paid as soon as practicable after the marriage takes place; 300 acres to be in a body, and probably the whole quantity of 400 acres above mentioned,—to be the lower part of the tract I own in King George, called Orter Hills, adjoining

320 \*the land purchased by John Minor of Col. Smith. The land abovementioned is to be independent of the land to which my granddaughter is entitled from her father's estate in King George and Culpeper. And on the land a comfortable house shall be built. Moreover, I will loan to my said granddaughter such other matters and things as it may be convenient to me to furnish her with. All the property above mentioned shall be considered as settled on my said granddaughter for her use and the heirs of her body; but in case of her death without issue, and in the event of such issue as she may have not arriving at the age of twenty-one years or marrying, the said property to revert to the heirs of my said granddaughter's father. It is to be understood and remembered, that my granddaughter is to relinquish all claims she may have against me on account of her father's estate, in consideration of the foregoing property thus settled on her, the land excepted. This is to be fully complied with by all the parties concerned after the marriage of John Hooe and Maria Hansbrough is celebrated. The negroes now hired out, not to be demanded till the end of the present year, when the land is likewise to be delivered. (Signed) Peter Hansbrough."

The testator's granddaughter Julia died; and then he died, in October 1822.

The nine slaves named in the above agreement for a marriage settlement, were part of the twenty-eight slaves which the testator had bought of his son John, and which were bequeathed by his will to the six children of that son. But the land mentioned in the agreement, was not parcel of the 2000 acres therein devised to those grandchildren, but was parcel of other lands held by the testator in King George.

The testator's executors and devisees executed the agreement for the marriage settlement, by delivering to Hooe and wife the slaves therein mentioned, assigning to them the 400 acres of land therein

321 described, and \*building a house thereon: and this land was worth much more than any 400 acres of land, parcel of the 2000 acres to which (after the death of her sister Julia) Mrs. Hooe would have been entitled under the will.

The bill was exhibited in the superior

court of chancery of Fredericksburg, whence it was removed to the circuit superior court of Spotsylvania, by John Hooe and Maria his wife, against the executors and the devisees of Peter Hansbrough deceased, to recover one fifth part of the residue of the twenty-eight slaves bequeathed by the testator to his grandchildren, over and above the nine slaves settled on her by the marriage contract, and one fifth of the 2000 acres devised by the will to those grandchildren, in addition to the 400 acres settled on her by the same contract.

It was proved, that the children of John Hansbrough, from the time of his death, lived with the testator, their grandfather, and were maintained and educated by him.

The circuit superior court held, that the legacy of the slaves was adeemed by the gift contained in the marriage contract; but that Mrs. Hooe was entitled to an equal share with her brothers, of the 2000 acres of land devised to her by the will, notwithstanding and in addition to the 400 acres settled on her by the marriage contract; and decreed accordingly: from which decree, this court allowed the defendants an appeal.

Leigh, for the appellants.

Patton, for the appellees.

CABELL, J. The question in this case, is, whether the legacies and devises given by the will of Peter Hansbrough, to his granddaughter Maria Hansbrough (now Mrs. Hooe) were revoked, adeemed or satisfied, by the subsequent advancement in real and personal property, made to her by him, on her marriage to Mr. Hooe.

322 \*The doctrine upon this subject, so far as relates to legacies, was very concisely, but lucidly laid down by Lord Eldon in *Trimmer v. Bayne*, 7 Ves. 508. He says, "The rule is settled, that where a parent, or person in loco parentis, gives a legacy as a portion, and afterwards, upon marriage or any other occasion calling for it, advances in the nature of a portion to that child, that will amount to an ademption of the gift by the will, and this court will presume he meant to satisfy the one by the other." This rule was fully considered, recognized and acted on by this court, in the case of *Jones v. Mason*, 5 Rand. 577. I am clearly of opinion, that this rule is applicable to, and is decisive of, this case, so far as respects the legacies of slaves and other personal property; and consequently, that the decree as to those subjects is correct.

The question whether the devises of real estate, also, were revoked, adeemed or satisfied, by the subsequent advancement, is attended with more difficulty. After much reflection, however, I have come to the conclusion, that this question likewise, is to be determined in the affirmative.

It is said, that no case has occurred in which the doctrine of the ademption of legacies has been extended to devises of real estate. This is true. But it is equally true that there is no case, in Virginia at least, deciding that the doctrine is inapplicable to such devises. The question is now fairly presented, for the first time, and we must meet it. The novelty of a question is well calculated to inspire caution

and circumspection, but is not sufficient to control our judgment. New cases are perpetually occurring; but they can be correctly decided, only by the application of old and well established principles. The case of *Jones v. Mason* was a new one: nothing like it could have occurred in England; nor had such case ever been presented to our own courts. It was there decided,

for the first time, that a specific  
323 \*legacy of slaves, given as a portion, was deemed, in part, by a subsequent advancement of other slaves, made and intended by the testator, in lieu of certain of his slaves given by the will. It was thus decided, because, according to the practice in our country, it had become common for parents to provide portions for their children by a bequest of slaves, and because it was, on principle, as just and proper that such portions should be deemed and satisfied by a subsequent advance of other slaves in lieu thereof, as if the portion provided by the will, and that provided by the subsequent advancement, had both consisted of money. It seems to me, that this principle is quite as applicable, in this country, to a portion by will consisting of lands; for it is well known, that it is almost as common to provide portions for children by a devise of lands, as to provide them by a bequest of slaves; and, as far as my observation has extended, it is more common to provide them in lands, than in money: whereas, in England, it is very rare that younger children are advanced otherwise than in money. Our legislature has, in many cases, manifested a disposition to break down the distinction, which formerly existed, between real and personal estate. Thus, in case of intestacy, the real and personal estate will, with a very few exceptions, go to the same persons; and an advancement of real estate is to be brought into hotchpot in the distribution of personality, and an advancement of personality is to be brought into hotchpot in the division of the real estate. It seems to me, that, in relation to the subject now before us, the nature of the estate given, whether real or personal, is a matter of no consequence. The object for which it is given, is the thing to be attended to. If it be given as a portion for the child, whether it be realty or personality, it ought to be deemed by a subsequent advancement made by the parent in lieu of the legacy. Now, in the case before us, it is impossible to look at the facts, and not to see

324 that \*the legacies and devises in the will were intended as a portion; and it is equally impossible not to see, that the provision by the advancement, on the marriage, was intended by Mr. Hansbrough to be in lieu of, and not in addition to, the provision made by the will. What is to prevent us from applying to this case the same principle of equity that was applied in the case of *Jones v. Mason*? I hope I have shewn, that there is nothing in the objection as to the novelty of the case. It is contended for the appellees, that our hands are tied up by our statute concerning wills, which, after prescribing the manner in which a will of lands shall be made, declares, that "no devise so made, or any

clause thereof, shall be revocable but by the testator or testatrix destroying, cancelling or obliterating the same, or causing it to be done in his presence, or by a subsequent will, codicil or declaration in writing, made as aforesaid." But, as Judge Green observed in *Jones v. Mason*, this clause is the same in effect with the clause in the statute of 1748, which was taken from the 22nd section of the English statute of frauds, 29 Ch. 2, and which provides, that "no will in writing, or any devise therein of chattels, shall be revoked by a subsequent will, codicil or declaration, unless the same be in writing." The statute of frauds, however, has never been held in England, to prohibit the revocation, either of wills of land or of personality, by implications founded on events subsequent to the making of the will. And in the case of *Wilcox v. Rootes*, 1 Wash. 140, it was expressly decided, that the subsequent marriage of the father, and the birth of a child, was an implied revocation of a will, even at law, both as to real and personal estate. I see no objection to extending the principle, at least in equity, to an implied revocation by a subsequent advancement, made and intended by the testator in lieu of the provision made by the will. The fact that a legatee of personal property can recover his legacy only in a court of

325 \*equity, while a devisee of lands, taking the legal title, may recover in a court of law, seems to me to make no material difference in the case. It very often happens, that the legal title is in one person, while the equitable is in another; and, in such cases, it is competent to a court of equity to prevent the assertion, or enforce the surrender, of the legal title.

I am of opinion to reverse the decree, so far as it purports or intends to give to the appellees any portion of the real estate; and to dismiss the bill.

BROOKE, J., concurred.

TUCKER, P. If there can be a case in which a grandfather can place himself in loco parentis in relation to his grandchildren, of which there is no reasonable doubt, this is such a case. John Hansbrough, the son of the testator, being dead, his children are taken into the family of the grandfather and receive their nurture and education from him; and by his will, he places them in the position of children, by devises and bequests of real and personal property to be divided among them and his sons and daughters, giving them the share of their deceased father. The bequests to them are not of independent and substantive legacies, which might be deemed an emanation from his mere bounty; but it is a partition among his living children and the children of a deceased son, of his entire estate. For although some of the clauses of the will contain devises and bequests of distinct and separate property to be divided among them, yet there are others, in which other portions of the estate are given to the children and grandchildren together, to be divided equally amongst them, except that the grandchildren are to take the portion of their father. And the whole will taken together shews very distinctly that it was the testator's design that his grandchildren



should have what his son John would  
326 have \*had. He had thus placed them  
in loco filiorum, and by consequence  
places himself in loco parentis.

I am not less satisfied, that the intention  
of Peter Hansbrough, the testator, was that  
the settlement made upon the marriage of  
his granddaughter Maria should be a satis-  
faction of what he had given her by his  
will. He did not design a double portion  
for her. The peremptory style of Mr.  
Hooe's communication was in no wise cal-  
culated to conciliate the grandfather, and  
to induce him to give to this daughter of  
his son John twice as much as to her  
brothers and sisters. The facts proved  
establish the refusal in the first instance,  
and the reluctance throughout, of the tes-  
tator to enter into the marriage agreement.  
He produced his will and insisted on its  
provisions as being sufficient. But the  
matter was pressed upon him, and he at  
length assented. We see in this no evidence  
of a disposition to add to what he had given  
by the will. On the contrary, as I under-  
stand the transaction, he on his part was  
unwilling to bind himself by contract to  
do that which he had already done by his  
will, and thus to take from himself that  
power of revocation which the circum-  
stances of the case or his own natural dis-  
position might have made it desirable to  
retain. Mr. Hooe, on the other hand, was  
probably unwilling to subject himself to  
the caprices of the old man, and may have  
been desirous to make the advancement  
(which seems to have been a *sine qua non*)  
as irrevocable as the marriage tie, by which  
he was to be indissolubly bound. This, I  
take it, was the real matter of difference,  
nor does there appear to be the least reason  
for believing that either of the parties  
thought of the provisions of the settlement  
being cumulative, instead of a mere sub-  
stitute for the provisions of the will.

Now, it is an established principle that  
when a parent, or person in loco parentis,  
gives a legacy as a provision, and after-  
wards upon marriage, or upon any  
327 other occasion \*calling for it, he  
makes an advance in the nature of a  
portion to that child, that will amount to  
an ademption of the gift by will. *Trimmer*  
*v. Bayne*, 7 Ves. 508; *Monck v. Monck*, 1  
*Ball & Beat*. 298. Was the marriage settle-  
ment, as it is called, such an ademption?  
The court below considered it as such, as  
to the whole of the provisions of the will  
except the land; but it held the devise of  
the land to be unrevoked by the subsequent  
contract.

Was the devise of the land revoked or  
adeemed by the marriage settlement? I  
concur with the court below, in thinking  
it was not. It is conceded, that there is no  
instance in the English books or our own,  
of such a revocation. A gift or sale of the  
devised subject is indeed an ademption,  
because the thing itself is gone. It is  
taken away by the act of the testator him-  
self, whose power of disposition is not  
restrained by his will. But the gift of  
other land cannot in like manner operate an  
ademption, because the land devised is not  
taken away. It is left for the will to oper-  
ate upon; and to permit the gift of other

land to effect an ademption, would be to  
construe such gift as evidencing the *animus*  
*revocandi*, which the statute has provided  
shall only be declared by a subsequent will,  
codicil, or declaration in writing, made in  
the manner in which a will of lands is re-  
quired to be made. There are, indeed, two  
ways by which a devise of lands may be  
rendered nugatory or may be avoided:  
either by taking away the subject, so that  
the will though unrevoked has nothing to  
operate on; or by revoking the clause, so  
that, although the subject remains, there  
is no will to dispose of it. But a gift of  
other land cannot operate to adeem, since  
the land devised is left for the will to oper-  
ate on; nor can it operate to revoke, be-  
cause revocation can only be according to  
the statute.

It is said, however, that notwithstanding  
the statute, there may be implied revoca-  
tions. This cannot be denied; but it may  
be confidently affirmed, that there is  
328 no \*case in which a devise to a child  
of one tract of land has been held to  
be impliedly revoked by the gift of another.  
How far it was legitimate to set up any  
implied limitation in the teeth of the sta-  
tute, may not now be questioned. We are  
bound by adjudications in this respect  
which we may not disregard. But where  
no precedent commands us to set the sta-  
tute at defiance, we should steadfastly ad-  
here to its wise and salutary provisions.

Again, it is said, that by the rules of  
equity an advance to a portioned legatee is  
to be taken as satisfaction. But these  
rules do not extend to the realty. They are  
rules for the personality, over which the  
control of equity is entire. The subjects  
of legacies and distribution are within its  
peculiar jurisdiction. The legatee acquires  
no legal title by the will, and distribution  
can only be obtained through a court of  
chancery. That court, accordingly, can  
make and has made certain rules on this  
subject, which must now be followed. But  
the realty devised is not within its grasp.  
A devise passes the legal title to the devisee,  
and the question of revocation is for a court  
of law. Had Hooe and wife instituted their  
ejectment for the land devised, no ques-  
tion of their title could have been raised.  
In vain would the defendants have set up  
the gift of other land as a revocation of  
the devise. It could not be pretended to  
have that operation in a court of law; and  
it is equally clear that equity must follow  
the law in deciding the question of revoca-  
tion.

It seems to be supposed, however, that  
as the contract in this case is not executed  
but executory, a specific execution would  
not be decreed except upon the terms of  
releasing the interests under the will.  
Whether this be so or not, it may not in  
this case perhaps be proper to decide, as  
the bill is filed not to carry into execution  
the marriage settlement, but to enforce the  
rights of the plaintiffs under the will. But  
if the question were before us, I should  
hesitate to accede to the proposition.

329 \*Contracts of marriage cannot be re-  
garded as standing upon the ordinary  
footing of other contracts as to specific  
execution. When the marriage has taken



place, there must be specific execution, unless there be fraud. Unreasonableness or delay, or any of the usual grounds of opposition, would seem inadequate to bar a decree for specific performance when the irreversible execution of it by marriage has once taken place. The parties, by that act, are placed in a situation in which the status quo ante has become impossible forever. Specific execution, from the moment of consummation, seems to be inevitable for the purposes of justice. I except, as of course, matters of fraud or of contract. If, for instance, in this case the agreement had been obtained by fraud, or if Hooe and wife had agreed that her rights under the will should be given up in consideration of the settlement, a case would certainly be presented in which a court of equity would compel the necessary releases to effectuate justice. But that cannot be in the case as it stands. There is no proof of fraud, whatever we may think of the unusually peremptory requisition of the intended husband. Nor is there any proof that he even knew of the provision by will, and much less that he agreed that one provision should be substituted for the other. Upon what ground, then, could a court of equity take away the settlement rights of Hooe, unless he would relinquish the testamentary rights of Maria Hansbrough in the lands devised to her, when neither she nor her intended husband ever assented to, or so understood, the contract of marriage? There can, I think, be no sound reason for doing so, and if the question was fairly presented by the record, I should incline to decide it in the negative. With these views, I am of opinion to affirm the decree so far as respects the real estates devised by Hansbrough to the female plaintiff.

We are next to enquire, whether the court erred in declaring the bequests of personal estate to Maria Hansbrough  
330 \*to have been adeemed and satisfied by the marriage contract? And I am of opinion, that in this also the court was right. Upon the argument of the case, I was disposed to think, that as the limitations in the will and in the settlement were somewhat different, and absolute fee being limited to the unborn children in the one case, and a contingent one in the other, there could be no ademption. But reflection and authority have satisfied me, that if the direct objects of the provision are the same in both, it is not material though there be some variation as to those remotely in contemplation of the party. Thus, as both the provisions are for Maria Hansbrough who was the direct object of them, and as to her do not materially vary, it is immaterial that the provisions differ somewhat as to her unborn children, who were remotely contemplated, and may truly be regarded as mere accessaries to herself. The case of *Monck v. Monck* is, in this respect, much stronger than this. There, Lord Monck bequeathed to his brother £5000. the interest to be paid to him during life, and if he married, with power to jointure his wife by an annuity of £150. per annum, the principal to go to the issue of the marriage, and in default &c. over. He afterwards, on his brother's marriage,

gave his bond to trustees in the marriage settlement, declaring the uses to be to pay the interest to his brother for life, remainder to his wife for life, the principal to be divided amongst the issue in such shares as the father should appoint. The variance in the provisions was not held sufficient to relieve the case from the general rule. I think, then, there is no difficulty in this case arising out of the variance of the provisions, and there is certainly none as to the adequacy of the settled property to cover all the personal bequests. For though the devise of the land cannot be revoked or adeemed by the gift of other land, yet the gift of that other land is an advancement which upon the rules of equity will, if adequate,  
331 adeem the \*personal bequests. Now, there can be no doubt, that the 400 acres of land and the personal estate in the settlement are of more value than all the personal interests bequeathed to Maria Hansbrough by the will; and if so, they are, including the share in the residue, adeemed by the settlement. As to the doctrine respecting the residuum, see the cases collected in Hovenden's note 3, to *Wilson v. Piggott*, 2 Ves. jr. 350.

The counsel for the appellants has presented another view of this case, which requires to be noticed. He considers it as falling within the influence of the rule, that no man can be permitted to claim under and against a will. But here the appellees do not claim anything against the will. It is true, they claim lands, slaves, money &c. which were otherwise disposed of by the will. But the testator himself, by his own act, adeemed and revoked that testamentary disposition. From the moment that he made the settlement, so much of the will as had given the settled property to others was annihilated, and the appellees do not assert a claim inconsistent with the will. So that although, so far as respects the personal bequests to them, there is an ademption, yet it is not because they are claiming against the will, but because the testator is conceived to have satisfied those bequests by the marriage settlement in his lifetime. If the principle contended for could be applied to gifts in satisfaction of legacies, there could never be a difficulty as to an advancement being intended as a satisfaction or not. In every case, the donee would be compelled to give up the one or the other.

Decree reversed, and bill dismissed.

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\*Redford v. Gibson.

April, 1841, Richmond.

(Absent TUCKER, P. and BROOKE, J.)

Vendor's Lien\*—Case at Bar.—G. by S. his attorney. sells and conveys land to W.: the conveyance ex-

\*Vendor's Lien—Reservation of—Statute.—The language of JUDGE ALLEN, in *Redford v. Gibson*, 12 Leigh 340, that "Prudence dictates the propriety, in all cases, of retaining an express lien where the legal title is parted with," is quoted in *McClure v. Cook*, 39 W. Va. 584, 20 S. E. Rep. 614; *Lough v. Michael*, 37 W. Va. 680, 17 S. E. Rep. 182. But the statutes now provide that if any person convey any real estate and the purchase money or any part thereof, remain

presses, on its face, that purchase money is all paid; but, in fact, 800 dollars thereof having been paid on day of conveyance, S. on same day deposits the same in W.'s hands, to indemnify him against a suretyship in certain bonds taken upon ne exeats against S. as attorney in fact of G. which ne exeats are afterwards discharged; and 400 dollars are, by the contract, retained in W.'s hands to meet the possibility of dower of G.'s wife, and she is now dead: W. sells and conveys the land to R—HELD, G. has no lien on the land for the 800 dollars, but has a lien for the 400 dollars with interest.

Robert Gibson, having been indicted for murder in Virginia and fled from justice, and sojourning in Georgia, by letter of attorney dated the 1st April 1815, constituted Christopher Strong his attorney in fact to make sale of a parcel of 157 acres of land, called High Hill, lying in the county of Prince Edward. Strong sold the land to Blake Woodson, and an agreement was made between the parties in these words:

"I have this day purchased of Christopher Strong, attorney in fact for Robert Gibson, a tract of land 157 acres, called High Hill, lying in Prince Edward county, adjoining Abner Nash's land on Appomattox river, for which I am to give him 2200 dollars; 800 dollars of which are paid down; 1000 dollars are retained in my hands until the final result of a suit between Robert Gibson and William Randolph is known; and 400 dollars I have retained on account of Mrs. Gibson's dower interest—if it can be purchased for less than 400 dollars, I am accountable to Robert Gibson or his representatives for the difference between that purchase and the 400 dollars; if I purchase it for more than that sum,

333 \*the sum over is to be on my own account; and if Mrs. Gibson should not become entitled to her dower interest, then I am bound to Robert Gibson for the whole sum of 400 dollars. Witness my hand and seal this 27th May 1815." Which paper was signed and sealed by "Blake Woodson."

Though the agreement expressed, that 800 dollars of the purchase money "was paid down," yet, in fact, either no money passed from Woodson to Strong, or, if any passed, it was immediately returned by Strong to Woodson, as appeared by the following receipt dated the same day:

"27th May 1815. Received of Christopher Strong, attorney in fact for Robert Gibson, 800 dollars, which sum is deposited in my

hands in consequence of my having become his surety in two bonds taken under two writs of ne exeat, that issued from the county court of Cumberland, one at the instance of Willis Vaughan, and the other at the instance of Richard Ligon, by two justices of the peace of said county, each against Christopher Strong agent or attorney in fact for Robert Gibson &c. which sum is to remain in my hands to abide the decision of the law in those cases. (Signed) Blake Woodson."

Of these two papers counterparts were kept by Woodson; and a deed of bargain and sale of the 157 acres of land was executed by Strong, the attorney in fact of Gibson, to Woodson, dated the same 27th May 1815, and expressing that the whole consideration of 2200 dollars had been paid; which deed was also duly recorded.

Gibson returned to Virginia in 1817, and was tried for the murder of which he had been indicted, and acquitted. He then exhibited a bill in chancery against Woodson and Strong, wherein he alleged, that the sale of this parcel of land by, Strong to Woodson was a fraudulent transaction, and as proof that it was so, he alleged (among other things) that Strong had been

334 \*offered a larger price for the property by other persons, and he prayed that the whole transaction might be set aside, on repayment of the purchase money. And in July 1818, he filed an amended bill, alleging, that no part of the purchase money had been paid by Woodson, and praying that the transaction might be set aside, without any repayment of purchase money.

It is no further necessary to notice the proceedings in that suit, than to state, that, after the amended bill was filed, namely, on the 28th September 1818, Gibson took the deposition of the appellant Edward Redford; in which Redford deposed, that, in 1814, he offered a Mr. Riddle, who was then the agent of Gibson, 2300 dollars for this very 157 acres of land called High Hill, provided Riddle would leave in his hands 1000 dollars until the decision of a suit then pending in the court of appeals between Gibson and William Randolph; and that Riddle and Mrs. Gibson should execute a deed to the deponent, with her relinquishment of dower: that he tendered a deed to Riddle and Mrs. Gibson, which she refused to execute, unless the deponent would pay her the money arising from the sale of the land, and to this Riddle refused to accede.

Pending that suit, Woodson sold and conveyed to the same Redford, the whole 157 acres of land, for 5000 dollars, by deed dated in June 1820. And afterwards, in 1823, the bill in that suit was dismissed, but without prejudice to any suit which Gibson might bring to recover the purchase money which Woodson had contracted to pay for the land.

Immediately on Gibson's failure in that suit, he exhibited the present bill against Woodson, Strong and Redford, in the superior court of chancery of Richmond, whence it was removed first to that of Williamsburg, then to that of Winchester, and thence to the circuit superior court of

unpaid at the time of the conveyance. he shall not thereby have a lien for such unpaid purchase money, unless such lien is expressly reserved on the face of the conveyance. W. Va. Code, ch. 75, sec. 1: Va. Code 1887, ch. 110, sec. 2474.

**Implied Equitable Lien.**—In *Poe v. Paxton*, 26 W. Va. 611, the court said: "The principle is, that this lien exists in equity presumptively, when the purchase money, or any part of it, remains unpaid; and it is for the vendee to show such circumstances as repel the presumption or rebut the equity. 1 Lead. Cas. Eq. (top p.) 272. 'Prima facie the purchase money is a lien, and it lies on the vendee to show the contrary; and the death of the vendee does not alter or defeat the lien.' *Garson v. Green*, 1 Johns. Ch'y 208; *Tompkins v. Mitchell*, 2 Rand. 428; *Redford v. Gibson*, 12 Leigh 332."

Frederick. In this bill, he stated the material facts of the transaction prior to 335 Redford's purchase, \*and then Redford's purchase of Woodson for 5000 dollars; that Woodson had in fact paid nothing at all to Strong; that Woodson was now insolvent: and he prayed, that the conveyances might be set aside for fraud, or if not, that the land might be subjected to the payment of the purchase money. And in an amended bill, filed in July 1825, he charged that Redford purchased the land with full knowledge of all the facts, and was in truth induced to make the purchase for the purpose of saving a debt due from Woodson to him, which had otherwise been desperate.

Redford, in his answer to the original bill, stated his purchase of Woodson, and affirmed, that he had paid the whole of the purchase money to him or for him; that nearly five years had elapsed from the time of Strong's sale to Woodson till Woodson's sale to him, during which time Woodson was quite solvent; so that Gibson might, at any period of that time, have made the small balance due for the land, if Mrs. Gibson had relinquished her right of dower, which, however, she had not done and refused to do; Redford, believing from the character of Gibson's suit against Woodson and Strong, that he rested satisfied with Woodson's solvency, was induced to become the purchaser of the land, and he now held it subject to Mrs. Gibson's right of dower, in case she should survive her husband. And he added, that he believed, that all the purchase money, except the sum retained on account of Mrs. Gibson's dower, was paid to Gibson's agent Strong, and to William Randolph, who had a lien on the land by an elegit. And in answer to the amended bill, he stated, that he purchased of Woodson in April 1819, and received a conveyance in June 1820; and declared, that he paid the whole purchase money to and for Woodson before the conveyance was made. He denied, that he bought to save a debt, or indemnify

336 himself as a surety for \*Woodson, and said, indeed, that he did not remember that he was a surety for Woodson at the time. He denied, that he knew, at the time he received the deed of conveyance from Woodson, that the purchase money contracted to be paid by Woodson had not been paid by him, and he referred to his answer to the original bill on that point. He added, that when he bought the land of Woodson, he Woodson was solvent; and the long delay of Gibson to assert any lien on the land, and the character of his former suit in which no attempt was made to subject the land to sale for the purchase money, was inconsistent with the present claim, or at least made it inequitable.

Woodson also answered, and, after detailing the transaction between him and Strong, touching his purchase of this parcel of land, he said, that he had paid William Randolph from 1000 to 1200 dollars on account of his claim; that the wife's dower was still a subsisting charge; that, moreover, a suit was pending in the county court of Prince Edward, in favor of White & Co. against Thomas Gibson and Robert

Gibson (Thomas having been the original owner of the land), the object of which was to charge this very land with a debt due from Thomas Gibson to White & Co. on the ground, that the conveyance by Thomas to Robert Gibson was made in fraud of Thomas's creditors; which suit had been instituted before the sale made by Strong to Woodson, though he did not recollect it, and it was unknown to Redford when he made his purchase: neither had Redford any knowledge of Gibson's present claim when he bought, and was not induced to purchase in order to save himself, the debt due to him being inconsiderable, and much the greater part of the purchase money having been paid in cash, or to Woodson's orders.

As to the defendant Strong, the bill was taken for confessed.

337 \*It appeared, that the claim of Randolph was paid off on the 2nd June 1826, and then amounted, principal and interest, to 1260 dollars. And that the two writs of ne exeat against Strong as Gibson's agent, in which Woodson became surety for Strong, and received from him the 800 dollars to hold as indemnity, were discharged in June 1818.

The record of the suit of White & Co. against Thomas and Robert Gibson, was also exhibited: it asserted a claim upon this land and other property, as having been fraudulently conveyed by Thomas to Robert, to defeat the creditors of Thomas; and it was still in full prosecution.

There were also sundry exhibits and depositions on both sides, incoherent and inconclusive, upon the questions, whether Woodson, at the time of his sale to Redford, was solvent or not? and whether Redford had notice, at that time, of the non-payment of the purchase money by Woodson to Gibson?

The cause was heard before the court of chancery of Williamsburg in January 1827; and the court declared, that Redford, in his answer to this bill, having said he was induced to make a purchase of the High Hill tract of land from the character of the former suit, and he having given his deposition in the former suit, wherein an amended bill had been filed charging that the purchase money had not been paid, a few months before he gave the deposition, and two years before he obtained his deed for the land; and as his answers were imperfect in denying notice, and in not alleging payment before notice; from these facts, and all the evidence in the cause, the court was of opinion, that Redford had notice of the purchase money being still due to Gibson, before he paid Woodson, if indeed he had ever paid him; and that, therefore, the land was liable in the hands of Redford, for the purchase money 338 which was \*due from Woodson.

Therefore, the court ordered accounts to ascertain what payments had been made, or incumbrances removed, by Woodson, and what was due from him.

After this decree was made, Redford filed an amended answer, wherein he positively and explicitly denied notice of the fact that the purchase money due from Woodson to Gibson was unpaid at the date of the

conveyance from Woodson to him, alleging, that the whole purchase money he had contracted to pay Woodson, was paid before Woodson made the conveyance. He affirmed, that the cash payment of 800 dollars was in fact made by Woodson to Strong the attorney of Gibson. And he referred to the suit of White & Co. against Thomas and Robert Gibson, the issue of which he could not anticipate, though he apprehended that the decree in it might affect the land.

To this answer Gibson put in a general replication. And the depositions of the defendant Woodson and of Robert G. Scott were filed, proving that Woodson had taken a receipt from Strong for the payment of that money to him, which had been lost or mislaid.

In October 1829, the court of Prince Edward made a decree in the case of White & Co. against Thomas and Robert Gibson, wherein the court held, that the conveyance from Thomas to Robert was fraudulent as against Thomas's creditors, and ordered that High Hill, and sundry other property, should be sold to pay the debt due to White & Co. And a copy of that decree was filed in this cause.

Gibson filed a letter from one Dorsey to him, dated the 13th June 1828, giving him an account of the death of Mrs. Gibson.

And the cause coming on for hearing again, in the superior court of chancery of Winchester, to which it had been removed,

in December 1830, the court was of opinion, \*that though Redford, in his last amended answer, had most positively denied that he had notice of the non-payment by Woodson to Gibson of the purchase money of High Hill, yet his denial was outweighed by the strong and conclusive evidence in the cause referred to in the decretal order of January 1827, so that notwithstanding his denial of notice, the aspect of the cause had not been changed since the making of that order; therefore, the court again ordered Woodson and Redford to render an account of any lien or claim on High Hill, which had been paid by them or either of them, and for which Gibson was liable.

The commissioner reported, that the only money which had been paid, was 1260 dollars paid to William Randolph on the 2nd June 1826—that the 800 dollars for which Strong gave his receipt to Woodson as money paid to him, was the same money for which Woodson on the 27th May 1815 gave his receipt to Strong, as so much deposited with him by way of indemnity against Woodson's suretyship for Strong in his bonds taken on the writs of ne exeat, which were discharged in June 1818, and so this money had not in fact been paid by Woodson to Strong—and that Mrs. Gibson was now dead. Therefore, the commissioner stated the account of principal and interest, allowing credit for the 1260 dollars paid to Randolph on the 2nd June 1826, and made the balance of the debt due to Gibson, principal and interest, on the 2nd December 1834, to be 3498 dollars 83 cents.

The court, at June term 1835, decreed that Woodson should pay Gibson, the sum of 3498 dollars 83 cents, with interest on 2200 dollars from the 2nd December 1834 till

paid; and that unless Woodson or Redford should pay that sum, then the land called High Hill should be sold to pay the amount.

From which decree Redford, by petition to this court, asked an appeal; which was allowed.

340 \*Taylor and Leigh for appellant, contended, that he had no notice whatsoever of the non-payment by Woodson of the 800 dollars, which, by the contract between Woodson and Strong, was "to be paid down." It was true, that Gibson, in his former suit against Woodson and Strong, had by his original bill sought to set aside the transaction as fraudulent, and by an amended bill filed in July 1818, charge that the purchase money remained yet unpaid; and it was true, that Redford was afterwards, in September 1818, examined as a witness in that cause touching a wholly distinct point; it was true too, that in Redford's answer to the present bill, he referred to the former suit, and spoke of it as one in which Gibson did not seek to charge the land with the purchase money. The answer shewed, indeed, that he was apprised of the object of the original bill, but that he was not apprised of the object of the amended bill; for it accurately described the object of the original, and omitted all mention of that of the amended bill; and how could he be charged with notice of the amended bill, merely because he gave a deposition in the cause, on a distinct point, after the amended bill filed? To charge a witness examined in relation to a single fact, and that a fact hardly pertinent to the cause, with a knowledge of all the pleadings as they then were, would be straining presumption beyond reason and law. Redford's answers in this cause, had not been fairly considered and interpreted: they did all, with perfect consistency, and without equivocation or evasion, deny notice of the non-payment of the purchase money by Woodson to Gibson, except that part thereof which was retained to meet Mrs. Gibson's possibility of dower. They admitted that, according to the adjudications in the English court of chancery, if the purchase money had not been paid, and no security had been taken for it, though the conveyance expressed that it had been paid, the land in the hands

341 of a subsequent purchaser, \*with notice of the non-payment, might be charged with the amount due: it was an equitable lien which the court would enforce. It might be otherwise in Virginia, where all deeds were recorded, and a purchaser looked to the record to see what incumbrances there were upon the land. But, however that might be, they said, Strong was Gibson's attorney in fact, and Strong's acts were Gibson's. Now, Strong gave Woodson a receipt for the 800 dollars as so much paid to him; and though that money was returned to Woodson as a pledge to indemnify him as surety in the ne exeat bonds, still the receipt given to Woodson shewed, that the money was in fact paid. The land was relieved from the lien, and Woodson was personally liable for the money upon the discharge of the writs of ne exeat. In this respect, the case resem-

bled that of *White v. Wakefield*, 7 Sim. 401, 10 Cond. Eng. Ch. Rep. 116. Gibson, having got his money for his land, gave it back to the vendee upon a wholly new contract. And if Redford, purchasing from Woodson, had been exactly informed of the facts, he would have been entitled to hold the land exempt from any lien for the 800 dollars. The court below erred also in holding that the 400 dollars retained for Mrs. Gibson's dower was to be paid: *Winter v. Ld. Anson*, 1 Sim. & Stu. 434, 1 Cond. Eng. Ch. Rep. 221. Besides, there was no evidence that she was dead, but a letter from one Dorsey stating that she was; but the counsel said they had heard that she was living long subsequent to the date of that letter, and, at all events, the letter was no evidence of her death. And they submitted, that the court erred in making no provision for the satisfaction of the decree of *White & Co.* against this same land.

Cook and Patton, for the appellee, entered into a critical examination of Redford's answers, for the purpose of shewing that he did not deny notice of the non-payment of the purchase money by Woodson to 342 Gibson, or, \*if he denied notice of the fact, he did not deny notice that Gibson claimed that it had not been paid. They coupled the circumstance of Redford having been examined as a witness in Gibson's suit against Woodson and Strong, after the amended bill was filed charging that the money had not been paid, with Redford's answer in this cause, in which he speaks of the nature of the former suit; and thence argued, that Redford was apprised, at the time of his purchase from Woodson, of the non-payment of the purchase money due from Woodson to Gibson. As to the rest, they said it was clearly settled, that the vendor of land, taking no security for the purchase money, had a lien on the land for the purchase money unpaid, which followed it in the hands of all volunteers and purchasers with notice: that the fact of the vendor having made a deed expressing on its face, that the whole purchase money was paid, or having made a deed and endorsed a receipt for the purchase money thereon, if in truth the money remained unpaid, did not relieve the land from the lien for it. *Saunders v. Leslie*, 2 Ball & Beat. 509. If a receipt for the money endorsed on the deed, could not relieve the land from the lien, how could a receipt on another piece of paper have that effect? As to the 400 dollars which was retained for Mrs. Gibson's dower, Gibson's lien extended to that: the vice chancellor's decree in *Winter v. Ld. Anson*, was reversed on appeal to the lord chancellor, 3 Russ. 488, 3 Cond. Eng. Ch. Rep. 495. And this money was now due, for Mrs. Gibson was dead: a letter was filed, giving an account of her death in 1828; the commissioner reported that she was dead, and no exception was taken to the report on this point. Then, as to the decree of *White & Co.* against Thomas and Robert Gibson, the record of the suit, so far as it had then proceeded, was filed as an exhibit with Woodson's answer; and after the interlocutory order in this cause, the decree in that

cause was filed as an exhibit before 343 the commissioner. \*The decree was detached from the record, and it did not appear to be a decree in the same cause. But on examination of the decree, it would be found that it did not certainly direct the sale of this land.

ALLEN, J. This is a bill filed to subject land sold and conveyed by Gibson to Woodson and by the latter to Redford, to the payment of the purchase money alleged to be due by Woodson to Gibson. That the lien of the vendor exists against the vendee and volunteers claiming under him, and against third persons who had notice that the purchase money was not paid, is laid down by all the elementary writers, and, I think, is now too clearly settled to be drawn in question. The lien, however, is the creature of a court of equity, formed upon a supposed intention of the parties; and wherever, from the circumstances of the case, it appears that the parties did not contemplate such a lien, it will not be established. There is strong reason in our country, where all incumbrances are required to be recorded, not to extend this secret equitable lien beyond the principles already established. The records are universally looked to with us, as disclosing all charges upon the property. Prudence dictates the propriety, in all cases, of retaining an express lien where the legal title is parted with. If the vendor, instead of adopting this course, chooses to rely upon his secret equitable lien, he should be cautious not to do any thing leading to the inference that no such lien was intended to be retained. If, from his acts, third persons may fairly infer that the personal credit of the vendee was looked to, it would be a fraud upon them to permit the lien to be set up against them.

Gibson, then residing in Georgia, constituted Strong his attorney in fact, with full power to sell and convey the land in question, and receive the purchase money.

On the 27th May 1815, Strong sold to 344 Woodson and made \*him a deed.

Gibson returned to Virginia in 1817, and in 1818 instituted a suit against his attorney Strong and Woodson, in which he sought to set aside the sale on the ground of fraud between his attorney and Woodson: he failed in his attempt to shew the fraud, and his bill was dismissed in 1823. Strong may be therefore dismissed from our view.

What a man does by his authorized attorney, he does himself, and the case is to be contemplated, so far as third persons are concerned, as a transaction between Gibson himself and Woodson. Gibson, then, in 1815, sold and conveyed the land to Woodson, and by his deed acknowledged the payment of the money. The admission in the deed, and a receipt for the purchase money endorsed on it, are not sufficient to repel the presumption of law that a lien was retained for the purchase money. The case of *Saunders v. Leslie*, cited at the bar, is a direct authority as to this point. On the day of the sale and conveyance, Woodson executed an instrument under seal, which sets out the terms of the contract. By this it appears, he was to give 2200 dollars for

the land; of which 800 dollars is said to be paid down; 1000 dollars he retained to meet the claim of Randolph, then in suit, and 400 dollars on account of Mrs. Gibson's dower interest. Of this agreement Woodson retained a counterpart, which he filed with his answer. On the same day, Woodson gave a receipt to Strong, acknowledging the receipt from Strong as attorney in fact of Gibson, of the sum of 800 dollars, which sum was deposited in his hands in consequence of his having become the surety of Strong in two bonds taken under two writs of ne exeat sued out against Strong by the creditors of Gibson, and the money was to remain in his hands to abide the decision of those cases. This is all the evidence we have touching the transactions of that day.

345 \*It is contended by Gibson's counsel, that in truth no money was actually paid, and that Woodson has acquired the land without giving any thing at the time. The money retained to meet the Randolph claim, was paid to Randolph afterwards. And the controversy now relates to the 800 dollars, and the 400 dollars. The counsel may be correct in the inference that the sum of 800 dollars was not actually paid; but it is but an inference, from the evidence, and that against the terms of the agreement and receipt. It would, perhaps, be as reasonable to infer, that the creditors of Gibson, an absentee, learning that his attorney in fact, also a resident of a distant state, had sold his land and received part payment, sued out the writs, and compelled him to give the security. Whatever may have been the fact, in what attitude do these transactions place Gibson towards third persons, viewing them as his own acts? (and in that aspect they must be contemplated). He sells his land, and makes a conveyance, in which the receipt of the purchase money is acknowledged: he takes on the same day an agreement from his vendee reciting the terms of the contract, in which the payment of this 800 dollars is admitted: and by another receipt, bearing the same date, it appears this money was deposited to remain with Woodson until the decision of certain suits. Suppose the money had been actually paid to Gibson, and in an hour afterwards, he had been held to bail in suits which he intended to controvert, and had deposited this money with his bail. Upon the payment of the money the lien was gone. Could the deposit with the bail, who happened to be the vendee, revive it? The cases in which it has been held, that the receipt for the purchase money is not sufficient to repel the presumption of law, are cases where there was no change in the original contract: the vendor had taken the bond or agreement of the vendee for the payment of the purchase money at the time stipulated. But in the case like the

346 present, how \*could the vendor have sued for this 800 dollars at law? Not on the original contract, for that recited its payment. He must have recovered in an action for money had and received, and upon proving that the writs of ne exeat had been dismissed, as it appears they were, and exhibiting the receipt, his case would

have been made out. The consideration, then, would have been the money deposited, and not the land sold. For this deposit he necessarily looked to the personal credit of Woodson; and if so, his lien was gone. For it never exists when the circumstances shew an intention not to rely on it. And as it regards a third person, a fair purchaser, would it not be grossly unjust to charge the property in his hands? He sees in the hands of his immediate vendor, the deed, the counterpart of the agreement, and the receipt. Can he suppose, with these papers before him, that the land is still looked to for the security of the purchase money, in the face of the agreement acknowledging payment, and of a receipt shewing a deposit of the money with the vendee to meet a possible and distinct liability? No man, it seems to me, could have supposed he was incurring danger in purchasing under such circumstances. The case, it strikes me, is stronger against the lien than the case of *White v. Wakefield*. In that case, the purchase was made by one of several trustees, the money to be derived from a trust fund. The business was transacted by one of the trustees, and the vendor acknowledged the receipt of the whole of the purchase money in the deed, and by a receipt endorsed on it; but a portion of the money was retained by the trustee. There was an account between the vendor and acting trustee, shewing how the balance of the purchase money was paid, and reciting that a sum was retained until the deeds were executed and legal matters completed, and that it was to bear interest. The vendor took a lease of the property, and so continued in possession. The

case was decided against the lien, 347 \*upon the ground, however, that the vendor had dealt in this way with one of the trustees without the knowledge or concurrence of the others. They had a right to suppose the trust fund had been properly applied, and it would have been a fraud on them to permit the lien under such circumstances to be set up against the estate. The case shews, that where, from the circumstances, third persons have a right to suppose personal credit is given, the lien will not be established against them, even although the vendor held possession of the estate under a contract of lease. As to the 800 dollars, therefore, I think the transactions shewed that no lien was retained or contemplated, and that whether Redford had notice of these transactions or not, is not material. Indeed, I have proceeded upon the concession, that the papers disclosing to him all that now appears to the court, were exhibited to him, and that Gibson, by putting it in the power of his vendee to exhibit them, has deprived himself of all right as against such vendee to charge the land.

The 400 dollars, retained by Woodson to indemnify himself against the claim of Mrs. Gibson for dower, I think is a lien on the land. There is nothing in the circumstances indicating any intention to waive the lien as to this sum. The purchase money being an equitable lien, it devolves on the purchaser to shew circumstances indicating an intention not to insist on it.

The postponement of the payment to an indefinite time, does not, it seems to me, of itself shew such intention. The authority of *Winter v. Ld. Anson*, relied on to shew that in such a case there was no lien, was reversed by the lord chancellor on appeal. There, Mousley purchased the estate of Winter. The conveyance expressed that the whole purchase money was paid; in fact, but a portion was paid; Mousley executed his bond for the remainder of the purchase money, payable within twelve months after the decease of Winter. The vice chancellor dismissed the bill.

348 The case came up on an appeal \*before the lord chancellor, who said, "In general, where a bill, note, or bond is given for the whole or any part of the purchase money, the vendor does not lose his lien for so much of the money as remains unpaid. The circumstance, that the money is secured to be paid at a future day, does not affect the lien. I do not think that the lien is affected by the fact of the period of payment being dependent on the life of the vendor. That circumstance does not appear to me to afford such clear and convincing evidence of the intention of the vendor to rely, not upon the security of the estate, but solely upon the personal credit of the vendee, as would be necessary in order to get rid of the lien. It would not be inconsistent with an express pledge, and I do not perceive why it is at variance with the lien resulting from the rules of a court of equity." In this case, the payment depended on the contingency of the wife surviving the husband and asserting her title to dower, and the agreement between the parties shewed it was held for the purpose of meeting that liability. Of this the purchaser had full notice, and admits it in his answer. I think, under such circumstances, he took the property subject to this charge.

It is objected that there is no evidence in the record of the death of Mrs. Gibson. There was a reference to a commissioner to ascertain the outstanding incumbrances: he reported that Mrs. Gibson was dead, so that her dower claim constituted no charge on the estate; and to this report there is no exception on that account. The matter reported on was embraced in the scope of the enquiries submitted to the commissioner. The evidence upon which he proceeded, does not appear by his report: if upon the letter filed, although it is not proved so as to make it evidence, it may have been admitted; or other evidence of the fact may have been before him. If the correctness of his conclusion had been controverted by an exception, evidence upon the point 349 might \*have been filed. It would be a surprise on the party, to permit the exception to be taken in the appellate court.

I think, however, the court erred in not making some provision to secure the purchaser against the charge created by the decree in favor of White & Co. The purchaser was not entitled to a credit; for it does not appear certainly, that the land will be sold under the decree. Still there is enough in the proceedings in that case, to render it very probable that the land will eventually have to be sold to satisfy the

claim. The charge is one which Gibson was bound to remove; it creates a cloud on the title, and a sale under such circumstances would necessarily be attended with a sacrifice. If the land is subjected to this charge, Redford would have a right to call upon Woodson's estate for indemnity. Under these circumstances, Gibson is not entitled to a decree against either Woodson or the land, until this incumbrance, which it was his duty to remove, is extinguished.

Therefore, it seems to me, the decree should be reversed with costs, and the cause remanded for further proceedings, with instructions, that the land in the hands of the appellant Redford is liable to the payment of the 400 dollars only, retained in the hands of Woodson to meet the claim of dower, with interest thereon from the time of the purchase; and that Gibson is not entitled to a decree for any part of the purchase money, until it shall be shewn that the land has been exonerated from any incumbrance growing out of the suit of White & Co. against him.

The other judges concurred—Decree reversed, and cause remanded &c.

### 350 \*Hamletts and Others v. Hamlett's Ex'ors &c.

May, 1841. Richmond.

**Will—Construction—Case at Bar.**—Testator bequeaths residuum of his estate, after his wife's death or marriage, to be equally divided among James, Mary, Patsey, Nancy and Narcissa [who were testator's children], the children of his son George, the children of his daughter Elizabeth, the children of his son Bedford deceased, and the children of his daughter Obedience; his five children legatees were all married, and had, in all, 81 children living at his death; his son Bedford left 3 children, and his son George and daughters Elizabeth and Obedience were married, and these four had, in all, 18 children living at testator's death; and the last three had 5 children born after his death and during his widow's life: **Held**, by circuit superior court, and affirmed by this court.

1. **Same—Same—Same—After-Born Children.**—That the children of George, Elizabeth and Obedience, born after testator's death and during widow's life, as well as those in being at testator's death, are entitled to shares.

2. **Same—Same—Same—Same.**—That such of the grandchildren as were in being at testator's death, took vested and transmissible interests, liable however to be diminished by the birth of other grandchildren, and the after-born grandchildren as soon as they came in being took likewise vested and transmissible interests.

3. **Same—Same—Same—Taking Per Capita or Per Stirpes.**—That the grandchildren took per stripes and not per capita; so that each of the

\*Devise to "Children"—After-Born Children.—See the principal case cited in 4 Va. Law Reg. 624; 29 Am. & Eng. Enc. Law (1st Ed.) 411, 412.

†Wills—Construction—Taking Per Capita or Per Stirpes.—The principal case is cited with approval in *Hoxton v. Griffith*, 18 Gratt. 578; *Senger v. Senger*, 81 Va. 707; *Ross v. Kiger*, 43 W. Va. 402, 26 S. E. Rep. 196. See also, *Crow v. Crow*, 1 Leigh 74; *Walker v. Webster*, 96 Va. 377, 28 S. E. Rep. 570; and foot-notes to *Brewer v. Ople*, 1 Call 212; *McMaster v. McMaster*, 10 Gratt. 275.



testator's children legatees took one ninth, and each family of his grandchildren legatees took one ninth to be subdivided among them respectively.

James Hamlett, the elder, late of Charlotte, who died in 1819, by his will, first devised and bequeathed as follows: "My desire is, that my beloved wife Jane shall enjoy uninterrupted possession of my mansion house and plantation, with such part of my personal estate as she shall think proper for her support, and that she shall be at liberty to lend any part thereof to such of my children as she shall think proper, but if she shall lend any part to any of them, the part so loaned should at her decease be returned, in order to make fair and equal division as I may hereafter direct: but if my wife shall marry, my desire is, that she shall no longer reside

351 on \*the plantation where she now lives, or have possession of any part of my land in Virginia, but shall remove to the plantation whereon she formerly resided in Person county, North Carolina, which she shall enjoy instead of my estate in Virginia, with the whole of the personal estate and slaves thereon, except two named Dick and Anne." He then devised to his son James Hamlett a part of the land (particularly described) on which he resided (the same before devised to his widow), and the residue thereof to his two grandsons Thomas and James Hamlett (they were sons of his son Bedford Hamlett deceased); that is, he devised the remainder in fee expectant on the estate for life or widowhood therein before devised to his wife, to his son James and grandsons Thomas and James Hamlett, respectively. He then devised to his son George Hamlett a parcel of land on which he (George) was then living; and to his grandsons Drury and Samuel Major (they were sons of his daughter Obedience) all his (the testator's) land in Halifax. He bequeathed to his daughter Narcissa Jeffress four slaves by name, one horse, six cows and six sheep, and to his son George 300 dollars. And, lastly, he added—"My desire is, that after the decease of my wife, the whole of my estate, except the part herein before disposed of, may be divided in manner and form following, viz. equally among James Hamlett, Mary Jeffress, Patsey Wilson, Nancy Jeffress, Narcissa Jeffress, the children of my son George Hamlett and Lucy his wife, the children of my daughter Elizabeth Averett, the children of my son Bedford Hamlett deceased, and the children of my daughter Obedience." The testator's son James, named executor in the will, took probat thereof in the county court of Charlotte on the 4th November 1819.

By deed, dated the 19th November 1819, between Jane Hamlett, the testator's widow, and James Hamlett, his son and executor,

352 Thomas Jeffress, James Wilson, \*Richard Jeffress and Coleman Jeffress, the husbands of his daughters Mary, Patsey, Nancy and Narcissa, legatees in the will named,—the widow Jane released all the estate and interest devised and bequeathed to her by her husband's will, in the testator's mansion house and plantation and in his personal property in Virginia,

and they released, conveyed, and covenanted to secure to her all the land in Person county North Carolina (wherein she held a life estate before her marriage with the testator), all the slaves thereon, fifteen in number, all the crop of that year made on the plantation, and all the household and kitchen furniture there (for the same estate and in the same manner as the property was held by her before her marriage with the testator), and sundry other chattels, which were then in Charlotte, Virginia.

In April 1835, while the testator's widow was yet living, a bill in chancery was exhibited by all the children and grandchildren legatees of the testator except his son James, against James as colegatee and executor; setting forth the provisions of the testator's will, and particularly the residuary clause (which was set out in hæc verba) and the deed of the 19th November 1819 between the testator's widow and James Hamlett the executor and others; and praying a settlement of the executor's accounts of administration, and a decree for a division, to be presently made, on the testator's residuary estate among the legatees, according to his will. And James Hamlett put in an answer to the bill, in his own right as legatee and as executor, professing his readiness to settle his administration accounts, and to have a division presently made of the residuary estate.

Two questions were presented by the pleadings: 1. Whether only such of the children of the testator's son George and his wife Lucy, and of his daughters Elizabeth and Obedience, as were in being at the time of the testator's death, were entitled to 353 come in as legatees of \*the residuary estate, or all the children of that son and those daughters, as well those born after the testator's death and during the life of his widow, as those who were in esse at the time of his death? And 2. Whether, in the division of the subject among the testator's children and his grandchildren, the grandchildren respectively should take per stirpes, or all the children and grandchildren equally per capita?

The court ordered accounts to be taken, by a commissioner, of the executor's administration, and of the rents and profits of the testator's mansion house and plantation, and of the profits of his slaves and other personal estate in Virginia, accrued since the deed of the 19th November 1819 between the testator's widow and James Hamlett his executor and others: that the commissioner should enquire and report, whether the agreement contained in that deed was beneficial to the infant legatees concerned: that he should enquire and report, what was the present age of Lucy the wife of the testator's son George Hamlett; and how many children the testator's son James Hamlett, and his daughters Mary Jeffress, Patsey Wilson, Nancy Jeffress and Narcissa Jeffress, respectively, had at the testator's death, and how many they each had now; and that he should present a scheme for the division in three views: 1. Dividing the fund among the residuary legatees per stirpes; 2. dividing it among them per capita, regarding as legatees only



such of the children as were born at the time of the testator's death; and 3. dividing it among all the children and grandchildren of the testator who were parties to the suit; that is, the testator's five children and his grandchildren by his other two sons and two daughters, as well those who had been born since the testator's death as those who were then in esse.

It appeared by the commissioner's report —1. That the testator's son James Hamlett had four children living at the testator's death: that his daughter Mary, wife

354 \*of Thomas Jeffress, had seven children, all born before the testator's death: that his daughter Patsey, wife of James Wilson, had twelve children, nine of whom were born before his death: that his daughter Nancy, wife of Richard Jeffress, had six children, five born before his death, and one since born: and that the testator's daughter Narcissa, wife of Coleman Jeffress, had seven children, all born before the testator's death. So that the testator's children who were residuary legatees, each and all had children, and all together thirty-two children, and two of his daughters were of that age that they, as well as the son James, might and would probably have more issue. 2. That the testator's son George had by his wife Lucy, seven children, four of whom were born before the testator's death, and three since born; and that Lucy, the wife, was now fifty-six years old and her youngest child was born in 1823, and therefore, probably, past child-bearing: that his daughter Elizabeth, wife of William Averett, had seven children all born before the testator's death: that his son Bedford, who died before the testator, left three children living at the testator's death: and that his daughter Obedience had been twice married, first to William Major, and then to James Faulkner, and that she had eight children of both marriages, three born before and five after the testator's death. So that, of the testator's grandchildren who were made residuary legatees, there were in all eighteen living at his death, and five since born; and two at least of his children, to whose children he bequeathed shares, might be expected to have more issue.

Thus it appeared, 1. that if the fund was to be divided among the testator's legatees, children and grandchildren, per stirpes, it would be divided into nine parts, and each of his five children would take one ninth, and each of the four sets of grandchildren would take one ninth, to be subdivided among them respectively. 2. That if the

355 fund was to be divided among the testator's \*five children, and his eighteen grandchildren, who were born before his death, per capita, it would be divided into twenty-three parts, and each of the children and grandchildren would take one twenty-third part. And 3. that if it was to be divided among the testator's five children and his twenty-six grandchildren born before and since his death, per capita, then it would be divided into thirty-one parts, and each of the children and grandchildren would take one such part.

The fund in hand at the time of this re-

port was 14,305 dollars 87 cents: of which, upon the first principle, each of the testator's five children would get 1589 dollars 31 cents, and each of the four sets of grandchildren the same sum to be subdivided among them respectively. Upon the second principle, the share quoted to each of the testator's five children and each of his eighteen grandchildren born before his death, was 621 dollars 90 cents. And upon the third principle, the share quoted to each of the testator's five children and twenty-six grandchildren born before and since his death, was 421 dollars 41 cents.

The commissioner also reported, that the agreement contained in the deed of the 19th November 1819, between the testator's widow and James Hamlett the executor and others, was beneficial to the infant parties concerned.

Upon a hearing of the cause on the report of the commissioner shewing all the matters above stated, the court declared, that all the grandchildren, whether born before or after the testator's death, who should, at the time for the division of the fund (namely, at the death of the widow), come within any one of the classes described in the will, would be entitled to a share of the fund: that such of the grandchildren as were in esse at the death of the testator took vested and transmissible interest; such interests being liable, however, to

356 be diminished by the birth of other grandchildren; and that \*the after-born children, so soon as they came in esse, took likewise vested and transmissible interests. That, notwithstanding the cases of Blackler v. Webb, 2 P. Wms. 383; Butler v. Stratton, 3 Bro. C. C. 367, and Crow v. Crow, 1 Leigh 74, upon the intention of this testator, inferred from his intention to make a provision for his whole family, and the inconsiderable part of his estate which his own children would get in a division per capita, the division ought, in this case, to be per stirpes; a view strengthened by the fact that the testator's five children who were themselves to take as legatees, had children at the time of his death, and indeed large families. And that a division of the fund might be presently made, seeing that, in the ordinary course of nature, no other grandchildren entitled to a share of the fund, could hereafter come in esse. Therefore, the court, after ordering the commissioner's former report to be reformed in some particulars, directed him to ascertain the exact amount of the fund, and to report a division of the same, per stirpes; that is, giving one part to each of the testator's children legatees in the will, and one part to each set of grandchildren legatees, to be subdivided among them, respectively.

The commissioner reported that the whole fund was now 14,619 dollars 9 cents; which was divided into nine shares of 1624 dollars 34 cents each: and one share was assigned to the testator's son James Hamlett; one to Richard Jeffress and Nancy his wife; one to Coleman Jeffress and Narcissa his wife; one to Mary Jeffress, whose husband died pending the suit; and one to James Wilson administrator of his wife Patsey who was now dead: one to the children of Elizabeth

Averett, subdivided into eight parts; one to the children of Obedience Faulkner, subdivided into eight parts; one to the children of Bedford Hamlett, subdivided into three parts; and one to the children of George Hamlett, subdivided into seven parts.

357 \*After the interlocutory decree was made, several depositions were taken by the plaintiffs, which were returned with the commissioner's last report. The evidence they contained was quite vague; but it might be inferred from the depositions, collated with each other—

1. That the testator had in his lifetime advanced to his son James, about 100 acres of land, worth about 460 dollars, and that the land devised by his will to that son, was about 500 acres worth about 5000 dollars: that he had, in his lifetime, advanced to his son George, about 200 acres of land (the same devised to him in his will) which George yet held, worth about 2000 dollars: that the land devised to his two grandsons, Thomas and James Hamlett, was about 450 acres, worth about 2800 dollars: and that the land devised to his two grandsons, Drury and Samuel Major, was worth about 1450 dollars.

2. That, at the time of the testator's death, Thomas Jeffress husband of his daughter Mary, James Wilson husband of his daughter Patsey, and Richard Jeffress husband of his daughter Nancy, were in good circumstances, and Coleman Jeffress husband of his daughter Narcissa, was in narrow but not needy circumstances: that the testator's son Bedford had died insolvent: that his son George, and William Averett husband of his daughter Elizabeth, were both in embarrassed circumstances and very improvident; and that James Faulkner husband of his daughter Obedience, was reputed to be much embarrassed by an unfortunate speculation, but was an industrious and provident man.

Upon the final hearing, the court, adhering to the opinion expressed in the interlocutory decree, decreed a division of the subject per stirpes, among the testator's five children and four sets of grandchildren including those born since, as well as those born before, his death.

The grandchildren applied by petition to this court for an appeal from the decree; which was allowed.

358 \*Robinson, for the appellants. The decree is directly contrary to the authority of Blackler v. Webb, and a long series of adjudications. In Blackler v. Webb, the testator bequeathed the surplus of his estate equally to his son James and to his son Peter's children, to his daughter Traverse, and to his daughter Webb's children, and to his daughter Mann. At the time of making the will, his son Peter was dead, leaving several children; his daughter Webb was living, but her husband was in low circumstances, having been twice a bankrupt. It is hardly possible that two cases should have actually occurred, more perfectly alike in all material circumstances, than that case and this. It was argued there, as it may be argued here, that it was not likely the testator intended his own children to take no greater share

than each of his grandchildren, and that the construction should be according to the statute of distributions. To which it was answered, that such part of the surplus as is given to the grandchildren must be the same, and have the same construction, as if the testator had particularized each grandchild by name, as John, Thomas &c. when there could be no question but that the grandchildren must have taken per capita and not per stirpes; and as to the statute of distributions, as the testator's daughter Webb was living, her children could take nothing by representation within that statute. Lord Chancellor King at first seemed inclinable that the grandchildren should take per stirpes only; but at length he decreed, that the children and grandchildren (being fourteen in number) should each take per capita, as if all the grandchildren had been named by their respective names; and he said, that the grandchildren could not take according to the statute of distributions, or in allusion thereto, forasmuch as the testator's daughter Webb was living, and her children could not represent her; and to determine that the grandchildren should take per stirpes would be

359 going too much out of the \*will, and contrary to the words, when the meaning of the testator might be according to his words, and that meaning a reasonable and sensible one. The decisions of the English courts, from 1716 to 1822, have followed the principle of Blackler v. Webb, with remarkable uniformity and consistency. Northey v. Strange, (decided in 1716) 1 P. Wms. 340; Richardson v. Spragg, (1718) Id. 433; Warner v. Hone, (1718) Prec. in Chan. 491; Thomas v. Hole, (1728) Ca. Temp. Talb. 251; Lugar v. Harman, (1786) 1 Cox 250; Eccard v. Brooke, (1790) 2 Cox 213; Butler v. Stratton, (1791) 3 Bro. C. C. 367; Longmore v. Broom, (1802) 7 Ves. 124; Horridge v. Ferguson, (1822) Jac. 583; 4 Cond. Eng. Ch. Rep. 273. The case last cited is very remarkable: there, the testatrix bequeathed the residue of her property to such of the children of Thomas, Mary, William, Elizabeth and James Henley, as should be born in lawful wedlock and living at her death, or the issue of such of them as should be married, in equal shares and proportions. At the death of the testatrix, there were two children of Thomas living; he had had a son who had died leaving five children, and a daughter who had died leaving two: these were all living at the death of the testatrix. Mary Henley had one child, William two, and Elizabeth one, all of whom were living at the death of the testatrix, but they had no children. James Henley died before the testatrix, unmarried. It was held, that the word or (in the bequest to the children of the five persons named, or their issue) should be construed to mean and, and the children and grandchildren were let in to take equal shares.

In Virginia, a like case, Tucker &c. v. Tucker's ex'ors, was before the old general court in 1740, and is reported in Barradall's MS. reports, p. 94. The testator bequeathed: "I give all my ready money and outstanding debts, to be equally divided between Robert Tucker, John Tucker,

John Cooke, Robert Cooke, and 360 \*Jacob Walker's children; and in case Mr. Walker's children die before they come of age, that their parts go to the survivor of their children." Walker's children were four in number: their mother who was dead, was related to the testator in equal degree with the Tuckers and Cookes; they were the testator's nephews, and she was his niece. It was insisted, on behalf of Walker's children, that the word equally could not be satisfied unless each legatee had an equal share, and there was no difference between naming, and not naming, the children in the will. The general court, after two arguments, decreed that Walker's children took, collectively, a fifth part among them. But this decree was reversed upon appeal.\* Barradall, in a note, says that the reversal, as he was informed, was chiefly by reason of the word parts [their parts, in the plural] in the limitation over to the survivor of Walker's children. But the decision in *Blackler v. Webb*, though it was not cited in the general court, had been made some years before, and in the authority of that case, no doubt, the true reason of the reversal is to be found. And, lately, the principle of *Blackler v. Webb* has been followed, and established by this court, in *Crow v. Crow*, 1 Leigh 74.

The principle is correctly stated in 2 Powell on Devises, p. 331. That where a devise or bequest is made to a person described as standing in a certain relation to the testator, and to the children of another person standing in the same relation, as to my brother A. and the children of my brother B. the legatees take per capita and not per stirpes: A. only takes a share equal to one of the children of B. though it may be conjectured that the testator had a distribution according to the statute of distributions in his mind. The court will find, on examination of the adjudged cases, that the principle has been applied to cases presenting every variety of

361 \*circumstances; that it has been equally applied, whether the persons whose children were made legatees, were dead or alive, or some dead and some living; and that it has never, in any instance, been controlled by a regard to the number of children which the testator's children, brothers &c. made legatees by description of classes, had at the time, and the number of the other legatees made so by name. And the reason on which the principle is founded, is, that all the persons to whom the bequest extends, are considered as entitled to take in like manner as if they were named; and all are considered as taking directly in their own right, and none by way of representation.

This principle of construction has been so long established, and so uniformly applied, in so many cases, and those so variously circumstanced, that it has become a canon of property and ought not now to be disturbed or departed from. It was wisely established at first; but even if it was not, "it is better the law should be certain than that every judge should speculate upon

it;" so said Lord Eldon in *Sheddon v. Goodrich*, 8 Ves. 497, in reference to a much more questionable doctrine than this; and many other judges have affirmed the same maxim of judicial wisdom.

Macfarland and Leigh for the appellees. The principle of construction adopted in the case of *Blackler v. Webb* and the other cases cited for the appellants, is not a positive rule of law, a canon of property to be arbitrarily applied, whether it conform with testator's intention or not, like some of the rules of construction that have been applied in cases of executory devise, and implied estates tail, where a legal construction and effect have been given to a testator's language, though confessedly different from his actual intention. This case, like most others that arise on wills, presents a question of testamentary intention: and this court has instructed us, that the intention of the testator is the cardinal

362 rule, "the polar star to guide us in the construction of wills; that the intention is to be carried into effect, provided the dispositions intended do not conflict with the law; and that the intention is to be collected from the circumstances of the testator, his estate and family, the situation of the legatees, their relation to and connexion with him, as well as from the words of the will. See the opinions of Pendleton, P., in *Shelton's ex'ors v. Shelton*, 1 Wash. 556, and in *Kennon v. M'Roberts & ux.*, Id. 102.

In the first clause of this testator's will, he authorizes his wife to lend any part of the property before given her (in effect, his whole estate in Virginia) to such of his children as she should think proper, but if she should lend any part to any of them, the part so loaned should at her decease be returned, in order to make fair and equal division as he should thereafter direct. It was his children, then, for whom he meant to provide; it was among his children that he meant afterwards to direct a fair and equal division.

Then, consider the situation of his family and the relation of the several legatees to him. Of his own five children to whom he bequeathed shares of his residuary estate, his son James had four children living at his death; his daughter Mary, seven; his daughter Patsey, nine; his daughter Nancy, five; and his daughter Narcissa, seven: these five children had, then, thirty-two children; and they all might, and some probably would (as two of them in fact did) have more issue. Of his children to whose children he bequeathed shares of the same residuary estate, his son Bedford was dead leaving three children; his son George had four; his daughter Elizabeth, seven: and his daughter Obedience, three; in all eighteen children living at the testator's death; and George, Elizabeth and Obedience, might and probably would have (as two of them in fact had) more issue

363 born during his widow's life, who would be let in \*for shares of the same fund. The intention which the court is asked to impute to the testator, is, that he meant to give to each of his own five children, to aid them in the maintenance of their thirty-two chil-

\*The appeal from the general court was to the king in council.—Note in Original Edition.

dren already in existence, and all the children they should afterwards have, exactly the same portion of his estate, as he gave to each of his eighteen grandchildren, then born, and to each which should be afterwards born, of his other four children. To impute such an intention to the testator, were to violate all probability, and all sense of parental justice by which the testator may fairly be presumed to have been actuated in disposing of his property among his offspring. The estate to be divided was only some 14,600 dollars; and dividing it per capita, there will be thirty-one parts or shares; of which each of the testator's five children legatees (for themselves and their thirty-two children, and still increasing families) will take one share, and each of his twenty-six grandchildren legatees will take one share. A division per capita, professing to rest on the principle of equality, will perpetrate the grossest and most cruel inequality. If the law imperiously commands this, the law, though common sense revolt at it, must be obeyed. But, happily, there is no such arbitrary rule of law, applicable alike to all testamentary dispositions of the kind; applicable as well where it works plainly contrary to, as where it may conform with, the testator's apparent intention.

The cases cited for the appellants, it must be confessed, seem very strong. But in *Blackler v. Webb*, it does not appear, how many children the testator's son James and his daughters Mrs. Traverse and Mrs. Mann, respectively, had, or whether they had any, or how many his daughter Mrs. Webb had, or his son Peter left. For aught that appears in the reported state of the case, Peter might have left some three or four, Mrs. Webb might have had two, and James, Mrs. Traverse and Mrs. Mann none.

Suppose it had appeared, that James, 364 \*Mrs. Traverse and Mrs. Mann, had, living at the testator's death, numerous families, some twenty children in all, and that Peter had left, and Mrs. Webb had, some twelve between them; the case would then have been like this; and the like question would have arisen, which arises here, whether it was possible to imagine, that the testator, without any assignable motive, intended to give to his own three children, to enable them to rear and support their numerous families, exactly the same portion which he gave to each of his grandchildren by his son Peter and daughter Mrs. Webb?

In *Horridge v. Ferguson*, the bequest was to and among "such of the children of Thomas, Mary, William, Elizabeth and James Henley as should be born in wedlock and living at the decease of the testatrix, or the issue of such of them as should be married." If the bequest had been to the issue of such of them as should be dead, the court would have had no doubt, that the issue of such as were dead should take per stirpes, instead of the deceased parents. But the court thought that it was too much to interpret "the issue of such as were married," to mean "the issue of such as were dead;" that, according to the strict grammatical meaning of the words, the issue were to take instead of their parents, in

some event not expressed; which would render the bequest uncertain. Yet the testatrix intended that the issue were to take; and to let them in, it was necessary to construe the word or to mean and. If the word or was taken in its literal sense, such of the children as were married and living at the testatrix's death, would have been cut out entirely. It was necessary, either to understand the word or to mean and, or the word married to mean dead: and the court preferred the former alternative, and then it was clear the issue came in per capita. The court said, "by understanding the word or grammatically, you cannot make sense of the passage without inserting 365 something else; \*but by using that latitude of construction which the court has been in the habit of resorting to, and converting it into and, the whole is made consistent, and all the members of the family are let in." Besides, it seems, the testatrix there was not providing for her own family, and was under no moral duty to have regard to the situation of the legatees in dispensing her bounty among them: she was not providing for Thomas, Mary, William, Elizabeth and James Henley, or for any of them, but for the children and other offspring of them all.

All the English cases that have been cited, are open to similar commentaries. And in respect to them all, it will be found, on examination, that the courts have by no means designed to lay down any fixed inflexible rule of construction, but have adopted that construction, which, upon the circumstances, appeared most just.\*

In *Tucker &c. v. Tucker's ex'ors*, the bequest was of a fund "to be equally divided between Robert Tucker, John Tucker, John Cooke, Robert Cooke" [nephews of the testator] "and Walker's children" [children of his niece]; "and in case Walker's children should die before they came of age, then their parts to go to the survivor." The general court decreed, that Walker's four children should take one fifth part per stirpem. "But note this," says Barradall, "the decree was reversed upon an appeal, and chiefly, as I have been informed, by reason of the word parts in the limitation over to the survivor of Walker's children." Mr. Robinson thinks, that the reason for the reversal is to be found in the authority of *Blackler v. Webb*. It may have been so: but Barradall was likely to be well informed: he himself argued the cause in the general court; and Mr. Jefferson says, he was one "of the most eminent of the 366 \*counsel at that bar."† And the reason on which Barradall was informed the reversal was chiefly grounded, seems a

\*The counsel went into a critical examination of the whole class of cases; but it is not necessary to report their comments on them all.—Note in Original Edition.

†See preface to Jefferson's reports. That small volume contains Barradall's reports of cases which depended on our own colonial laws, but not of the cases which depended on questions of law or equity common to both the mother country and the colony. Therefore, Mr. Jefferson has not included the case of *Tucker &c. v. Tucker's ex'ors*.—Note in Original Edition.

natural and sufficient one: the language of the limitation over shewed that Walker's children were not to take collectively one part, but "parts" (in the plural), and if more than one, then certainly four parts.

Crow v. Crow is certainly not a decisive authority for the appellants. The testator there bequeathed: "The balance of my slaves shall be equally divided among my children, to wit, the heirs of William Crow, namely, William, Robert, Patsey, Nancy, Henry, Ennis and John (heirs of William Crow deceased), Thomas, Moses, and John Crow, and the children of my deceased daughter Massey Jones, and the children of my deceased daughter Sarah Crane; but the children of my daughter Jones are to take only such part as their mother would take if she was alive, that is to say, a child's part, and in like manner the children of my daughter Crane are to take only such part as their mother would take if she was alive, that is to say, a child's part." The question was, whether the seven children of the testator's deceased son William, should take collectively one part among them, or take per capita seven out of twelve parts? The county court and the chancellor held, that they should take per stirpes; this court that they should take per capita; Green, J., dissenting. The case of Blackler v. Webb, and other English cases of the same class, were indeed cited, and the general principle they proceeded upon, stated and approved. Yet this court did not rest its decree, merely or mainly, upon the authority of those cases, but rather on the particular provisions of the will before them: namely, that the testator mentioned the seven children of his son

367 William by name, as his own "children; and then (which was the most influential consideration) he expressly provided, that the children of his daughter Mrs. Jones, and those of his daughter Mrs. Crane, respectively, should take per stirpes, but did not provide, that the children of his son William should likewise take per stirpes; whence the court inferred the intention, that William's children should take per capita. And it was on this peculiar circumstance in that case, that the decision was mainly founded. There is nothing like it in our case.

It is to be remarked, that in all the cases which have been referred to, the bequest was to take effect immediately on the testator's death, when all the legatees named, or described by classes, would be ascertained, and the aliquot parts they were each to take, would of course be also ascertained. But in this case, the division of the fund was postponed till the death or marriage of the testator's widow: his five children named legatees were known, and they were to have their aliquot parts, without regard to their numerous families, or any future increase thereof; but his four children's children who were to take as legatees, could not be known till the widow's death. Upon the principle of a division per capita, the aliquot parts of the testator's own children would be liable to continual diminution, and the aggregate shares of each of three sets of the grandchildren legatees, would be continually increasing. The testator

could not have intended to give his five children such small portions of his estate, and even those small portions subject to eventual and probably great diminution.

Evidence was adduced, by the appellants (it seems), of the value of the lands which had been advanced by the testator, in his lifetime, to his sons James and George, and of the value of the lands devised to his son James, to his two grandsons D. and S. Major, and to his two grandsons Thomas and James Hamlett. If the object for which

this evidence was adduced, was, to 368 shew a "reason why the testator should make a greater provision for the several sets of grandchildren legatees, than for the children legatees, it is nothing to the purpose. For though land was advanced and land devised to the son James, no land was advanced or devised to the daughters Mary, Patsey, Nancy and Narcissa, who are certainly to take an equal share with James, of the residuary estate, whatever that share may be; land had been advanced to George, yet George's children born and to be born before the widow's death, were to have a share or shares of the residuum; and lands were devised to two sons of the testator's son Bedford, and to two sons of his daughter Obedience, and yet they are made legatees of the residuum, along with the other child of Bedford and the other children of Obedience.

Evidence, too, was adduced by the appellants to shew that the testator's five children legatees, were all in easy circumstances, whereas, of the children whose children were made legatees, Bedford had died insolvent; George was living, and was needy and improvident; the husband of his daughter Averett was also needy and improvident; and the husband of his daughter Obedience, though industrious and provident, was supposed to be embarrassed: and the purpose of this evidence was, apparently, to assign a motive which might have induced the testator to make a more liberal provision for the four needy branches of his family, than for the five who were well to do in the world; to give to his children legatees a pittance (a pittance, having regard to their numerous and probably increasing families) and to give the same bounty to each of the children of his other four children, which, as to them, was comparatively a large provision. The circumstance may indeed explain the reason why the testator bequeathed portions of his estate to five of his children, and other portions to his grandchildren instead of their parents; but it shews no motive for making a more liberal provision for the latter than

for the former. He gave portions of 369 his estate to "his five children, because they would probably improve his bounty to the advantage of their families: he gave other portions to the children of his other children, because, if he gave them to their parents, they might probably be wasted by those that were both needy and improvident, and applied to the payment of the debts of those who were embarrassed; so that neither they nor their families would enjoy his bounty. If all his children, or their husbands, had been equally provident and equally unembarr-

rassed, he would have given his estate in equal portions to his nine children; if all had been equally improvident and wasteful, or equally embarrassed with debt, he would have given his estate to the children of them all. A consideration of the situation of the several branches of the testator's family, affords a strong argument that the decree of the circuit superior court conforms with the testator's real intention, and is right.

The President announced the unanimous opinion of the court, that the decree should be affirmed, but the reasons of the opinion were not stated.\*

Decree affirmed.

### 370 \*Wright v. Cohoon.

May, 1841, Richmond.

**Will—Construction—Estate Tail—Case at Bar.**—Testator devises the lands to his son E. W. to him and his heirs forever; and if his son E. W. should die without lawful issue of a son, then to his son H. W.—HELD, E. W. took by the will an estate tail: dissentiente TUCKER, P.

In a writ of right, brought in the circuit superior court of Nansemond, by the plaintiff in error against the defendant, to recover a parcel of 729 acres of land in that county, there was a special verdict stating the case thus:

Stephen Wright, who died early in 1816, by his will devised as follows—"I give to my son Edward Wright the plantation on which I now reside, and also the plantation I bought of James Wilson, to him and his heirs forever—I desire that if my son Edward Wright should die without lawful issue of a son, that the aforesaid lands and plantation to descend and go to my son Henry Wright." The devisee Edward entered upon the lands devised to him; and by deed, dated the 19th August 1819, sold and conveyed the plantation on which the testator resided to Cohoon, the tenant in this action; and under that conveyance Cohoon took and had ever since held, and now claimed. Edward Wright died in January 1832, "without" (in the words of the verdict) "leaving or having had lawful issue of a son or of issue male or female." The

testator's son Henry Wright was the demandant in the action; and the plantation on which the testator resided was the land demanded. The question referred to the court was, whether the demandant or the tenant was entitled?

The circuit superior court held that the law was for the tenant, and gave judgment for him accordingly; to which this court allowed the demandant a supersedeas.

371 \*Robinson, for the plaintiff in error. The testator certainly did not mean what the words of the executory limitation literally import, that if Edward should die without leaving lawful issue of a son of Edward, that is, without a grandchild or remoter descendant sprung from a son of his own, in such event the estate should devolve to the testator's son Henry. Upon that construction, if Edward had died leaving a son, and that son had no issue living at Edward's death, the son of Edward would have taken nothing. And the construction supposes, that the contingency upon which the testator meant to limit the estate to his son Henry, was the failure of great grandchildren of his own, male or female, sprung from a son of his son Edward; an intention so unusual, and indeed so unnatural and absurd, that the court will not impute it to the testator, if by any reasonable construction it can be avoided. The construction is easy and obvious: the superfluous preposition "of" should be struck out of the limitation, and the will should be understood as if it read, "if Edward should die without lawful issue, a son;" meaning, without a son. And then, the effect will be, that Edward took an estate in fee, with an executory devise over to Henry in the event of Edward dying without a son; and as that event must of necessity be ascertained at Edward's death or within nine months after, the executory devise was good in its creation, and Henry is now entitled to the estate. In *Melson v. Cooper*, 4 Leigh 408, the testator devised land to his son W. and his heirs, and if he should die without a son, and not sell the land, then to his son G.; and Carr and Cabell, J., thought, that a general absolute unlimited power to sell the land was plainly given to W. and that, therefore, he took an absolute fee; Tucker, P., doubted. In that case, but for the power to sell the land, the executory devise to G. limited upon the event of W. dying without a son, would have been held good. In *Doe v. Frost*, 3 Barn. & Ald. 546; 5 Eng. C. L. R. 373, the testator, having a son and 372 daughter, \*and the latter having many children, devised lands to his son W. F. and his heirs, and if W. F. should have no children, child or issue, the said estate was, on the decease of W. F. to become the property of the heir at law, subject to such legacies as W. F. might leave by will to the younger branches of his family: and it was held, that it was to be ascertained at the period of the son W. F.'s death, whether the estate devised to him should then vest in him in fee absolutely or pass over to some other person, and that W. F. took under the will an estate in fee, with a good executory devise to the person who, on the happening of the event con-

\*The decree was pronounced at a very late day of the term. The president told the reporter, that a written opinion had been prepared, which was mislaid. It has never been found. Considering the interesting question involved, its doubtfulness, and the weight and apparent application of the authority of *Blackler v. Webb* and the other cases of that class, it is much to be regretted, that the reasons of the decision of the court are lost to the profession. The reporter learned, in conversation with the judges, that, upon the particular circumstances, they thought this testator intended a division of the subject among the legatees per stirpes, and that there was nothing in the authorities which required the court to disregard the intention in this case more than in any other cases of testamentary disposition. He inferred, that the court saw reasons to distinguish this case from those of *Blackler v. Webb*, *Crow v. Crow*, &c. not to deny, or shake, the authority of those adjudications.—Note in Original Edition.

†The principal case is cited in *Tinsley v. Jones*, 18 Gratt. 299. See foot-note to *Callis v. Kemp*, 11 Gratt. 78.

templated by the will (namely, the dying of W. F. without issue living at his death) should be heir at law of the testator. In *Murray v. Addenbrook*, 4 Russ. 407; 3 Cond. Eng. Ch. Rep. 729, the testator having bequeathed an annuity to J. W. for life, gave the annuity, upon the death of the annuitant, to the eldest surviving son of the annuitant's father Sir J. M. and failing issue male of Sir J. M. to his daughters living at the demise of such issue male, in equal proportions; at the death of J. M. the annuitant, his father Sir J. M. had no son living, but he had two daughters: and it was held, that the executory bequest to the daughters of Sir J. M. was well limited, and that in the event that occurred, they were entitled. He cited also *Birthright v. Hall*, 3 Munf. 536, and *Burfoot v. Burfoots*, 2 Leigh 119.

Leigh, for the defendant in error. If the words of the limitation are to be understood to import, that if the testator's son Edward should die without issue sprung from a son of Edward, the estate should devolve to the testator's son Henry, then this would be a devise to Edward in fee, with an executory devise over to Henry limited upon a general failure of issue of any son of Edward; and the executory devise to Henry would be clearly void, as being limited on too remote a contingency.

The jury so understood the words of the limitation; \*for the special verdict find that Edward died "without leaving or having had lawful issue of a son or of issue male or female." But I agree, that that could hardly have been the meaning of the testator in framing this limitation. What, then, is the true import of the words "if my son Edward should die without lawful issue of a son?" I understand the meaning to be, without lawful issue of the son sex; equivalent to without issue male. Among the various functions of the preposition "of" in composition, Dr. Johnson says, it is sometimes used as "noting something that has some particular quality," and sometimes, as "noting species or kind;" but it must be confessed, that the examples he quotes do not exactly, though they do very nearly, indicate the same function of the preposition which I attribute to it in this will. I cannot remember any instance of this form of expression, in the precise sense I ascribe to it here, in any book\* or written instrument; but it is not uncommon in the vernacular speech of Virginia, especially of the people of Eastern Virginia; and was more frequent formerly, within my memory, than it is now. It must be familiar to the judges of this court. Taking it, that by "issue of a son," the testator meant issue of the son sex (which I have no doubt is the true explanation of the words) we have a

plain case: he devised the estate to his son Edward in fee simple, and if he should die without issue of the son sex, without issue male, then over to Henry. And then, it cannot be doubted, that Edward took an estate tail by the will, with a contingent remainder to Henry. But, suppose the testator had said, as Mr. Robinson insists his words ought to be understood,—“if my son Edward should die without lawful issue, a son, the estate shall go to  
374 \*my son Henry”—would the words

“without lawful issue, a son,” import the same meaning as the words “without a son?” I rather think the qualification of the word “issue” by the word “son,” would only serve to explain that by the word “issue” first used, he meant male issue; and then Edward took an estate tail. But grant all that Mr. Robinson asks; take the will as if it read thus—“I give my son Edward the plantation &c. to him and his heirs forever, and if he should die without a son, I give the same to my son Henry”—still, I insist, Edward would take an estate tail. *Robinson v. Miller*, 1 Roll. Abr. 837; 6 Cruise's Dig. 303; *Robinson v. Robinson*, 1 Burr. 38; 3 Bro. P. C. 180; *Tomlin's Ed.*; *Wild's case*, 6 Co. 16, b.; *Cook v. Cook*, 2 Vern. 545; *Merrymans v. Merryman*, 5 Munf. 440. If Edward took an estate tail by the will, with a contingent remainder to Henry, the statute for abolishing entails converted Edward's estate tail into a pure and absolute fee, and cut off Henry's contingent remainder; and Edward's conveyance to Cohoon passed the absolute fee.

CABELL and BROOKE, J., without stating the reasons of their opinion, said the judgment was to be affirmed.\*

TUCKER, P., dissented. After stating the case, he said—It is contended by the counsel for the plaintiff in error, that Edward Wright's conveyance to Cohoon gave him only an estate for Edward's life, and that on the death of Edward, the title devolved to his brother Henry; and in this I think he is sustained by the best established legal principles.

The only difficulty that can exist in the case, arises from the word “of” in the connexion which it has in the clause—“if my son Edward dies without lawful issue of a son.” But this word I take to  
375 have been interpolated, \*either by a slip of the pen or by reason of the testator's want of skill in expressing himself. If we retain the word, the literal interpretation is, if he die without a grandchild, or rather, without a child of a son. But, besides the improbability of the testator's looking to the grandchildren of his son, that is, his own great grandchildren, it is not easy to imagine why he should have used this clumsy phraseology, instead of at once saying if he die without grandchildren. Moreover, if, as the words thus construed imply, he was looking to his own great grandchildren, it is not easy to discover a motive why the great grandchild, which might be

\*An instance has occurred to the reporter's memory since the argument. In Sir Walter Scott's *Peveril of the Peak*, vol. 2. ch. 28, the Duke of Buckingham says to Christian—“Christian, thou art the most barefaced villain that ever breathed.”—“Of a commoner, I may,” retorts Christian; meaning, of the commoner class or order of men, not of the whole society, nobles and commons.—Note in Original Edition.

\*Both Judges told the reporter afterwards, that in any view of the case, they thought the judgment right.—Note in Original Edition.



of either sex conformably with the will, should be the child of a son rather than a daughter. It is contended, indeed, that the words are equivalent to—if he die without male issue; but this cannot be; for it is not by the will prescribed that the lawful issue of a son should be male issue. The words would be as well satisfied by female as by male children of the grandson of the testator. Again, even if we retain these words, Edward's estate could not be an estate tail. For he cannot take, per formam doni, an estate either in tail male or tail general: not tail male, because the lawful issue of his son are not required to be male; nor tail general, because only a son of his could take; a daughter could not. If, then, we rigorously retain this particle "of," the clause would still give no estate tail to Edward. The most it could do, would be to give an estate tail general to his son, if he had one, and if he had none, then to give the estate over to Henry.

I think, however, we are warranted in striking out this word "of;" *Doe v. Micklen*, 6 East 486; *Smart v. Clarke*, 3 Russ. 365; 3 Cond. Eng. Ch. Rep. 437. And then the limitation is to Edward and his heirs, and if he die without a son, then over to Henry. Taking it thus, there is a clear executory devise limited upon a fee simple. The first words, standing alone,

would give a fee, but they are clogged and limited by the subsequent words, if he die without a son then over to Henry in fee. It is a clear limitation of a fee upon a fee, by way of executory devise, in the event of the first taker dying without a son. As where a testator devised to his mother for life, remainder to his brother in fee, but if his brother's wife then encent had a son, then to him in fee: a son was born: and this held a good executory devise to the son; *Dyer* 127, a. in margin. So, where lands were devised to T. and his heirs forever, but if he died without issue, living W. then to W. and his heirs; here, the words without issue, living W. were considered as constituting a good contingency, and the limitation over was held good. *Pells v. Brown*, Cro. Jac. 590. So, where lands were devised to E. H. forever, that is, if he have a son or sons who shall attain 21, but if he die without son or sons to inherit, then the testator's son W. H. to inherit: held, that E. H. took an estate in fee, subject to an executory devise over in the event of his dying without a son who should attain 21. *Heath v. Heath*, 1 Bro. C. C. 147. So, devise to S. S. and her heirs, but if she should die leaving no child or children or lawful issue of her body living at the time of her death, then to T. B. and his heirs: held, that S. S. had a fee subject to an executory devise over to T. B. upon the contingency of her dying without child &c. *Doe v. Wetton*, 2 Bos. & Pull. 324; *Right v. Day*, 16 East 67. So, a devise to A. and his heirs forever, but if he died leaving no son, then to such son of his executor as he the executor should nominate, and if no such son, then to B. was held a good executory devise to B. *Fairfax v. Heron*, Prec. in Chan. 67; *Butl. Fearn* 431; 6

*Cruise's Dig.* 466; 4 Bac. Abr. Legacies and Devises; I. p. 296. From these cases, it seems clear, that if the words of this will are equivalent to—if he die without a son, the devise over to Henry was a good executory devise.

The cases cited for the defendant in error, seem to me entirely inapplicable. Thus, in *Robinson v. Miller*, \*the devise was to the wife for life, and after to the testator's son, without words of inheritance, and if his son died without issue, having no son, then over: adjudged an estate tail; and properly, for there being no words of inheritance in the devise to the son, his children could never get the estate, unless it was construed to be an estate tail, though it was clear the testator postponed the devise over with a direct reference to benefiting his son's issue. So of *Wild's* case: it was held, that a devise to A. and his children, he having then no children, created an estate tail, because if A. had but a life estate, the children could never take any thing, whereas it was clearly the intention of the testator that they should be benefited by the devise. See 6 *Cruise's Dig.* 299. The principle stated in 2 Vern. 545, is but a reiteration of that in *Wild's* case, and *Merrymans v. Merryman*, 5 Munf. 440, is of the same character. The celebrated case of *Robinson v. Robinson*, 1 Burr. 38, was a devise for life and no longer to L. H.; then to such son as he should have lawfully to be begotten (without words of inheritance), and for default of such issue, then over. L. H. took an estate tail, since the testator's manifest intent was to benefit the whole line of his issue, for the estate was not to go over until they failed, and if L. H. took but a life estate, his descendants could not receive the benefit intended for them. In these cases it is observable, that the first taker having no inheritance unless an estate tail was created, the son, children, or other descendants, could never come into any enjoyment of the estate. The estate tail, therefore, was implied to effectuate the intent of the testator in favor of the son, children or issue. But, in the case at bar, Edward Wright took a fee by the first words, and his son of course would take the estate unless he aliened it. In this it is distinguished from the cases cited.

Judgment affirmed.

### 378 \*Robinson & Meem v. Burks.

October, 1841. Richmond.

**Assumpsit—Account—Sufficiency under Statute.\*—**Under the statute, 1 Rev. Code, ch. 128, §86, an account filed with declaration in assumpsit for goods sold, charging goods sold "per account rendered," with proof that the account was rendered, is sufficient.

*Robinson & Meem* surviving partners of *M'Kee, Robinson & Co.* brought assumpsit against *Burks*, in the circuit superior court of Lynchburg. The declaration contained four counts: 1. indebitatus assumpsit for the price of goods sold and delivered;

\*See monographic note on "Assumpsit" appended to *Kennaird v. Jones*, 9 Gratt. 183.



2. the same, on quantum valebant; 3. the same, for money lent and advanced; and 4. the same, on an account stated. Plea, the general issue. At the trial, the plaintiffs exhibited an account, which had been filed with the declaration, commencing with these words: "1828, July 12. To amount goods per bill rendered and due 1st October 1828—76 dollars. To amount goods per bill rendered to yourself—23 dollars." And then followed several items, shewing the amount claimed, which was 107 dollars. The plaintiffs also offered in evidence a notice to the defendant requiring him to produce the account rendered; and offered to introduce a witness to prove, that the goods, for which the two items above mentioned were charged, were actually sold, and delivered to the defendant, and accounts thereof actually delivered to him; and that the particulars were not entered on the plaintiffs' books, but only the amounts were charged thereon, in the form in which they were charged in the account filed with the declaration. The defendant objected to the introduction of the evidence, and the court excluded it; to which the plaintiffs excepted. There was a verdict and judgment for the defendant. The plaintiffs applied to this court for a supersedeas, which was allowed.

379 \*Garland for plaintiffs in error.

The opinion of the circuit superior court was founded on the statute, 1 Rev. Code, ch. 128, § 86, p. 510, and was a mistake of the statute; *Moore v. Mauro*, 4 Rand. 488.

The attorney general, for the defendant.

PER CURIAM. The evidence was improperly excluded. The judgment is to be reversed, and the cause remanded to the circuit superior court, for a new trial; in which the evidence, which was offered at the former trial and excluded, if again offered is to be admitted.

### J. & H. Brien v. Pittman & Co.

November, 1841, Richmond.

**Foreign Attachment in Equity—Affidavit of Nonresidence.**—In proceeding by foreign attachment in chancery, HELD, error to decree for plaintiff without affidavit of defendant's non-residence.

**Same—Judicial Sale—Lands—Bond from Plaintiff.**—Error, to decree sale of lands, without requiring bond with surety from plaintiff, in double the reported value of the lands, with condition for performing future orders or decrees:

\***Foreign Attachment in Equity—Issuance of Subpoena—Previous Affidavit of Nonresidence.**—It was held in *Moore v. Holt*, 10 Gratt. 284, that it is not necessary that the plaintiff in a foreign attachment in equity shall file with the clerk an affidavit of the nonresidence of his debtor before the process is issued, in order to constitute it, with the endorsement in the nature of an attachment, a lien when served; and JUDGE LEE, who delivered the opinion of the court in *Moore v. Holt*, said, on page 288, that the case of *Brien v. Pittman*, 12 Leigh 379, does not decide that the affidavit must be filed before the subpoena can issue. He says: "The court in that case held that it was error in the court below to proceed to decree against absentees without an affidavit of nonresidence, or that upon enquiry at their usual places of abode, they could not be found.

**Same—Same—Same—Terms of Sale.**—Error, to decree a sale of lands for cash:

**Same—Same—Same—Payment to Creditor—Conveyance to Purchaser.**—Error, to direct payment of money to creditor and conveyance of land to the purchaser, before the sale is reported and confirmed.

This was a foreign attachment in chancery, sued out of the circuit superior court of Jefferson, by E. Pittman & Co. against John & Henry Brien, the absent debtors, and Brown, the garnishee. The bill alleged, that John & Henry Brien owed Pittman & Co. the sum of 1599 dollars with interest &c. and were not residents of Virginia; that they owned land in Jefferson called the Ore Banks, and another piece of land on which Brenner's ferry was located, and they had considerable effects in the hands of Brown; therefore, the bill prayed \*a decree for the debt due to the plaintiffs; and that the lands and the effects of the absent defendants might be attached and made subject to the claim. But there was no affidavit (as the statute, 1 Rev. Code, ch. 123, § 1, p. 474, requires) that the defendants John & Henry Brien were absent from the commonwealth, or that upon enquiry at their usual place of abode they could not be found so as to be served with process.

The process was served on Brown, the garnishee; and the order of publication against John & Henry Brien having been published, and proof of the debt claimed by Pittman & Co. against John & Henry Brien being offered; the court proceeded to decree, that John & Henry Brien should pay Pittman & Co. the sum of 1599 dollars with interest &c. and costs, and that Brown should out of their funds and effects in his hands pay the same; and the court appointed three commissioners, who or any two, being first sworn, should value the lands of John & Henry Brien in Jefferson, and also enquire what funds in personal estate they had within the power of the court, out of which the plaintiffs might have satisfaction of their claim.

The report being accordingly made, shewing that Brown had goods in his hands of John & Henry Brien of 800 or 1000 dollars value, and six horses and six carts valued at about 500 dollars, and that their land at the Ore Banks was worth about 5500 dollars, and the other parcel at Brenner's ferry

Nothing is intimated of any necessity to file this affidavit before the subpoena issues; and it is expressly held that the answer of a defendant admitting that he was a nonresident would render any affidavit unnecessary."

The principal case is cited to the same effect in *Pulliam v. Aler*, 15 Gratt. 69; *Chapman v. Railroad Co.*, 26 W. Va. 314. See foot-note to *McKim v. Fulton*, 6 Call 106.

†**Judicial Sales—Real Property—Terms of Sale.**—The principal case is cited in *Pairo v. Bethell*, 75 Va. 833, as authority for the general rule, that real property of value should be sold on a reasonable credit, unless under peculiar circumstances, and the circumstances to take the case out of the general rule should appear by the record. See *Kyles v. Tait*, 6 Gratt. 45, and note; and monographic note on "Judicial Sales" appended to *Walker v. Page*, 31 Gratt. 636.

was worth about 500 dollars; the court decreed, that, unless the absent defendants should pay the debt decreed the plaintiffs before the day of sale thereafter appointed, John M'Endree, who was appointed a commissioner for the purpose, should sell the personal property, and, after satisfying two prior claims, should apply the residue to the payment of the claim here decreed; and, after exhausting the proceeds of the sale of the personalty, that

381 he should sell the said two parcels of land, for cash, to the \*highest bidder, after advertising the time, place and terms of sale for four weeks successively in one of the newspapers printed in the county of Jefferson. And the court ordered the commissioner to pay the plaintiffs out of the proceeds of the personal property, as far as it would reach, so much of the debt, interest and costs as the same would suffice to pay; and that he should deliver the personal property to the purchasers, and make a deed to the purchaser of the realty, and make a report to the court. But it was ordered, that the plaintiffs should not have the benefit of this decree for the payment of the debt claimed by them until they should have entered into bond with surety, in the clerk's office of the court, in a penalty equal to double the amount of the sum decreed to be paid, with such condition as the law requires in the case of absent defendants.

Pittman & Co. executed the bond with surety. And shortly after, John Brien appeared and obtained leave to file his answer, upon giving security for costs, so as nowise to withdraw the property attached from the lien of the attachment. This answer stated, that the debt was justly due Pittman & Co. and that he himself was not an inhabitant—and that the lands in Jefferson were held by the defendants John and Henry (who owned four parts out of six) and Luke Brien (who owned the other two parts of six). And thereupon, the court ordered the commissioner to make sale only of the undivided interests of John & Henry Brien in the lands.

Before the commissioner proceeded to execute the decree, the Briens applied by petition to this court for an appeal from the decree; which was allowed.

The cause was argued here by Berry for the appellants, and Robinson for the appellees.

ALLEN, J., delivered the opinion of the court.—That there was error in proceeding to decree against the absentees,

382 \*without affidavit that the said defendants were out of the country, or that upon enquiry at their usual places of abode, they could not be found, so as to be served with process. The proceeding by foreign attachment being an innovation upon the common law, and liable to much abuse, the mode of proceeding prescribed by the statute should be adhered to. Although such affidavit as to the defendant John Brien, has been rendered unnecessary by his answer, admitting he is not an inhabitant of the commonwealth, that answer does not admit the non-residence of the other defendant, and would not be evidence against him as to this fact if it did.

The court is further of opinion, that it was error to decree a sale of the lands until bond with good security in double the value of the lands had been filed. The law which requires a valuation of the land by discreet commissioners acting under oath, was intended to furnish the court with the evidence by which complete indemnity could be provided for the defendant, in the event of the decree being afterwards set aside. The measure of such indemnity is not the amount of the debt decreed, but the value of the land sold and possibly sacrificed. Though where the debt is small and the property valuable, it is in the power of, and may be proper for, the court to direct the sale of one or more of separate tracts, or of a portion of an entire tract, if a portion can be sold without material injury to the residue, of which fact the court should be satisfied; yet, in all cases, bond should be required in double the value of the land actually decreed to be sold.

The court is further of opinion, that under the discretion vested by our statute in the courts, as a general rule, real property of value should be sold on a reasonable credit, unless under very peculiar circumstances; and that nothing appearing in the record to take this case out of the general rule, it was error to decree a sale for cash.

383 \*The court is further of opinion, that it was irregular to direct payment of the money to the creditor, and the execution of a deed to the purchaser, in the decree for sale. Before such direction is given, a report of the sale should be made, to enable the parties interested to shew cause against it, and that the court may see that its decree has been properly executed. Payment of the proceeds to the creditor, and the execution of a deed to the purchaser, should be decreed only after the confirmation of the report of sale.

Therefore, decree reversed with costs, and cause remanded &c.

### Dabney v. Catlett.

November, 1841, Richmond.

(Absent TUCKER, P., and BROOKE, J.)

**Indemnifying Bond—Provision for Protection of Purchasers Omitted\*—Case at Bar.**—Sheriff on seizure of chattels under a f. fa. takes indemnifying bond under statute 1 Rev. Code, ch. 184, § 25, with condition to save sheriff harmless, and to pay and satisfy any person claiming title to the property, all damages he may sustain by the seizure and sale; omitting to provide also, as required by the statute of 1828, Supp. to Rev. Code, ch. 315, § 1, that the obligors shall warrant the title of the property sold under the execution to the purchaser thereof at the sheriff's sale: HELD, the bond is defective and not good as a statutory bond; but it is good at common law, and the sheriff may maintain an action on it for indemnity against damages recovered against him by the owner of the property seized and sold.

**\*Indemnifying Bond—Provision for Protection of Purchasers Omitted—Syllabus in Principal Case Disapproved.**—The syllabus in the principal case, in so far as it states that an indemnifying bond which does not contain the additional statutory requirement for the protection of the purchaser of the property

Debt by Dabney, late sheriff of Gloucester, against Catlett, in the circuit superior court of that county, for 300 dollars, the penalty of a bond with collateral condition. \*The bond was dated in 1837, and was executed by Catlett and one Howlett since dead. The declaration counted on and made profert of the bond in the usual form, and set out the condition in hæc verba: "The condition of the above obligation is such, that whereas J. Catlett assignee of J. Howlett hath sued out of the circuit superior court of Gloucester, two writs of fi. fa. against the goods &c. of J. Dutton upon judgments obtained in the said court, which writs with the legal costs attending the same amount to 191 dollars, and whereas T. Dabney, sheriff &c. hath levied the same on the following property, [specifying, among sundry other chattels, one grey mare] and a doubt arising whether the right of the said property is in the said Dutton, the sheriff hath required of the said Catlett bond to indemnify him pursuant to the statute in such case made and provided; now, if the above bound Catlett and Howlett shall indemnify the said Dabney against all damages which he may sustain in consequence of the seizure and sale of the property on which the said execution has been levied, and moreover shall pay and satisfy to any person or persons claiming title to said property, all damages which such person or persons may sustain in consequence of such seizure or sale, then the said obligation to be void." And the declaration assigned the following breach of the condition, that the right

of the property in the grey mare was in one Booker, and the same was not liable to seizure or sale under the executions; and that Booker, in an action against Dabney the sheriff, recovered 62 dollars with interest &c. for damages by Booker sustained by reason of the seizure and sale of a grey mare part of the property so levied on and sold, and 32 dollars costs of suit, as would appear by the record of that suit; and that Dabney had paid Booker the full amount of the judgment so by him recovered, which neither the said Catlett nor the said Howlett, nor the representatives of the said Howlett, or either of them, have paid \*to the said Dabney, though thereto often requested. By reason whereof action accrued to the said Dabney to demand and have of the said Catlett the said sum of 300 dollars (the penalty of the bond). Nevertheless &c.

Catlett took oyer of the bond and condition, and demurred generally to the declaration.

The court held that the law upon the demurrer was for the defendant Catlett, and gave him judgment: to which this court allowed Dabney a supersedeas.

Stanard, for plaintiff in error. The circuit superior court erred in sustaining the demurrer. The bond was not a good statutory bond under the statute of 1819, 1 Rev. Code, ch. 134, § 25, p. 533-4, as amended by the statute of 1828, Supp. to Rev. Code, ch. 215, § 1, p. 272, which requires, that the condition of every indemnifying bond that should afterwards be taken by a sheriff in virtue of the former statute, shall con-

is not a good statutory bond for any purpose, and therefore could furnish no protection to the sheriff against the action of the claimant of the property, is wholly unauthorized by the action of the court, and is expressly repudiated by JUDGE ALLEN in *Aylett v. Roane*, 1 Gratt. 284, where he says: "It would seem from the abstract of the reporter, that it is supposed this court has decided in the case of *Dabney v. Catlett*, 12 Leigh 388, that a bond which does not contain this additional covenant, is not a good statutory bond for any purpose; and therefore could furnish no protection to the sheriff against the action of the claimant of the property. That was a proposition insisted on by the appellant's counsel in that case, for the purpose of his argument; but no such decision was made, or intended to be made by the court. That was a suit instituted by the sheriff, upon a bond of indemnity similar to the one under consideration. The declaration after setting out the condition, charged that the claimant of the property had sued the sheriff, and recovered damages from him; which he was seeking to recover from the obligors. There was a general demurrer to the declaration, which was sustained by the court below. This court reversed the judgment, overruled the demurrer, and remanded the case. No reasons were given, but it is apparent that, whether the bond was good as a statutory, or a common law bond, the demurrer should have been overruled. If good as a statutory bond, as I think it was, so far as the claimant of the property was concerned, that did not deprive the sheriff of his remedy on it. The law permitting the sheriff to require a bond of indemnity, was in ease of the sheriff; to relieve him from the responsibility which at common law rested on him. It is to be made payable to him, and is to contain a provision for his indemnity.

Unless the act had contained a provision, authorizing a third person to put it in suit in the name of the sheriff, he alone could have sued upon it.

"When he has taken a good bond, the law protects him from the action of the party claiming the property, unless the securities in the bond become insolvent. But this is matter of defence, which the sheriff may rely on or not, at his election; and his failure to set it up in a suit against him by the claimant of the property, does not change or diminish the liability of the obligors in the bond. They are bound to indemnify the sheriff, as well as to pay the claimant of the property any damages he may sustain. When the claimant recovers his damages from the sheriff, they are damages sustained by the sheriff in consequence of the seizure and sale of the property, for which the obligors are bound to indemnify him. Any other construction would render the condition to indemnify the sheriff himself supererogatory. The court, therefore, without entering into the question whether the bond was a good statutory or common law bond, because it did not arise in the case, held that the action could be maintained." This language is also quoted with approval in *Morgan v. Hale*, 12 W. Va. 719, 720, where the court, in addition, says: "In the bond in *Aylett v. Roane*, there was precisely the same omission as in the case of *Dabney v. Catlett*, and in the latter case, the court in its opinion, came unanimously to the conclusion that as to the claimant of the property the bond was good under the statute notwithstanding the omission. In neither of the cases did the court decide that the bond was good at common law." The principal case is cited in *Duval v. Malone*, 14 Gratt. 27. See monographic note on "Statutory Bonds" appended to *Goolsby v. Strother*, 21 Gratt. 107.

tain a further provision "that the obligors shall warrant and defend to the purchaser or purchasers of the property such estate or interest therein as shall be sold under the execution or other process;" and the condition of the bond in this case omitting the additional provision required by the last statute, the sheriff could not defend himself against the action of Booker the owner of the property, by pleading, under the 27th section of the statute of 1819, that he had taken and returned an indemnifying bond. But though the bond was not good as a statutory bond, it was a good common law bond, and bound the obligors to indemnify the sheriff, and therefore he was entitled to his action. *Hewlett v. Chamberlayne*, 1 Wash. 367; *Johnstons v. Meriwether*, 3 Call 523; *Beale v. Downman*, 1 Call 249; *Crawford v. Jarrett's adm'r*, 2 Leigh 630.

The attorney general, contra. The action against the sheriff for seizing and selling the property under Catlett's executions, was brought by Booker, the owner  
386 \*of the property so seized and sold.

The indemnifying bond taken by the sheriff was a perfectly good statutory bond so far as Booker the owner was concerned, though it omitted the provision in favour of the purchaser at the sheriff's sale required by the statute of 1828. Therefore, no action lay for Booker the owner against the sheriff for seizing and selling his property: an action lay for him, on the indemnifying bond, against Catlett and his surety, and it may yet be prosecuted, under the statute of 1819, 1 Rev. Code, ch. 134, § 26, 27, p. 534. In assigning the breach the declaration does not positively aver, that there was a seizure and sale of the property, but only that the property was not liable to seizure and sale under the executions.

Stanard. The breach was assigned in the very words of the condition; and that was sufficient. *Craighill & al. v. Page, governor &c.*, 2 Hen. & Munf. 446.

PER CURIAM. The judgment is erroneous, and is reversed with costs. And this court proceeding to render such judgment as the circuit superior court ought to have given, is of opinion, that the matters of law arising on the defendant's demurrer to the plaintiff's declaration are for the plaintiff &c. Therefore, it is further considered that the demurrer be overruled. And ordered, that the cause be remanded to the circuit superior court, for an enquiry of damages, unless the defendant shall plead to issue.

Judgment reversed.

387 \*The Bank of Virginia and May v. Boisseau & Others.\*

November, 1841. Richmond.

Subrogation†—Endorsers—Trust Deed to Indemnify First Endorser—Case at Bar.—A deed of trust is executed to indemnify a first endorser at bank from

\*The principal case is cited in *Hauser v. King*, 76 Va. 735; *Moore v. Johnson*, 34 W. Va. 678, 12 S. E. Rep. 920. The case of *Hopewell v. Bank of Cumberland*, 10 Leigh 206, was followed in the principal case.

†See monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

loss: but tho' the note is not paid, the first endorser is exempted from liability by the failure of the bank to give him due notice of dishonour: *H&L*, neither the bank nor any subsequent endorser, has any claim to rank as creditor on the trust fund under the deed of trust, by subrogation to the first endorser, who was thereby indemnified, but who never sustained any loss.

On the 19th March 1829, Edward Boisseau executed a deed of trust to John Goode, conveying certain property for the indemnification of Peter Boisseau and others. The deed recited, that Peter stood bound as endorser for Edward on two negotiable notes that had been discounted by the bank of Virginia at Petersburg, one for the sum of 4500 dollars, and the other for 1200 dollars, both of which had been executed in January preceding, and were renewable according to the course of business in said bank at the end of every sixty days, at the pleasure of the president and directors of the bank; and that Peter was bound as surety of Edward in two administration bonds, one for the due administration of the estate of Archibald Baugh, and the other for the due administration of the estate of Daniel Boisseau, and was bound as surety in a forthcoming bond entered into on an execution sued out by P. Martin assignee of William Gasquet against the said Edward, and was bound as surety for the said Edward in several other bonds and notes, the amount whereof was not then recollected; and that Edward was indebted to Peter, by note or single bill dated the 2nd May 1827, in the sum of 250 dollars, and to Priscilla Boisseau, by note or bill bearing even date with the deed, in

388 the \*sum of 360 dollars, and was bound to pay her the sum of 66 dollars 66 cents annually during her life; and that Edward was desirous to indemnify Peter and save him harmless from all loss and damage by reason of his endorsements as aforesaid, or any other he might make for the purpose of continuing the accommodation of the bank to Edward for the said two sums of money, or any part of them, or of either of them, and to secure Peter the said 250 dollars with all interest due or to become due thereon, and to secure the said Priscilla her annuity aforesaid, and 360 dollars, with all interest which should become due thereon. Therefore, the property, which included all the estate of Edward, was conveyed to the trustee Goode. Upon trust, that whenever Peter should be compelled or called upon to pay all or any part of any note or obligation in which he was bound as surety for Edward, or whenever Edward should make default in the payment of the 250 dollars with interest thereon to Peter, or of the 360 dollars with interest, or the annuity of 66 dollars 66 cents, to Priscilla, it should be lawful for Goode, the trustee, if required by Peter or by Priscilla, to make sale of the subject, or any part thereof, at such time and place as he should think best, after advertising &c. and out of the proceeds of such sales, to pay and sat-

isfy all charges of sale, and then to pay and satisfy to Peter, his executors, administrators and assigns, all and every sum or sums of money which he should have been compelled to pay as endorser or surety of Edward, and every sum of money with all interest that should be due to Peter or Priscilla, or to their respective executors, administrators and assigns; and so the said trustee should proceed to make sale of the said property, real and personal, and

389 \*apply the proceeds until Peter should be fully saved harmless as endorser and surety as aforesaid, and until Peter and Priscilla should be fully satisfied and paid all money which should be due them. And if the trustee should be compelled to make sales of the property during the lifetime of Priscilla, he should have power to vest so much of the proceeds of sale in productive stock, or to put out so much at interest, as would suffice to pay her the annuity of 66 dollars 66 cents for her life, and the principal to be applied after her death to the purposes of this trust. And the surplus of the said property, or of the proceeds of sale thereof, after the indemnification of Peter as endorser and surety, and after payment to him and Priscilla of the debts and annuity aforesaid, should be applied to indemnify Richard Perry as surety of Edward Boisseau administrator of Archibald Baugh deceased, and if any surplus should then remain, the same should be applied to indemnify John Winston Jones, Thomas Howlett and William Hamlin, the other sureties of Edward administrator of Daniel Boisseau deceased.

In fact, Peter Boisseau was the first and John F. May the second endorser of a note for 4500 dollars, and Peter was the first and one Robert Archer was the second endorser of a note for 1200 dollars, both discounted at the bank of Virginia for the accommodation of Edward Boisseau; and these notes becoming due on the 22nd January 1829, were not renewed, and the first note was protested, and the other was held by the bank, but no notice was given to Peter Boisseau of the dishonour of either; so that he was held exempt from all liability for the contents of either. See *May v. Boisseau*, and *Bank of Virginia v. Same*, 8 Leigh 164. Peter Boisseau, therefore, never had any claim for indemnification against those two notes under the deed of trust of the 19th March 1829; he suffered no loss by reason of either of them.

390 \*The president and directors of the bank of Virginia and John F. May exhibited their bill in the circuit superior court of Henrico, against the representative of Edward Boisseau, Peter Boisseau, Priscilla Boisseau, Richard Perry, John W. Jones, Thomas Howlett and William Hamlin, and Goode the trustee, setting out the deed of trust of March 1829, and claiming that they had a right to rank on the trust subject for satisfaction of the two notes for 4500 dollars and 1200 dollars, on which Peter had been bound as endorser, but had been held exempt from liability by reason of the neglect to give him notice of the dishonour thereof. The defendants insisted, and the court held, that the plaintiffs had no such right. The plaintiffs ap-

plied to this court for an appeal from the decree; which was allowed.

Macfarland, for the appellants, and Leigh, for the appellees, submitted the case, upon the authority of *Hopewell & others v. Bank of Cumberland*, 10 Leigh 206.

PER CURIAM. The decree must be affirmed.

### 391 \*Doane and Others v. Keating.

November, 1841, Richmond.

[37 Am. Dec. 671.]

(Absent BROOKE, J.)

**General Average—Deck Cargo—Parol Evidence.**—One ships goods from New York to Norfolk, to be stowed on deck; but the bill of lading is in the usual form, not mentioning that the shipment is of a deck load: in an action by the shipper against the shipowner for average, parol evidence that the goods were to be stowed on deck is admissible.

**Same—Same—Jettison.**—In case of jettison of a deck load, to avoid dangers of the seas, the owner of the goods is not entitled to the benefit of general average.

The appellant Doane, Sturges and Buckley, were owners of the schooner *Empire*, which was one of a line of packets running between New York and Norfolk.

In October 1837 Keating shipped at New York for Norfolk 25 hogsheads of molasses to be stowed on deck, and bills of lading were signed by the master, in the following words: "Shipped in good order by Thomas Keating, on board the schooner *Empire*, whereof is master for the present voyage, now lying in the port of New York and bound for Norfolk, twenty hogsheads molasses, being marked and numbered as per margin, which are to be delivered in like good order and condition at the aforesaid port of Norfolk (the dangers of the seas only excepted) to Merit Jordan or his assigns, he or they paying freight for the said thirty-five dollars as customary, with primage and average accustomed. In witness whereof, the master or purser of said vessel hath affirmed to bills of lading, all of this tenor or date, one of which being accomplished the other to stand void. Dated at New York the 15th October 1837. (Signed) J. P. M'Math."

The vessel sailed from New York on the 21st October, and did not arrive at Norfolk till the 6th November. In

392 \*the progress of the voyage, the vessel being off cape Henry, a violent storm came on, which blew her off to cape Hatteras; and while she was scudding before the wind, a consultation was held as to what was to be done, and it was recommended that part of the deck load should be staved. The master gave orders that it should be done; and 23 of the 25 hogsheads of molasses were accordingly staved. This course was necessary to save the vessel, the cargo and the crew; the storm could not be weathered without doing it. On the arrival at Norfolk, the cargo was delivered, Keating making no claim, and giving no notice not to deliver the cargo.

In December 1837, Keating sued out of the circuit superior court of Norfolk, a sub-

\*See 14 Am. & Eng. Enc. Law (2d Ed.) 968.

poena in chancery against Doane, Sturges and Buckley, the ship owners, M'Math the master, and Rowland the agent of the owners, with an endorsement of foreign attachment. The ground of claim stated in the bill, was, that the master did not take due and proper care of the 25 hogsheads of molasses, but failed to deliver 23 hogsheads of the same. In consequence of which, the ship owners being non-residents, the bill sought to subject any property of theirs, in the hands of the home defendants, to satisfy the value of the 23 hogsheads.

Rowland answered, that he had no property of the ship owners in his hands; and M'Math, that the schooner was in his possession as master, and was within the jurisdiction of the court. The ship owners answered; that due and proper care was taken of the molasses: that during the voyage, a violent storm made it necessary for the safety of the vessel, the cargo, and all on board, that the molasses, which was a deck load, should be thrown overboard or staved, and so it was owing to the act of God, that the 23 hogsheads were staved and remained undelivered; and they denied that they were responsible for goods shipped on deck, as in this instance the molasses was, and staved in consequence of perils  
393 of the sea, insisting that where a deck load is so lost by the perils of the sea, without any want of care on the part of the master, the loss must fall on the shipper and not on the ship owners.

It was clearly proved, that Sturges, one of the owners, reluctantly, and at the earnest request of Keating, agreed to take the molasses as a deck load, and Keating saw it being stowed on deck: that the bill of lading was signed, in its present form, by the master, without reading it: that the freight of 35 dollars, was one dollar per hoghead from New York to Norfolk, and ten dollars from Norfolk to Gosport where the molasses was to be delivered, which was the usual freight for a deck load; whereas, had it been stowed under hatches, the freight would have been one dollar and twenty-five cents per hoghead: that Keating arrived at Norfolk before the vessel, and stated in conversation with several persons that his molasses was on deck, and he expected it would be lost; and he told one witness, that he thought the 23 hogsheads should come under general average; the witness told him he thought not, and offered to go with him to Mr. Cowper, the secretary of the marine insurance company; Mr. Cowper, upon Keating's state of facts, remarked that a deck load was not entitled to the benefit of general average; upon which Keating observed that the loss of the molasses would be his loss.

There was proof, on the other hand, to shew that the vessel was employed in the coasting trade between New York and Norfolk, and was so constructed as to carry deck loads, and was in the habit of carrying such loads.

On the 29th November 1838, the court ordered, that the ship owners should give bond with surety in the penalty of 2000 dollars, with condition that the vessel should be forthcoming to pay and satisfy the decree, or that they should pay and satisfy

the sum that should be decreed to Keating; and on failure to give such bond, the sergeant of Norfolk borough was directed  
394 to take \*possession of the vessel, and deliver her in the possession of Keating upon his executing a like bond, and on his failure to give such bond, to retain the vessel till further order. And the cause coming on for hearing, the court decreed, that the ship owners should render an account of the value of 23 hogsheads of molasses at the price such molasses would have been worth at Norfolk at the time of the vessel's arrival there, and of the several values of all the goods and merchandize shipped on board the schooner which arrived, distinguishing the several shippers and the respective values of their goods and merchandize, and also an account of the value of the schooner, her tackle, apparel and furniture; and then, the commissioner was directed to state an account upon the principle of general average and contribution; ascertaining the amount due Keating in consequence of the loss of his molasses. On the next day, the parties filed an account to be received and taken as the accounts which the commissioner was to state: and the ship owners consenting, that the sum of 1258 dollars should be taken as the true amount due to Keating (if any thing was due) after ascertaining the contributory share which the several owners of the schooner and of her cargo should pay towards his loss, and deducting such contributory share from the value of Keating's molasses which was staved for the preservation of the schooner and her cargo; and it appearing that the ship owners delivered all the cargo that arrived safe in the vessel, to the respective consignees thereof, without settling the average loss, or demanding payment of the several contributory shares; the court decreed, that the ship owners should pay Keating the said sum of 1258 dollars, with interest from the 1st January 1838 till paid, and the costs of suit; and that, unless payment should be made within sixty days from the adjournment of the court, the sergeant should make sale of the schooner, her tackle, apparel and furniture, &c.

395 \*From this decree, Doane, Sturges and Buckley, by petition to this court, prayed an appeal; which was allowed.

Robinson, for the appellants, maintained, that goods shipped on deck, if lost by jettison, were not entitled to the benefit of general average; for they, by their situation, increased the difficulty of the navigation, and were peculiarly exposed to peril. 3 Kent's Comm. 240; citing *Smith v. Wright*, 1 Caines's Rep. 43; *Lenox v. United Ins. Company*, 3 Johns. Cas. 178; *Boulay-Paty*, tom. IV. 566; *Code de Commerce*, art. 421; *Dodge v. Bartol*, 5 Greenl. 286; *The brig Thaddeus*, 4 Mart. Louis. Rep. 582; to which may be added *Barber v. Brace*, 5 Conn. Rep. 9. In *Abbott on Shipping*, p. 344, it was said, that "the French ordinance, in express terms, excluded from the benefit of general average, goods stowed on the deck of the ship; and the same rule prevailed in the practice" of England. If, however, there could be any doubt on the question as a general one, there could be

none as respects this particular case; for the parties here must be considered as having contracted with a view to the law of New York; as to which the cases of *Smith v. Wright* and *Lenox v. United Ins. Company* were decisive.

Lyons and Standard for the appellees, argued, that the bill of lading shewed a shipment in the ordinary manner, and a shipment at what would be a full freight if shipped under hatches, stipulating delivery at Norfolk not at Gosport; whereas, they said, it was usual, when the shipment was of a deck load, that the bill should express the fact. This bill of lading, therefore, was the only evidence as to the terms of the contract. When the goods of several were shipped in a general ship, the bill of lading was given and taken to express the contract, *Abbott on Ship*, 216, 219. And it was assignable like a bill of exchange by the custom of merchants,

396 \**Lickbarrow v. Mason*, 2 T. R. 63, 5 Id. 683. A bill of exchange was a contract in writing by the custom of merchants, and the whole of the contract must appear on the face of the bill, *Thomas v. Bishop*, 2 Stra. 955. So a bill of lading was a contract in writing by the custom of merchants, and could not be varied by matter lying in parol. A merchant who underwrote a policy of insurance, was never permitted to shew what did not appear by the instrument, *Kames v. Knightly*, Skin. 54, and why should a ship owner who signed a bill of lading, be permitted to shew what did not appear on the bill?

Then, as to the merits: The principle of the law of jettison was founded on the plainest natural justice—that where several persons were embarked in the same adventure, and it became necessary to sacrifice the property of some for the preservation of that of others, those whose property was thus preserved, should contribute, in proportion to their interests, to make good the loss incurred for their benefit. But to this principle there was an exception, generally but not universally recognized, that deck loads were not entitled to the benefit of general average. The exception should be held applicable only to cases that came within the principle on which it rested: cessante ratione cessat et ipsa lex. What was the principle? The exception had been established on grounds of public policy rather than abstract justice: it was designed to discourage a mode of shipment, whereby men might expose, not only their own property, but the property and even the lives of others, to extraordinary hazard. In the case of *Smith v. Wright*, it was said by the court, "that shippers of goods under hatches, and the insurers of ship and cargo, were not liable to contribution" (namely, for deck loads thrown overboard) "on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation." In *Abbott on Ship*,

397 344, after stating, \*that "the French ordinance, in express terms, excludes from the benefit of general average, goods stowed upon the deck of a ship," and that "the same rule prevails in practice in England," it is added, "goods so stowed may, in many cases, obstruct the management

of the vessel, and except in cases where usage may have sanctioned the practice, the master ought not to stow them there without consent of the merchant." And *Phillips on Ins.* 332, citing *Valin*, Tom. 2, p. 205, said, that "the right to demand contribution may depend on the particular situation of the thing sacrificed. If goods carried on deck are thrown over, it is held, in general, that no contribution can be claimed. The reason given by *Valin*, is, that the goods so carried embarrass the navigation of the ship. But he thinks that this doctrine ought to be controlled by the usage of trade, and accordingly that contribution may be claimed for goods thrown overboard from the deck of small coasting vessels, or river craft, which usually carry a part of their loads on deck." The presumption of law was, that, in general, shippers of goods under hatches, and insurers of ship and cargo, were ignorant that any part of the cargo would be shipped on deck, and consequently were not held responsible for any part of the deck load thrown overboard to preserve the rest of the cargo. But this, like every other presumption, might be rebutted by facts: the law would not presume ignorance where knowledge was proved; and if goods were shipped under hatches, with full knowledge, on the part of the shippers, that goods would be shipped on deck, they must be taken to consent that goods should be so shipped. In such case, the principle of the exception no longer applied: the case fell within the rule which required contribution, not within the exception which exempted the ship and the rest of the cargo from it. Now, they said, it was proved, in this case, that this coasting packet between New York and Norfolk

398 \*was constructed to carry deck loads, and was in the constant habit of carrying them; whence the inference was irresistible, that all the shippers were acquainted with the fact. Consequently, all were bound to make good the loss incurred by the jettison of Keating's goods. If there was any difference between the law of New York and that of Virginia, the law of Virginia must govern the case, for Norfolk was the port of discharge. *Simonds & Loder v. White*, 2 Barn. & Cress. 805, 9 Eng. C. L. R. 251.

Robinson replied, that there was, in truth, no conflict between the parol evidence and the bill of lading. It was argued, that the bill of lading of a deck load, usually expressed the fact. But of that there was no evidence, and nothing was more improbable; for the principle that a deck load, in case of jettison, was not entitled to general average, was a principle of maritime law. The bill of lading, in this case, excepted "dangers of the seas;" and the jettison was caused by a danger of the sea. The bill of lading provided, that the shipper should pay freight, "with prime and average accustomed;" the average there meant, was petty average, not general or gross average, such as this was; *Abbott on Ship*, 326. But, if it included general average, it only included average accustomed; and the jettison of the deck load was not, by the custom, entitled to the benefit of general average. Besides, if



to the bill of lading, through mistake, omitted to state the real terms of the contract, proof of the real terms was admissible; and it was in proof, that the contract was, that the molasses should be stowed on deck, and the general bill of lading was signed by the master without reading it.

There was other points argued at the bar—viz. whether Keating could maintain his action against the ship owners alone, for the whole amount he was entitled to; especially seeing, that after his conversation with Mr. Cowper, he had abandoned all claim, and the master had delivered the rest of the cargo? On which point, 399 \*Robinson cited *Shepherd v. Wright*, Show. P. C. 18; *Birkley v. Presgrave*, 1 East 220; *Price v. Noble*, 4 Taunt. 123; *Dobson v. Wilson*, 3 Camp. 480, and *Abbott on Ship*, p. 351, and Stanard relied on *Abbott on Ship*, 244. And whether, as Keating alleged in his bill, that the master did not bestow proper care and attention to the molasses, and the reverse was proved to be the fact, he was entitled to recover any thing? But the court did not decide either of these points.

ALLEN, J. The first enquiry presented by this case, is, whether it was competent for the defendants below, to set up and rely upon the defence, that the goods in question were shipped on deck with the knowledge of the plaintiff, and therefore excluded from the benefit of general average. To admit any evidence to establish such facts, would, it is contended, be to contradict the terms of the bill of lading, the written contract between the parties. I do not deem it important to enter into a critical examination of the contract, to ascertain whether such evidence would or would not be consistent with the bill of lading. The perils of the sea are excepted; that the loss was incurred in consequence of those perils, is fully made out; and the only ground upon which Keating can rest, is the claim to general average. According to the maritime law, all who have been benefited by the loss of one, are bound to contribute to make it good, provided it is a proper case for general average. If Keating had proceeded against the ship owners for their misconduct in placing on deck the 20 hogsheads named in the bill of lading, without authority, it might then have become material to examine how far the evidence objected to conflicts with the written instrument. The ship owner is held responsible for all the contributory shares of those interested in the cargo, because the case is supposed to fall within the principle of general average, and the cargo was delivered

400 to the several \*owners thereof without their having been required to contribute. If the ship owner should be held primarily liable on this ground, he would have a right to recover from the various shippers their contributory shares; and unless the objection to the testimony would avail, if offered in defence to a bill against them for contribution, it ought not to avail here. Their liability results from the general principles of maritime law, and does not depend on any special contract with master or owner. Keating does not found his claim upon the bill of

lading: he seeks to recover for the failure to deliver twenty-three hogsheads; the bill of lading mentions but twenty. The court below held it a proper case for general average, and rendered a decree for the amount to which, upon the principles of general average, Keating was entitled.

By the maritime law, the loss by general average is to be adjusted at the place, and according to the law of the port of discharge; *Simonds & Loder v. White*. With this agrees the Ordinance of Marine, Liv. 3, tit. 8, art. 6. And Valin, Tom. 2, p. 192, shews, that the laws of the Rhodians were the same. Norfolk being the port of discharge, the laws of Virginia must govern. On this subject, our statutes and reports are silent. Nor have we, in this case, any proof of general usage. The case being entirely new, we must resort to the general maritime law, and take that rule which seems to have received the sanction of most commercial nations.

The rule of the Rodian law, as found in *Abbott on Shipping*, is this: "If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all." But goods stowed upon deck are excluded from this benefit. The French ordinance also excludes them. And so far as the matter has been acted upon in the courts of this country, the same rule has 401 been adopted. 3 Kent's \*Comm. 240, and the cases there cited.

This being the general rule, is there any thing in this case to make it an exception? It was contended in argument, that the general rule should not apply, because the vessel was employed in the coasting trade, constructed for the purpose of taking freight on deck, and that it is known to all who ship on such vessels, that such is the usage; from which it is inferred that all should be liable for contribution in case of jettison. To sustain this view, an expression in *Smith v. Wright* is relied on: it is there stated, "that shippers on deck are not entitled to general average; that the shippers of goods under hatches, and the insurers on ship and cargo, are not liable to contribution, on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation." If this were the true reason of the rule, there would be great force in the argument. Shippers under hatches could not claim the benefit of a principle, founded on their presumed ignorance of the fact, when it clearly appeared they were fully apprised of it. But this cannot be the true reason; for the ship owner is entitled to contribution for damage sustained by the vessel, to save her in a case of extremity; which could not be, if the rule were founded on the reason above mentioned. The master or owner cannot be ignorant that the goods are shipped on deck. The true reason why contribution cannot be claimed for goods shipped on deck, is given in a note to the case referred to: "The goods themselves increased the danger of the navigation, and are taken on board under an implied agreement that they shall be sacrificed if it be necessary to eject." It is a penalty imposed on the shipper, who thus puts to hazard the safety



of the ship and the lives of the crew. And this is the reason given by Valin, Tom. 2, p. 203. "The reason why payment for effects on deck thrown overboard or damaged, is refused by this article, is, that they serve only to embarrass the 402 working of the ship; \*the presumption is, that they have been thrown overboard, before an absolute necessity for jettison, and solely because they hinder and obstruct the working." If I have a proper understanding of the sense of the original, the jettison of goods on deck is justified under circumstances which would not authorize the same course with goods under hatches: so I understand the phrase, *la presumption est qu'ils auroient ete jettes avant toute necessite de jet*. And there is good reason for it; with the loading under hatches and the decks clear, so that proper exertions could be made for her safety, the vessel would ride out a storm securely, which, with her decks incumbered with loading, would endanger her safety. Such being the true reason of the rule, the usage of vessels engaged in the coasting trade to take on deck loads (even if proved, which it is not in this record) and the knowledge of that fact by the other shippers, would not vary the rule. Accordingly, some of the cases referred to in the American reports, were cases of coasting vessels.

It was further argued, that the general rule should not apply to coasting vessels, upon the authority of Valin, Tom. 2, p. 205, where it is said, contribution may be claimed for goods thrown overboard from the deck of small coasting vessels or river craft, which usually carry a part of their cargoes on deck; to which Phillips on Ins. 332, refers, as supporting the position that the usage of trade may control the general rule. The instances put by Valin are of a very limited navigation, between ports in the immediate neighbourhood of each other, and where it was scarcely necessary to venture into the open sea. In such cases, but little if any difference is made in freight, so inconsiderable is the risk; and the master has the right, under the usage, to stow the cargo as he pleases. A benefit results to all the shippers in consequence; for no difference being made, the freight chargeable to all is reduced; and 403 therefore as all are benefited, \*all should contribute. But no such reason can apply to the case where the master has no such right, and is only authorized to load on deck by special contract with the shipper. The instance referred to by Phillips, of the practice in whaling voyages to adjust, upon principles of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time after being put into casks, before it can be properly and safely stowed in the hold, would seem to be founded on the same principle. All are benefited equally. If the oil cannot be stowed safely until it remains some time on deck after being put in casks, each adventurer is exposed to the same peril; the exposure is for the benefit of all interested in cargo and ship; and therefore, according to the principles of equal and exact justice which seem to pervade this branch of maritime

law, all should contribute. But, in the case of coasting vessels on our coast, no benefit by the reduction of freight, or in any other way, accrues to the shipper under hatches, from taking on a deck load. The navigation is, on the open sea, rendered frequently more perilous from proximity to the shore, than navigation across the ocean.

I am therefore of opinion that this case does not fall within any of the exceptions to the general rule, and that Keating was not entitled to claim general average.

This view of the main question supersedes the necessity of enquiring whether the action can be maintained against the ship owner alone, if, in a case where general average can be claimed, he surrenders the cargo to the several shippers without collecting the contribution or taking from them any security.

I think the decree should be reversed and the bill dismissed.

STANARD, J. Passing by the objections to the recovery founded on the suggested discrepancy between the claim

asserted in the bill and that for which 404 the decree \*was rendered; passing by, too, the objection that Keating could not maintain his claim against the ship owners alone, for the whole amount which ought to have been contributed by them and the owners of the cargo; two questions arise on the merits of the claim: 1. Were Keating's goods shipped on deck in conformity with the contract of affreightment? And 2. if they were, and have been lost by a justifiable jettison of them, are the shippers of them entitled to the benefit of general average? The evidence, if it be admissible, is full and satisfactory, that the goods were shipped as a deck load; and there is no doubt that the jettison was justifiable under the circumstances. It is however objected, that the evidence to prove that the goods were shipped as a deck load, is inconsistent with, or explanatory of, the bill of lading, and that such evidence is inadmissible. The evidence is not, in my opinion, inconsistent with the bill of lading. That neither affirms nor disaffirms that the goods were shipped as a deck load; and my impression is, that the utmost it can avail the shipper, is to cast on the ship owner the burden of proof, that the stowing of the goods on deck was justifiable. But furthermore, if the bill of lading was of more efficacy, clear extrinsic proof, that it was signed by mistake, and that the actual agreement was, that the goods should be taken and stowed on deck, would be admissible; and such proof being offered would repel the claim founded on a paper so signed. It would be but the common case of a mistake committed in reducing an agreement to writing; a mistake, from which a court of equity would relieve, even if the party were asking its aid for the purpose; a fortiori would the court withhold its aid to enforce such contract according to its letter, in disregard of the proof of the mistake.

The general rule of the maritime law seems to be well established, that goods stowed on deck and lost by jettison, are not entitled to general average. Ab-

405 bott on \*Ship. 345; 3 Kent's Comm.

240; Valin, Tom. 2, p. 303, to which may be added the cases of Smith v. Wright in New York, Dodge v. Bartol in New Hampshire, Barber v. Brace in Connecticut, and The brig Thaddeus in Louisiana. And there are no decisions bringing the general rule in question. The exception which seems to prevail in some of the coasting trade of France, does not apply in this case. No such exception is admitted in respect to the coasting trade of England; and the cases before referred to shew, that it has not been admitted by the judicial decisions of other states of the Union in respect to the coasting trade of the U. States. The kind of lading and navigation, in which the exception is allowed in France, differs essentially from the lading and navigation of our coasting trade. In the former, no distinction is made in the freight, and the master, under the usage, has the discretion to put any part of the lading on deck which he thinks proper, without special contract and without incurring any responsibility for so doing. Our coasting trade navigates hundreds of miles in the main ocean, and is exposed to all sea risks.

I concur, that the decree is to be reversed and the bill dismissed.

CABELL, J., concurred. Decree reversed, and bill dismissed.

#### 406 \*Erskine & Eichelberger v. Staley and Others.

November, 1841, Richmond.

(Absent BROOKE, J.)

**Foreign Attachment in Chancery—Priority between Attachments in Chancery and at Law.**—Creditors of an absent debtor sue out a foreign attachment in chancery against him and a home defendant having in his possession specific goods of the absent debtor, as well as bonds, notes &c. to collect for him as his agent, and this process is served on the garnishee; other creditors of the same debtor, having brought an action at law against him, sue out an attachment against his estate to force his appearance, and this attachment, after the foreign attachment had been served on the garnishee, is levied on the same specific goods which were in the garnishee's hands at the time the foreign attachment was served on him; judgment being recovered in the action at law, pending the foreign attachment in chancery, the court of law orders a sale of the specific goods on which the attachment at law was levied; and the creditors in the action at law, being about to have a sale, under the order of the court of law, of the goods on which their attachments was levied, the creditors in the foreign attachment in chancery obtain an injunction to inhibit that sale, claiming a prior lien on the goods by virtue of their attachment previously served on the garnishee: HELD, upon the construction of the statute, 1 Rev. Code, ch. 123—

1. **Same—Same.**—That the creditors in the foreign attachment, by the service thereof on the gar-

nishee and from the date of such service, acquired a lien on the effects of the absent debtor in the garnishee's hands; and of this lien, neither the absent debtor, nor the garnishee, by any act of theirs, nor any third person by any attachment or other process of law, subsequently levied, could deprive them.

2. **Same—Same.**—Therefore, the creditors in the foreign attachment, if they shall get a decree, will be entitled to priority, for satisfaction thereof out of the attached effects, over the creditors claiming under the attachment at law subsequently levied.

3. **Same—Same—Injunction.**—And the remedy by way of bill of injunction, to which the creditors in the foreign attachment had recourse, was the proper remedy, to protect their rights.

**Same—Subpoena—Endorsement of Restraining Order—Effect.**—In the proceeding by way of foreign attachment in chancery, a subpoena against the absent debtor and the garnishee, with a restraining order endorsed by the clerk, served on the garnishee, is, "according to the settled practice, as effectual to attach the effects of the absent debtor in the garnishee's hands, as a formal order of the court to the same purpose would be.

Erskine & Eichelberger took out a subpoena in chancery from the circuit superior court of Jefferson, against Staley and Johnson, dated the 13th July 1837, and caused

**+Foreign Attachment in Chancery—Priority between Attachments in Chancery and at Law—Injunction.**—In Moore v. Holt, 10 Gratt. 286, the court said: "The first question presented in this case is as to the regularity of the proceeding by injunction at the suit of the creditor in a foreign attachment to restrain creditors who have attached the same effects by proceedings at law, from appropriating them to their use. This question is, however, sufficiently answered by the case of *Erskine v. Staley*, 12 Leigh 406, in which it is distinctly held that an application to the court of chancery to enjoin a sale in such case under the judgment at law is entirely regular and proper; and the judge who delivered the opinion in the case states that it is the only remedy the plaintiff in the foreign attachment could resort to."

**Same—Endorsement on Subpoena—Previous Affidavit of Nonresidence.**—Formerly, in foreign attachments in chancery, it was not necessary to file with the clerk an affidavit of the nonresidence of his debtor, before the subpoena issued, with the endorsement thereon forbidding the application of the attached property to any other use until the plaintiff's demand was satisfied, but such an endorsement without a previous affidavit, served as a notice to the home defendant, not to part with effects of the debtor in his hands without leave of the court, and when served upon the home defendant, created a lien in favor of the creditor, of which neither the absent debtor nor the garnishee, by any act of theirs, nor any third person, by any attachment or other process of law, subsequently levied, could deprive him. Moore v. Holt, 10 Gratt. 287, citing Smith v. Jenny, 4 Hen. & M. 440; McKim v. Fulton, 6 Call 106; Williamson v. Bowie, 6 Munf. 176; *Erskine v. Staley*, 12 Leigh 406. See the principal case cited in Chapman v. Railroad Co., 36 W. Va. 314. But see 4 Min. Inst. (4th Ed.) 410, where the author, after stating the above rule, says that the present statute (Va. Code 1887, ch. 141, § 2064), however, seems clearly to require that the affidavit shall be filed before the clerk is authorized to endorse the attaching order on the summons. See foot-note to McKim v. Fulton, 6 Call 106.

**\*Attachment—Fieri Facias—Priority between.**—As to the point that the lien of a *fieri facias* of prior date, has priority over an attachment of subsequent date, see the principal case cited in Puryear v. Taylor, 13 Gratt. 409. The principal case is cited with approval in Sandidge v. Graves, 1 Pat. & H. 106; Char-ron v. Boswell, 18 Gratt. 220.

an attachment to be endorsed thereon by the clerk, in the following words: "To stop and attach the debts, if any, due to the absent defendant Staley, from the home defendant Johnson, and to stop and attach the effects of whatever kind, stock of goods &c. of the said Staley the absent defendant, in the hands or under the charge of the said Johnson, as agent or otherwise, to satisfy a debt due from the said Staley to the plaintiffs, of 1592 dollars, with interest and the costs of this suit." Upon this process the sheriff made the following return: "Executed, July 14th 1837, by delivering a true copy of the within process to the home defendant Johnson, and a true copy to the wife of the absent defendant Staley, at the storehouse of the said Staley, he being not found within my bailiwick." There was no inventory of the goods and effects of Staley in the hands of Johnson, or in the hands of Staley's wife, returned with the process. Erskine & Eichelberger exhibited their bill in chancery against Staley and Johnson, at August rules of the court (namely, on the first Monday of the month); wherein they alleged that Staley (described as late of the county of Jefferson) was indebted to them by two bonds and a promissory note (particularly set forth) in the sum of 1592 dollars, and on open account in a further sum of about 300 dollars; that Staley had removed from Virginia, without intention to return, and was now residing in Illinois, whither he designed soon to remove his wife, and whatever effects he still had in Virginia; and that Johnson, who was Staley's regularly constituted agent, and who resided in the county of Jefferson, had in his hands, goods, wares and  
408 \*merchandise, and bonds, notes, and book accounts, belonging and due to Staley, and money by him collected for Staley, sufficient to satisfy the debt due to the plaintiffs: and, therefore, the bill prayed a decree against the absent defendant Staley, for the debt due from him to the plaintiffs, and that the goods and effects of Staley in the hands of the home defendant Johnson, might be attached in the hands of Johnson, and of Staley's debtors when ascertained, as garnishees, and subjected to the payment of the debt due to the plaintiffs. The allegation that Staley was a non-resident was verified by the affidavit of the plaintiff's attorney; and the bonds and note of Staley to them, for debts amounting to 1592 dollars, were exhibited with the bill.\*

Hamilton & Cost having brought an action of debt against Staley on the law side of the circuit superior court of Jefferson, for 736 dollars, and the *capias* ad respondendum sued out in that action having been returned *non est inventus*, an attachment against the estate of Staley, to force his appearance, was awarded at August rules 1837, returnable to September rules. The sheriff made return upon this

attachment: "Levied, August 9th 1837, on sundry household furniture and the store goods, consisting of cloths &c. which store goods were previously attached in the hands of J. G. Johnson by foreign attachment, and surrendered by said Johnson to me, subject to the said attachment; and a list of the said furniture and household goods returned herewith." Then followed an inventory of the articles of household furniture attached. Hamilton & Cost having filed their declaration, and Staley not replevying the goods attached by entering his appearance and giving special bail, final judgment (after regular proceedings  
409 at rules) was entered, "at November term 1837, for Hamilton & Cost against Staley for the debt demanded in this action, and the costs: and it was then also ordered "that the sheriff should make sale according to law, of the household furniture and store goods attached by him and mentioned in his return upon the attachment issued in this cause and in the list or inventory returned with the said attachment, or so much thereof as should be necessary to satisfy this judgment, and that he should pay the money arising from the sale of the said household furniture to the plaintiffs towards satisfying this judgment, and pay into court the money arising from the sale of such part of the said goods" (meaning the store goods) "as should be sold by authority of this order, and return to the court an account of the sales."\*

Upon this, at the same November term 1837, Erskine & Eichelberger exhibited "an amended bill and petition" (so called in the pleading) wherein, after referring to their subpoena in chancery of the 13th July 1837, the order of attachment endorsed thereon, and their former bill against Staley, the absent defendant, and Johnson the garnishee,—and referring also to the action at law brought by Hamilton & Cost against Staley, the attachment therein sued out against the estate of Staley to force an appearance, the levy of that attachment subsequently to the service of their subpoena and foreign attachment, the judgment rendered for Hamilton & Cost against Staley, and the order of court for the sale of the effects on which the attachment in that action was levied, and the disposition of the proceeds of sales thereby directed—they alleged, that Hamilton & Cost had declared their design to cause the furniture and goods of Staley to be sold under the attachment, and the order of the court, in

their action at law against Staley,  
410 without \*respect to the prior and better rights of Erskine & Eichelberger under their foreign attachment in chancery. Therefore, the bill made Hamilton & Cost parties defendants; and prayed, that they, and the sheriff of Jefferson, should be restrained and enjoined from proceeding to sell, or otherwise dispose of, the attached effects, under the attachment, judgment and order in the action at law against Staley, and that the attached effects should be

\*The proceedings of Erskine & Eichelberger were founded on the statute regulating attachments and suits against absent defendants, 1 Rev. Code, ch. 123, p. 474. Their suit was what is called, in Virginia practice, a foreign attachment in chancery.—Note in Original Edition.

\*Hamilton & Cost's attachment, and the proceedings upon it, were founded on the statute, 1 Rev. Code, ch. 123, § 61, p. 504, 5, and seem to have been quite regular.—Note in Original Edition.

sequestered and sold under the foreign attachment of Erskine & Eichelberger for the satisfaction of Staley's debt to them. The bill then further stated, that Johnson the garnishee was insolvent, so that it would be unsafe to entrust the goods and effects longer in his hands; and prayed that the court would order the same to be delivered up to them (Erskine & Eichelberger) upon their giving proper security, or that the sheriff should take and hold the same, till further order.

An injunction was accordingly awarded, till further order. And it being suggested to the court, that the value of the goods &c. might be impaired pending the suit, it was, by consent of Erskine & Eichelberger and of Hamilton & Cost, ordered, that the sheriff should proceed to make sale thereof, as directed by the order in the common law cause, and lend out the proceeds of sales until the next term of the court, taking bond with good security for the same; such consent, however, was nowise to affect the rights of Erskine & Eichelberger in this cause.

Hamilton & Cost, in their answer, insisted, that the plaintiffs acquired not any prior lien or right by their process of foreign attachment in chancery, and that they themselves acquired a prior legal right under their attachment at law, to have satisfaction out of the goods, which were attached (as the plaintiffs alleged) in the hands of the garnishee by service of the foreign attachment on him, but on which the sheriff actually levied their attachment.

They said, that, in point of fact, 411 Staley \*was not a non-resident against whom the process of foreign attachment properly lay, for that his absence from Virginia was only temporary, he having left home on business, leaving his family here, residing in a house he rented, and he had not, at the time, any settled residence out of the commonwealth: and that Johnson was not properly made a home defendant and charged as garnishee; that the goods and merchandize were stock in a trade carried on by the wife of Staley (who was himself an artizan in the U. States armory at Harper's Ferry) and the business was managed entirely by the wife; that Johnson was a young man employed by her to assist in the business, under her direction, and had no possession or custody of the goods; and so, the plaintiffs acquired no lien on the goods by the service of their process on Johnson as garnishee.

Depositions were filed touching the questions of fact raised by the answer—Whether Staley was, in truth, a non-resident against whom the process of foreign attachment will lay? And whether Johnson had charge and possession of the goods and effects of Staley as his regular constituted agent, as the plaintiffs alleged, or, as the defendants alleged, was only employed to assist in the business as a salesman and clerk, under the direction of Staley's wife?

The court, upon the motion of Hamilton & Cost, dissolved the injunction; thereby deciding, that Hamilton & Cost were entitled to have the proceeds of the attached effects of Staley applied to the satisfaction of their judgment, in preference to any

claim or lien of Erskine & Eichelberger under their foreign attachment. And it appeared from the opinion of the court (which was inserted in the record) that it held, upon the evidence, that Staley was not in fact a non-resident against whom the proceeding by foreign attachment was proper; and if he was, yet that Hamilton & Cost's attachment in their action at law, and the proceedings, judgment and 412 order, \*consequent upon it, gave them a right to the proceeds of the attached effects, which the court of chancery ought not, at the instance of Erskine & Eichelberger, to disturb.

Erskine & Eichelberger applied by petition to this court for an appeal from the decree; which was allowed.

The cause was argued here, by Lyons and Stanard for the appellants, and by Robinson for the appellees.

I. The questions of fact were argued upon the evidence—namely, whether Staley was in fact a non-resident of the commonwealth at the time of the foreign attachment sued out by Erskine & Eichelberger? and whether Johnson was his agent having possession of his goods and effects, and so was properly charged as garnishee? This court held, that the affirmative, upon both points, was proved.

II. The counsel for the appellants said, it was well established, that a subpoena in chancery against an absent debtor, with such a restraining order upon the home defendant thereon endorsed by the clerk, as was endorsed on the subpoena in this case, was, according to the regular practice, a substitute for the order of court authorized by the letter of the statute regulating attachments and suits against absent defendants, and affected the goods, effects and credits of the absent debtor in the hands of the home defendants or garnishees, in the same manner and to the same extent, as a formal order of the court to the same purpose would; and that such process operated, from the date of the service thereof on the home defendant or garnishee, as a lien on the goods, effects and credits of the absent debtor in the garnishee's hands, so far, at least, as to arrest them in his hands, and to inhibit and overreach any transfer afterwards made by the debtor himself, though made bona fide and for valuable consideration. M'Kim & al. v.

413 *Fultons*, 6 Call 106; \**Smith v. Jenny* & al., 4 Hen. & Munf. 440; *Williamson & al. v. Bowie & al.*, 6 Munf. 176. The question, then, was, whether the foreign attachment operated only as between the attaching creditor and the parties, the absent debtor and the garnishee, to avoid transfers made by them? or, whether it did not also overreach transfers of the attached effects made by operation of law? Whether, if any other creditor of the absent debtor should think proper to sue out an attachment against the estate of the absent debtor in an action against him at law, to force an appearance, and should get judgment pending the foreign attachment, or should have any other legal process levied on the same goods and effects, he could have the attached effects applied to the satisfaction of his judgment, without regard to the rights

of the attaching creditor under the foreign attachment previously served? They said, the case of *Williamson & al. v. Bowie & al.* was alone decisive of the point for the appellants: for the court there established the principle, that the effect of the foreign attachment was not to be ascertained by analogy to the doctrine of a *lis pendens* binding on purchasers without actual notice, but "by analogy to attachments against absconding debtors, whose credits as well as effects may be arrested, and alienation thereof prevented;" by "analogy to attachments against absconding debtors," in which cases it never was doubted, that the attachment first served had priority over all the rest. They said, the foreign attachment was a proceeding in rem (per Carr, J., in *Kelso v. Blackburn*, 3 Leigh 306), a proceeding against the absent debtor's effects in the hands of the garnishee at home, given when the proceeding in personam, by reason of his non-residence, would be impracticable or unavailing. The statute put the debtor's effects in the custody of the court for the benefit of the attaching creditor; and it authorized the court to make any proper order; to require security of the

garnishees for the safekeeping of the  
414 property \*to satisfy the debt; or, to order it to be immediately delivered to the attaching creditor upon his giving security for the return thereof to such persons and in such manner as the court should direct; or, to put it into the hands of a receiver; or, to direct an immediate sale, and the proceeds to be held subject to future order. Neither was there any way in which the garnishee could get a right to dispose of it, but by giving bond with surety and thus creating a personal and adequate responsibility to the attaching creditor for the value; or any way in which the absent debtor could get control over the attached effects, but by appearing and giving security to abide the decree. The statute gave the power to the court, and in giving the power imposed on it the duty, to take the attached effects into its own custody and care, and to hold them for the satisfaction of the attaching creditor's claim, if it should be found just; and it could not be material in what form the court exercised its power, or (more properly speaking) performed its duty—whether by ordering the attached effects to be delivered to a receiver, or to the attaching creditor himself upon his giving security to restore an account for them as the court should direct, or by leaving them in the hands of the garnishee upon his giving security to have them forthcoming to satisfy the decree, or without requiring security leaving them in his hands upon his own personal responsibility. The lien of the attaching creditor was immediate upon the service of his process, and as complete as any lien could be. *Erskine & Eichelberger* acquired, by the service of their foreign attachment on Johnson, the garnishee, a lien on the effects of the absent debtor Staley in his hands: Staley could not demand them of the garnishee, nor transfer them to any other person: the garnishee could not rightfully sell or dispose of them, or apply them to the satisfaction of any

other creditor. When *Hamilton & Cost* levied their attachment in their action  
415 at law against Staley to force \*his appearance, on his effects then in the hands of Johnson, they acquired only such rights as Staley their debtor, and Johnson the garnishee, had in the property: they could acquire no more. Now, the rights of Staley and of Johnson in the effects, were subject to the previous lien of *Erskine & Eichelberger* under their foreign attachment. In the case of several attaching creditors, prosecuting foreign attachments in chancery against the same absent debtor, and seeking satisfaction out of the same property of their common debtor, if there should not be enough to satisfy all, it had been the practice of the court, upon general principles of equity, to distribute the fund among all, pro rata, without regarding priority of time in the suing out or in the service of the several attachments: but it had never been thought, until the decree was pronounced in this case, that a creditor suing out an attachment at law, and getting judgment there, pending a foreign attachment in chancery against the same debtor, duly served before the attachment at law was even issued, much more levied, was entitled to priority over the foreign attaching creditor, for full satisfaction of his claim. They maintained, that whichever jurisdiction first attached on the subject, to that jurisdiction the disposition of it belonged; whichever attachment was first served, to that attachment the preference was due.

Robinson, for the appellees, first adverted to the cases cited for the appellants. He said, the case of *M'Kim & al. v. Fultons* merely decided that a foreign attachment issued by the clerk, and served, should not be discharged at the instance of the absent debtor, without requiring bond and security to perform the decree. In *Smith v. Jenny & al.* Chancellor Taylor expressed the opinion, that in the case of a foreign attachment in chancery, the plaintiff might make an endorsement on his subpoena in the terms of the statute, and that would be sufficient notice to the home defend-  
416 ant not to part \*with the absent debtor's effects in his hands without leave of the court. *Williamson & al. v. Bowie & al.* was the case of an assignment by the absent debtors, of a debt due them from the home defendant or garnishee, after service on the garnishee of the subpoena with the restraining order endorsed in the usual form; and this court held, that the subpoena, so endorsed and served, operated, agreeably to the practice in this state, to stop the payment by the garnishee of the moneys due from him to the absent defendants, and to inhibit a transfer thereof from them (the absent defendants) to others, from the time of the service of that process on him (the garnishee). Those cases, then, did not touch the question presented in this case: they only decided that if an order should be made by the court, to restrain the garnishee from paying, conveying away or secreting the debts by him owing to, or the effects in his hands of, the absent debtor, a subsequent assignment by the absent debtor of such debts or

effects would be invalid, and an assignment after service of the subpoena with the restraining order thereon endorsed, would be equally invalid. In going to that length, the court had authority for its decisions in the well established doctrine as to the effect of a *lis pendens*—that the purchase of the subject matter in controversy, *pendente lite*, does not vary the right of the parties in the pending suit: the court would not permit an absent debtor, after service of a subpoena in a foreign attachment, to assign his debts or effects attached by the creditor, and thus to evade and disappoint the decree in the cause. And in going thus far, the court has gone quite as far as was necessary to effect the object and policy of the statute; the purpose of which, declared in the preamble, was, to provide a remedy for "creditors who have experienced great difficulties in the recovery of debts from persons residing out of the jurisdiction of the commonwealth, but who have effects here sufficient to satisfy 417 and pay 'such debts.'" Now, the construction which the appellants' counsel contended for, would make the statute work beside and beyond its declared purpose and policy: it would make the resort of one creditor to the foreign attachment in chancery have the effect of anticipating and defeating the plain legal remedies of all other creditors, for the recovery of debts from a debtor within the commonwealth, or having estate within it which may be attached. The law was surely not dictated by any partiality or preference for one creditor over others, or for a creditor pursuing his remedy in equity, over a creditor pursuing his plain remedy at law. Such a construction would give the statute the effect of hindering and defeating the recovery of just debts by legal means. He submitted that a construction so contrary to the declared purpose and policy of the statute could not be right. Then, by the enacting words of the statute, the foreign attachment was only "to restrain the defendants in this country, from paying, conveying away or secreting, the debts by them owing to, or the effects in their hands of, such absent defendants;" not to interfere with or prevent the operation of the law to take such effects of the absent debtor out of the hands of the garnishees; not to disappoint the greater or more judicious and more successful diligence of other creditors in pursuing their legal remedies. If the court had made a formal order, and even required security of the garnishee to hold the effects in his hands subject to its future order, and he had nevertheless parted with the effects to the absent debtor himself or to any others; what would have been the remedy? Clearly, all that could have been done would have been to render a personal decree against the garnishee (and his surety, if any) for the value of the effects parted with. The service of the subpoena with the restraining order endorsed, on the garnishee, could not have any other or greater effect than the formal order of the court: it could be nothing 418 more than a notice to the garnishee not to pay or part with the debts or effects in his hands, and that if

he should do so, it would be at his peril; at the peril, namely, of a personal liability for what he should part with, in case the plaintiff should succeed. If he should encounter this peril, if he should part with the goods, and they should be taken under an execution sued out against the debtor; then, he said, they must be sold under the execution; since, while the attaching creditor in equity had acquired by his notice to the garnishee, only a right to charge, not the specific goods, but him personally, the creditor in the execution would have had the specific goods taken into the custody of the law, and acquired a lien on the goods themselves. It would be strange, indeed, that a debtor's goods, not previously assigned away by him, nor levied on by any officer under any process, should not be liable to be taken under an execution against the debtor; and exempted from such liability, merely because another creditor had a pending suit in equity against the same debtor to recover another debt, and that creditor, if he should get a decree, might wish to have those goods applied to satisfy his decree. It should be borne in mind, that the statute of Virginia giving the foreign attachment did not command the officer to attach the specific effects of the absent debtor found in the hands of the home defendant, but only to serve the process on the garnishee personally; differing, in this respect, from the law of foreign attachment of Pennsylvania (and of some other States) under which the specific goods themselves might be attached; *Serg. on Attachm. p. 10-12, 202; Morgan v. Watmough, 5 Wheat. 125.*

The proposition contended for by the appellants' counsel would be contrary to all the analogies of the law. Thus, it was laid down by Coke, and never doubted, that "if an action of debt be brought against the heir and he alieneth hanging the writ, yet shall the land 419 \*which he had at the time of the original purchased, be charged, for that the action was brought against the heir in respect of the land;" *Co. Litt. 202, b.* And yet it had been adjudged, that where two actions were brought against the heir on two several obligations of the ancestor, the plaintiff who first recovered judgment should have priority of execution, though his action was not first commenced; *Anon. 1 Mod. 253.* Our statute of executions, 1 Rev. Code, ch. 134, § 10, p. 528, provided, that "all executions of ca. sa. shall bind the real estate of the defendant from the time when they shall be levied;" yet this court adjudged, that the statute should be so construed, that the ca. sa. levied should avoid alienations made by the debtor himself, but not the action of the law upon his property at the suit of other creditors; *Foreman v. Loyd & al., 2 Leigh 284, overruling Jackson v. Heiskell, 1 Leigh 257.* In *Payne v. Drewe, 4 East 523*, where a writ of sequestration had been issued by the court of chancery in June 1800, and the writ had been delivered shortly afterwards to the sequestrators, but the sequestration had never been laid on; and a writ of *fieri facias* was delivered to the sheriff in January 1802, who,

being apprised of the writ of sequestration issued against, but never executed on, the debtor's goods, returned nulla bona; whereupon, Payne, the *fi. fa.* creditor, brought this action against Drewe, the sheriff, for a false return: it was held, that the sequestration was no excuse to the sheriff for not levying the *fi. fa.* on the goods, and he was held liable for a false return. Now, it had been decided by Lord Nottingham, "that a sequestration binds from the very time of awarding the commission, and not only from the time of executing it and its being laid on by the commissioner;" but Lord Ellenborough explained the sense and extent of that rule to be, that the sequestration bound the property as against the party himself against whom the sequestration issued and all claiming

420 \*by assignment from or representation through or under him, but it did not so vest the property in the goods absolutely, as to defeat a sale made by the sheriff under execution; *Id.* p. 537-8. And he concluded by laying down this general principle, "that where there are several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as (effectually, and for all purposes) bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed." In *Wallace v. Hanley*, 4 J. J. Marsh, 622, slaves of the absent debtor had been taken in the custody of the sheriff, and a judgment having been obtained at law by another creditor, an execution was sued out upon it and levied on the same slaves. In this state of things, an injunction was asked and awarded to inhibit the sale under the execution. But the plaintiff in equity, though the sheriff had had actual custody of the goods under his process, did not think it enough to rely on that prior custody: he charged, that the proceeding at law was a fraudulent contrivance to secure the proceeds of the property for the absent debtor; this charge of fraud being denied by the answer; and the court of appeals of Kentucky held, that the bill should be dismissed. So, in our case, if there had been an allegation, that the proceeding of *Hamilton & Cost* was a fraudulent contrivance to secure the proceeds of the goods to the absent debtor *Staley*, the interference of the court of equity to stay their proceeding, might properly have been asked. But in the absence of any such allegation, in the absence too of any proceeding wherein any particular goods had been taken into the custody of the officer of the court of chancery, there was nothing to prevent the levy of *Hamilton & Cost's* attachment on the goods, or the sale of the attached goods under the order of the court of law directing the sale.

421 \*He submitted, that there was no ground whatever for the interference of the court of equity, at the instance of *Erskine & Eichelberger*, by way of injunction. There was certainly no ground for such interference, if the property of the goods had not been altered by the service of their process of foreign attachment on

Johnson the garnishee; and if it had been so altered, then whoever had the right of property might have proceeded at law against the sheriff.

ALLEN, J. This is a contest between creditors of an absent defendant; one party having proceeded by foreign attachment, and the other by an attachment on the same property to force an appearance in an action at law. The foreign attachment was first executed; and the only question of interest presented by the case, is, whether a creditor coming in by operation of law, after the service of the subpoena in chancery on the home defendant, is entitled to priority?

This court has decided, in the case of *M'Kim & al. v. Fultons*, that the endorsement by the clerk, according to the practice of the country, is sufficient to restrain the application of the effects to any other use, and is a substitute for the formal order required by the words of the statute; and that case, and the case of *Williamson v. Bowie*, decide, that a subpoena so endorsed, operates, from the date of its service, to inhibit any alienation by the absent debtor. According to these adjudications, the lien acquired by the service of the subpoena cannot be defeated by any act of the debtor, except in the manner prescribed by the statute; namely, the giving bond to abide by the decree. This being the law, it would seem to follow, almost as a necessary consequence, that no subsequent creditor coming in, not by the act of the party, but under the operation of law, can defeat the lien. As a general rule, the creditor is entitled to those rights only, which 422 the debtor held. Even in the case \*of a fraudulent deed, though it is good as between the parties, it is void as against the creditor; as to him the property remains in the debtor, as if no deed had been executed. Therefore, when it is conceded, that the debtor, by no transfer or incumbrance, can defeat the lien of the attachment; that assignees coming in under him must take subject to the rights of the attaching creditor; if it is held, that a creditor coming in afterwards by operation of law is to be first satisfied, he will acquire rights which the debtor himself had not. If the statute is to receive such a construction, cases might, and, in practice, probably would occur, presenting strange anomalies. The attaching creditor's lien is superior to the claim of the bona fide assignee; the right of a bona fide assignee is confessedly superior to that of a creditor whose execution has not been delivered to the sheriff before the assignment or transfer; but if the principle contended for by the appellees is law, the creditor by execution, who is subordinate to the assignee, is to be preferred to the attaching creditor, whose claim is superior to that of the assignee.

It was argued, that the lien created by the service of the attachment in chancery, results from an application of the doctrine of *lis pendens*: that this authorizes the court to prevent the party himself from defeating the creditor by any alienation of the subject, but does not extend to the case of a creditor coming in by act of law. The



proceeding by foreign attachment is a proceeding in rem: the jurisdiction rests upon the fact, that the absent debtor has effects subject to the control of the court; and if no effects are found, the court has no authority to proceed. But when its jurisdiction once attaches, the court, according to well settled principles, may go on to do justice. If, however, the effects of the absent debtor may be taken from under its control by another creditor coming with a *fi. fa.*, the foundation upon which

its jurisdiction rested will have been swept away, and the plaintiff will be without remedy. So that, even admitting we were to look to the doctrine of *lis pendens* for the source of the lien of the attaching creditor, it seems to me, in a case like this of a proceeding in rem, where the jurisdiction of the court depends upon the existence of effects subject to its control, if that jurisdiction has once properly attached, it can never be ousted either by the act of the party himself or of any third person. The terms of the statute, it seems to me, will admit of no other construction: "the court may order the debts to be paid, and effects to be delivered, to the plaintiff, upon his giving security for the return thereof, to such person and in such manner as the court shall direct." He holds them subject to the order of the court alone. Would it be any defence in an action upon the bond given by him to return them, to say they were taken from him by a subsequent execution? On the contrary, is it not a necessary implication from the statute, that as he is to return them in pursuance of the direction of the court, until such direction is given he must hold them? Again, it is provided, that "if the plaintiff shall refuse or not be able to give such security" (as may be required on pronouncing a final decree in his favour) "the effects shall remain under the direction of the court, in the hands of a receiver or otherwise, for so long time, and finally be disposed of in such manner, as to the court shall seem just." The statute here speaks of the goods remaining under the direction of the court: they must then have been taken under its direction, and this by the service of the subpoena. The law also intended to protect the rights of the creditor whose property prevented him from giving the security required in the final decree. Time by the law is given to the absent defendant to shew cause against the decree. The effects can be held by the court until the period expires, and then, I presume, as the decree has become

absolute, there could be no doubt of the propriety of applying the effects to the discharge of the decree, without requiring security. But under the construction contended for, it would be in the power of any creditor getting a judgment at law, to levy on these effects, and so deprive the attaching creditor of the fruit of his decree.

The argument is not reported in the case of *Williamson v. Bowie*; but from the opinion of the court, it would appear that it was there contended that the lien resulted from the doctrine of *lis pendens*. But the

court, as I understand their language, overruled the proposition: "Not deciding (it said) as a general proposition, what is to be considered, in this country, a *lis pendens*, binding on purchasers without actual notice, yet considering this case by analogy to attachments against absconding debtors, whose credits as well as effects may be arrested, and alienations thereof prevented" &c.

It was contended, that as there was no actual seizure, no levy on specific effects, which were thus placed under the custody of law, the property in the goods remained in the debtor, and being in him other creditors might levy on them. But granting that no actual seizure is made so as to divest the property of the debtor, the consequence deduced does not follow. The legal property of goods may remain in one, subject to the equitable lien of another; and third persons coming in, under the first, must occupy his position and hold subject to the lien. For many purposes the property of the goods may rest in the debtor, notwithstanding the service of the attachment. Thus, in several attachments against the same absconding debtor, the attachments are levied successively on the same goods as his property, and they are paid according to the dates of their respective levies. So with executions. And in the case of foreign attachment, where the real estate is proceeded against, there is no seizure, no divesting of title, and from the nature of the subject cannot be.

\*But, in truth, I look upon the service of the attachment as equivalent to an actual levy. The effects may remain in the hands of the garnishee, but under the control of the court: he acquires a special property in them as agent of the court: and this property is sufficient to protect him against the claims of the owner: it is his duty so to protect himself; and upon his failure, a personal decree will go against him. The property of the goods is so far divested as to prevent a recovery by the party. And this distinguishes the case from *Payne v. Drewe*, which has been so much pressed on the court. There, a writ of sequestration had been issued out of chancery, which was held up by the sequestrators some eighteen months. In the mean time, a *fi. fa.* came to the hands of the sheriff, who seized the goods and made an inventory of them, but afterwards quitted possession and returned *nulla bona*; and the writ of sequestration was relied on as a protection against the suit of the creditor for a false return. Lord Ellenborough, without deciding what was the effect of a writ of sequestration, but conceding that it had the same obligatory effect as the award of an execution at common law, which binds from the teste of the writ, proceeded to enquire into the extent to which goods are bound by the award of the writ; and held, that it did not so vest the property in the goods absolutely, as to defeat a sale made by the sheriff under an execution; that the property of the goods was not altered, but continued in the defendant till execution executed. And this, it seems



to me, is very clear from this consideration, that if no levy is made before the return day, the goods cease to be bound, and an alienation made whilst the writ was in force, could not be overreached by a levy on a subsequent writ. The writ, when executed, related at common law to the time of the teste, and now to the time of the delivery, so as to overreach intermediate alienations. Having decided that the sheriff could have levied, and made a  
426 valid sale, \*notwithstanding the writ of sequestration in the hands of the sequestrators, he proceeded to shew, that, under the special circumstances of that case, the sheriff would not have been liable to the action of the party grieved. If, however, I am right in supposing that a foreign attachment is tantamount to an actual levy, that it places the effects under the control of the court, and so far vests the property in the garnishee or agent of the court, as to defeat all claims or transfers of the defendant,—the case stands upon wholly different grounds. So, in the case of two writs of fi. fa. the sheriff is bound to execute the writ first delivered, but if he do otherwise and execute and sell under the second, the property of the goods is bound by the sale. The remedy of the creditor in the first execution, is against the sheriff. And this for reasons of public policy: "for sales made by the sheriff ought not to be defeated, for if they are, no man will buy goods levied upon an execution." *Smallcombe v. Cross*, 1 Ld. Raym. 252.

The analogy derived from the case of *Foreman v. Loyd* wholly fails. That case, as appears by the language of all the judges, depended entirely upon the construction of the 10th section of the statute concerning executions. The mischief there intended to be remedied, was the alienation by debtors in execution to defeat the claim of the creditor. The first clause of the section was held to be limited to sales by the debtor himself, excluding involuntary judgments; and the words of the second clause, providing that a ca. sa. executed shall bind the real estate from the levy, were merely intended to effectuate the intention of the first clause.

On the facts in this case, I think the proceeding by way of foreign attachment was fully warranted; and that the application to the court to enjoin the sale under the order of sale in *Hamilton & Cost's* action at law, was regular, and indeed the only remedy the plaintiffs in the foreign attachment could resort to.

427 \*I think, therefore, the court below erred in dissolving the injunction. It should have continued the injunction until the case of foreign attachment was disposed of, and then have perpetuated it, in whole or in part, or dissolved it, as the result of that case should shew to be proper; giving to the appellants, the plaintiffs in the foreign attachment, priority of satisfaction if they should succeed in establishing their claim.

The other judges concurred. Decree reversed, and cause remanded &c.

## Owen v. Sharp & Wife and Others.

November, 1841, Richmond.

(Absent BROOKE, J.)

### Fraudulent Conveyance—Validity as between Parties.\*

—One makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors, but there is a secret trust that the grantee shall hold the property for the benefit of grantor's daughters: *H.M.D.*, the daughters cannot establish the secret trust in equity, and have a decree for the slave, her increase and profits.

**Same—Statute of Limitations.**—A fraudulent bill of sale is made of a female slave, absolute on its face, with a secret trust for the grantor's daughters, of whom the grantee becomes guardian in 1837, and in 1839 he settles his guardianship accounts, both wards having then attained to full age: they then set up a claim to the property, which the grantee denies to be just; and in 1837, they file a bill to establish the secret trust: *H.M.D.*, the statute of limitations would alone be a bar to the bill.

On the 1st January 1825, Waddy Thompson, being at the time much embarrassed with debt, executed a bill of sale of a female slave name Sukey to Nicholas Owen, in consideration of 250 dollars  
428 then paid by \*Owen, and warranted the title; and on the same day, Thompson gave his bond to Owen for 25 dollars, the hire of the slave for one year. In fact, however, the slave had been taken by the sheriff of Bedford under an execu-

\***Fraudulent Conveyances—Validity as between Parties.**—Although fraudulent conveyances are by the statute declared to be void as to the grantor's creditors, yet they are, by the great weight of authority, valid and binding between the parties. The principal case is cited, in support of this proposition, in *Harris v. Harris*, 33 Gratt. 756, 757, 759, 763, 770, 773; *Laws v. Laws*, 76 Va. 533; *Thornburg v. Bowen*, 37 W. Va. 644, 16 S. E. Rep. 827; *McClintock v. Lolsseau*, 31 W. Va. 871, 8 S. E. Rep. 615; *Horn v. Star Foundry Co.*, 23 W. Va. 540; *Turner v. Campbell*, 1 Pat. & H. 272, 273.

The principal case is distinguished in *Kyger v. Depue*, 6 W. Va. 299. See *Chamberlayne v. Temple*, 2 Rand. 384, 14 Am. Dec. 786.

See foot-notes to *Harris v. Harris*, 33 Gratt. 787; *Terrell v. Imboden*, 10 Leigh 321, and monographic note on "Fraudulent and Voluntary Conveyances" appended to *Cochran v. Paris*, 11 Gratt. 348.

And that this rule applies not only to the original parties to the fraudulent transaction, but to their heirs and representatives, and to all parties claiming under or by title derived from them, where no equitable rights intervene to protect such parties, see the principal case cited with approval in *McClintock v. Lolsseau*, 31 W. Va. 871, 8 S. E. Rep. 615.

**Maxim—In Pari Delicto.**—For a discussion of the maxim "*In pari delicto potior est conditio defendentis*," see 2 Va. Law Reg. 722, and opinion of JUDGE GREEN in *Horn v. Star Foundry Co.*, 23 W. Va. 532 *et seq.*, and JUDGE CHRISTIAN in *Harris v. Harris*, 33 Gratt. 756 *et seq.*, where these judges comment on the Virginia cases bearing on this subject.

**Parol Evidence to Show Deed a Mortgage.**—To the point that parol evidence may be admitted to show that a deed absolute on its face, was by a verbal agreement, intended as a mortgage, see *Hancock v. Talley*, 1 Va. Dec. 447, citing *Ross v. Norvell*, 1 Wash. 14; *Robertson v. Campbell*, 3 Call 421; *Owen v. Sharp*, 12 Leigh 427.

tion against Thompson; who, wishing to secure this slave against his creditors, for the benefit of his two daughters, Sarah now the wife of James Shark and Cecelia now the wife of Jordan Rusher, then unmarried and infants, and having received a sum of money in right of his wife, gave the 250 dollars out of it to Owen, which Owen paid to the sheriff, and Thompson paid the balance due on the execution; and thus the title of the slave was relieved from the execution, and the bill of sale was thereupon executed by Thompson to Owen, absolute on its face, but with a secret trust that Owen should hold the property for the benefit of the two daughters. Thompson died in April 1827. Owen, having been appointed guardian of the two daughters, took possession of the slave and carried her to his own house; declaring that she was to work for the benefit of the two daughters. But he settled his accounts of guardianship in 1829: Sharp the husband of Sarah, and David Thompson the agent of Cecelia, both the daughters being now of age, were present, and set up a claim to the slave, which Owen denied to be just, and therefore the profits were not brought to the credit of the wards in the settlement.

In 1837, Sharp and wife exhibited their bill against Owen and Rusher and wife, alleging the secret trust on which the slave Sukey had been conveyed by Thompson to Owen, and praying that the slave and her increase, now three in number, and the profits thereof, should be equally divided between the plaintiffs Sharp and wife and the defendants Rusher and wife.

The bill was taken for confessed as to Rusher and wife. Owen answered, and denied the trust; he said, that he purchased the slave with his own money, and 429 \*took an absolute bill of sale for her, without any such understanding or agreement as the bill alleged; that he settled his accounts of guardianship of Sarah and Cecelia in 1829, Sharp the husband of Sarah, and David Thompson the agent of Cecelia, both then of full age, being present, and setting up no claim for the slave; and that he had held peaceable possession of the property ever since, with the exception of some contention he had had with the creditors of Thompson.

The trust being proved, the court decreed, that the slave Sukey and her increase should be divided between Sharp and wife and Rusher and wife, and ordered Owen to render an account of the profits. From which decree, Owen applied to this court for an appeal; which was allowed.

The attorney general for the appellant. Robinson for the appellees.

ALLEN, J. With every disposition to deprive the appellant, the fraudulent donee, of the fruits of his iniquity, it seems to me, that the repeated decisions of this court, the principles which regulate courts of equity, and consideration of public policy, preclude us from giving relief in this case. A fraudulent conveyance, though void as to creditors, is good between the parties. Being valid between the parties, it follows, that the fraudulent grantor cannot be permitted to allege his fraud to avoid his deed. Accordingly, this principle was settled as

early as the case of Hawes v. Leader, Cro. Jac. 270, an authority cited and relied upon in *Starke's ex'ors v. Littlepage*, 4 Rand. 368, as being founded on sound principles of law and policy. The case of *Starke's ex'ors v. Littlepage* furnishes a striking illustration of the rule. The suit was brought by the representatives of the fraudulent grantee, to enforce the fraudulent conveyance: the debtor had continued 430 in \*possession of the property, and he was not permitted to protect that possession, by shewing that his deed was fraudulent. Judge Coalter, who dissented from the majority of the court, did not controvert the general principle: he only differed as to the mode of its application; in his opinion, the parties were in *pari delicto*; he thought, that neither party could be heard, and that they should be left by the courts where they had placed themselves. The principle was reaffirmed in *James v. Bird's adm'r*, 8 Leigh 510, and in *Terrell v. Imboden*, 10 Leigh 321.

If, then, the alleged trust had been in favour of the grantor, and he were the plaintiff, alleging that the deed was executed by him when embarrassed with debt, that though absolute and apparently for a full and valuable consideration, there was a secret trust that the property was to be held for his use, and to shew this trust he had proved the fraudulent intent in executing the conveyance, would a court of equity entertain him? Even according to Judge Coalter, in *Starke's ex'ors v. Littlepage*, the court would leave him where he had placed himself. Do the appellees occupy higher ground? They are volunteers claiming the benefit of his act, seeking it through his fraud. An attempt was made to give a different colouring to the transaction, by the allegation, that the money which the fraudulent grantor furnished to his grantee to make the ostensible payment for the slave, was the money of the plaintiffs. But this allegation is not sustained, but rather disproved. It has been argued, that Owen sets up the fraud to defeat the claim, and the case of *Ward v. Webber*, 1 Wash. 274, was relied on. In that case, the father had made an absolute conveyance to the daughter: after executing the deed, he got possession of it surreptitiously and destroyed it. The bill was filed by the daughter and her husband to set up the deed: the father answered, admitting the deed, but alleged it was made on con- 431 dition his daughter \*married to please him, which she had not done; he did not rely on any fraud in the execution of the instrument. After his death, his son set up the defence, that the deed was executed when the grantor laboured under a prosecution which threatened his life; and that it was made to screen his property from forfeiture if he were convicted, and upon a secret trust to reconvey to him, if he should get clear. Upon this state of facts it may be observed, that the duty of the parent to provide for the child, was a good consideration for the conveyance; and the execution of the deed being admitted, and no trust being declared on its face, the case of the plaintiffs was made out. They had an absolute conveyance, and no

proof of fraud came from or was necessary to come from them. It was offered by the defendant. To have received such evidence, would have been to have permitted the party committing the fraud to rely on it in his own defence. The court decided against the defendant, upon the ground that no secret trust was proved. It was unnecessary to decide upon the effect of such proof, and no opinion was given upon it. So far as the decision goes, it was against the party setting up such a defence. In this case, as it seems to me, the proof of fraud comes, and of necessity must come, from the plaintiffs. The defendant has his deed, absolute upon its face, and made apparently for a full and valuable consideration. The plaintiffs are driven to the necessity of shewing, by parol evidence, that this recital was false, that no consideration passed; and in doing so, they prove that the money ostensibly paid by the defendant was in fact the money of the grantor, and that this device was resorted to for the purpose of screening the property from his creditors. The deed being absolute, the plaintiffs attempted to establish the secret trust, and in doing so shew the intent with which it was created. If the facts were reversed, if the trust had been expressed on the face of the deed, and the grantee had refused to execute it on

432 the ground of fraud, he would then be compelled to allege his own fraud to protect himself, and could not be heard.

This view of the law and its application, is sustained by considerations of public policy. Men in the condition of Thompson are not likely to make such conveyances for their own benefit. They seek so to arrange their property as that the benefit may enure to those for whom they wish to provide, and upon whose kindness they can rely for support. The deed, to avail, must be absolute; this is necessary to deceive the public and defeat the creditor. If, after the creditor has been wearied out, the parties can be permitted to turn round, and shew that the recitals in the deed are false, made so with a fraudulent intent, and that there was a secret trust for the children of the grantor, the strongest inducement is held out to enter into such arrangements. It appears from the record, that the creditors of this grantor have been pursuing this property in the courts of Botetourt and Bedford; unsuccessfully, it may be inferred, as this controversy for it has been commenced. If it had been well understood that the concealment of the fraud, though it might injure the creditors, could not benefit the plaintiffs, the creditors, perhaps, would have been more fortunate.

In addition to this objection to the claims of the plaintiffs, there is another which is insuperable. The two daughters arrived at full age and married, more than eight years before the filing of this bill. Owen had been their guardian; and at the settlement of his accounts the husband of one, and the brother and agent of the other, were present. A claim was then set up to the slaves, which Owen denied. He then claimed the property absolutely: even if there had been a trust originally, he then disclaimed it, and held the property ad-

versely to the plaintiffs. About eight years elapsed after this settlement, before this suit was commenced. \*Owen, in his answer, relies on the length of time as protecting his right to the property. And the law is well settled, that the quiet possession of slaves for more than five years vests the legal right to the property in the holder.

The conduct of Owen, in this transaction, has been marked with the most heartless perfidy towards his confiding father-in-law and his children, and the grossest fraud. But standing in the position he does, it seems to me that the law protects him.

I think the decree should be reversed, and the bill dismissed, but without costs.

STANARD and CABELL, J., concurred. Decree reversed with costs; and cause remanded to the circuit superior court, with direction to dismiss the bill without costs.

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\*Pullen v. Mullen & Wife.

December, 1841, Richmond.

(Absent BROOKE, J.)

**Conveyance of Land—Mistake in Quantity—Suit to Correct—Confession of Bill.**—A house and lot conveyed to Mrs. M. and to her offsprings: Mrs. M. and her husband convey the same to a trustee and his heirs, to secure a debt; the trustee advertises the land to be sold in pursuance of the deed, but thinking that Mrs. M. had only a life estate, he proclaims that only an estate for her life will be sold, and that interest is sold to P. but the trustee conveys the whole fee simple; eight years after, M. and wife file a bill against P. to correct the mistake: and this bill is taken pro confesso: **HOLD**, 1. as the bill was taken for confessed, immaterial to enquire whether parol evidence is admissible to prove the mistake of the trustee in selling only an estate for Mrs. M.'s life, and then conveying the whole fee; and 2. the mistake is to be corrected, by decreeing that P. shall reconvey to Mrs. M. the remainder in fee expectant on her own life.

In February 1826, David Coyle conveyed, by a deed of gift, a house and lot in Fredericksburg "to Ann Curtis for the use and benefit of her the said Ann and her offsprings forever;" habendum "to the said Ann and her offsprings forever;" Ann Curtis married Ryland Mullen. And then, by deed dated the 4th May 1829, Mullen and wife conveyed the house and lot to John Chew and his heirs, upon trust to secure a debt of 50 dollars to James Wilkins; providing that if Mullen should make default in paying 17 dollars and ten cents with interest &c. at the expiration of three months, and the sum of 32 dollars 70 cents with interest &c. at the expiration of five months, from the date of the deed, then Chew the trustee should, "after giving public notice of the same, sell at public sale for cash" the house and lot, and pay, first the expenses of the execution of the trust, then the debt and interest due to Wilkins, and the balance, if any, to Mullen and wife. Default having been made, the trustee caused public notice to be given of the sale, in the manner usual in Fredericksburg, by sending round the town a written advertisement of the sale on the auctioneer's flag, with a bell; which advertisement re-

ferred to the deed of trust, and stated that the sale would be made of the house and lot on the premises, by Chew the trustee, in pursuance thereof. The sale was made on the 9th October 1829; and John Pullen became the purchaser at 105 dollars cash, which he immediately paid; whereupon the trustee, on the same day, conveyed the house and lot to him in fee simple, referring to the deed of Mullen and wife to him, which, as before stated, was a conveyance of the fee.

In November 1837, Mullen and wife exhibited a bill in chancery against Pullen and Chew, in the circuit superior court of Spotsylvania, stating that after the execution of the deed of trust of May 1829, one Clarke offered them 350 dollars for the house and lot, if a good title to the same could be conveyed; upon which they consulted counsel, who, upon examining the deed from Coyle to the plaintiff Ann, advised that, as the property was thereby conveyed to her and her offsprings, instead of her heirs, a good title could not be made without a decree of a court of chancery. That, on the 9th October 1829, the debt secured by the deed of trust being unpaid, the trustee Chew sold the lot at public auction for cash; but acting under the impression that the plaintiff Ann was only entitled, by the deed from Coyle, to a life estate in the lot, he sold the property for her life only; and being thus sold, it produced only 105 dollars. That sum was indeed less than the value of the property for the life of the plaintiff: the lot was sold without any previous advertisement in the newspapers; and if any notice of the sale was given, it must have been very short, since the debt became due on the 4th October, and the sale was made on the 9th of the same month. That Pullen was the purchaser at the trustee's sale; and

436 the \*plaintiffs had recently heard with surprise, that though he had bought the lot for the life of the female plaintiff only, he claimed the absolute fee simple, and contended, that it had been so conveyed to him by the trustee; upon which, having caused an examination to be made of the trustee's deed, they found that that deed did in fact convey to Pullen the absolute fee, without any restriction of the estate to the life of the female plaintiff according to the declared and known conditions and terms of the sale actually made. That this difference between the subject sold, and the subject conveyed, by the trustee, arose from his mistake or oversight; the trustee, being of opinion that the female plaintiff was entitled only to a life estate, inferred that her deed to him and his deed to Pullen would convey no more than she had a right to convey. That it was, however, certain, that only an estate for the life of the female plaintiff was sold to Pullen; the trustee Chew, and the auctioneer Buck, both so declared; and the plaintiffs were now advised, that the deed of Cole gave the female plaintiff clear estate in fee simple, and that such a particular estate having been sold by the trustee for more than enough to satisfy her husband's debt, the reversionary interest, in equity at least, remained in her, and she was entitled to have the sale set aside,

or the reversion reconveyed to her. And that the plaintiffs, acting under the advice of their counsel, caused a deed to be prepared, whereby Pullen might convey the reversion back to them, which they presented to him for execution, but he refused to execute the same; he persisted in his claim of the absolute fee simple. Therefore, Mullen and wife prayed that the sale might be set aside and annulled, and an account taken of rents and profits since the sale; or, that Pullen might be decreed to convey to the female plaintiff and her heirs, the remainder in fee expectant on her life; and general relief.

437 \*No answer was filed in the cause, and the bill was taken pro confesso. The depositions of Buck the auctioneer, of Chew the trustee, and of a Mr. Caldwell, proved all the allegations of the bill (except only, that counsel had advised that Mrs. Mullen had not the fee simple) and especially, that only an estate for the life of Mrs. Mullen was sold. Caldwell was of opinion, that the fee simple would have sold for double the price for which the life estate was sold to Pullen.

The court decreed, that the sale made by the trustee to Pullen should be set aside; and directed an account of rents and profits received by Pullen, and of the permanent improvements put by him on the lot since his purchase. And upon the coming in of the report, whereby it appeared, that the rents and profits exceeded the value of the permanent improvements by the sum of 110 dollars 95 cents, the court decreed, that upon Mullen and wife paying Pullen 53 dollars 95 cents (being the balance due of the purchase money he had paid in October 1829 with interest thereon, after deducting the net money he had received for rents and profits), Pullen should reconvey the house and lot to Mullen and wife; and, in case Mullen and wife should be unable or should fail to make or tender such payment, liberty was reserved to them, or to Pullen, to apply to the court for a sale of the property, in order that Pullen might receive the balance due to him, and Mullen and wife might receive their property.

Pullen asked of this court an appeal from the decree; which was allowed.

Patton, for the appellant. 1. The suit was prematurely brought. The sale of the property for the life of Mrs. Mullen was confessedly made; and, as she is still alive, no injury is done to any body by Pullen's holding the estate; nor will it be until after her death, that Pullen's claim to the fee

438 simple will intercept the just rights \*of her heirs. Suppose (as the court below seems to have supposed) that Coyle's deed to Mrs. Mullen and her offsprings, gave her and them an estate in common, still she cannot complain of this sale of Pullen, and her offsprings do not complain: they are not parties to the suit, and the court can give no decree touching their right or title. In truth, the only bill which she could have filed, was a bill to perpetuate testimony. But 2. if Mrs. Mullen had a right to come into equity, her relief should be limited to the correction of the mistake she complains of—the conveyance of the fee simple to Pullen,

instead of an estate for her life, which was sold to him. Even in case of an executory contract, where a party sells more than he had a right to sell, if the purchaser insists on specific performance of the contract so far as the vendor is able to execute it, equity decrees it; Lord Eldon's opinion in *Mortlock v. Buller*, 10 Ves. 314. Here, Mullen and wife conveyed a fee to Chew; Chew sold only an estate for Mrs. Mullen's life to Pullen; but he conveyed him the fee simple, and surely the conveyance passes the estate for the life of Mrs. Mullen. Complete justice would have been done, by decreeing that Pullen should release the remainder in fee expectant on Mrs. Mullen's life. 3. When Mullen and wife conveyed to Chew, they thought they had the fee, and therefore they conveyed the estate to Chew and his heirs. The trustee did not sell the whole estate; he thought he had only an estate for Mrs. Mullen's life, and he directed the auctioneer to make proclamation that an estate for life only was to be sold. But he had previously written or printed an advertisement, that the "house and lot" would be sold "in pursuance of a deed of trust." Now, the advertisement is the proper evidence of the terms of the contract. I understand the rule of law to be well established, that written particulars of a sale will not be affected by parol declarations of the auctioneer made at the sale. The lord chancellor said so, in 439 terms, in *Buckmaster v. Harrop*, 13 Ves. 471, 473. In *Higginson v. Clowes*, 15 Ves. 516, and *Jenkinson v. Pepys* (cited there, and in *Townshend v. Stangroom*, 6 Ves. 330), declarations of the auctioneer, merely explaining an ambiguity in the printed particulars, were rejected. *Rich v. Jackson*, 4 Bro. C. C. 514; *Gunnis v. Erhart*, 1 H. Blacks. 289. But suppose the mistake proved in this case; yet it is clear, that the trustee Chew intended to sell and convey the whole estate which was conveyed to him by the deed of trust, though he thought it conveyed only Mrs. Mullen's life estate. His deed, therefore, was written exactly as he intended to write it. The contract is completely executed. Our question is, whether such a mistake can be corrected by bill in equity? An executed contract cannot be varied by parol, any more than an executory one: the rule is a fortiori, in the case of the contract executed. In the case of a sale of land, if the contract is executed, it cannot be rescinded in equity, except on the ground of fraud distinctly charged and proved. *Thompson v. Jackson*, 3 Rand. 504. The mistake committed by the trustee was an ignorance of law and not of fact, as to the extent of his rights; and this is certainly remediless in equity as well as at law; *Brown v. Armistead*, 6 Rand. 594; *Mayor &c. v. Judah*, 5 Leigh 305. I suppose, with the counsel for the appellees, that Mrs. Mullen had a fee simple, or that she took under the deed of Coyle a fee tail, which the statute for abolishing entails converted into a fee simple. But perhaps this is not so clear; *Co. Litt.* 20 a. b.

Moncure, for the appellees. The deed from Coyle to Ann Curtis passed a fee simple to her. The deed gives the subject to

her "for the use of herself and her offsprings forever;" habendum "to her and her offsprings forever." The word "offsprings" is clearly a word of limitation, not a word of purchase; it is equivalent to the word "issue," or the words "heirs of her body forever." Then, the appellees are entitled to relief in this

440 \*case on the ground of mistake; which is a well settled, if not a well defined, head of equitable relief. The whole fee was conveyed by Mullen and wife to Chew the trustee; he sold only an estate for her life; but by some mistake, either of law or of fact, he conveyed not the life estate he had sold, but the whole fee, to Pullen. Of the true state of facts, there is no doubt. Parol evidence is admissible to prove mistakes in written instruments; and "if strong and irrefragable" (to use lord Thurlow's word in *Shelburne v. Inchiquin*, 1 Bro. C. C. 341,) it is sufficient of itself to justify the court in correcting the mistake or setting aside the contract. In *Baker v. Pain*, 1 Vess. 456, Lord Hardwicke said, "How can a mistake in an agreement be proved but by parol evidence? It is not used to contradict the face of the instrument, but to prove a mistake therein." The following authorities not only establish the general proposition that parol evidence is admissible and may be sufficient in such cases, but are also peculiarly applicable to the present case; *Gillespie v. Moon*, 2 Johns. Ch. Rep. 585; *De Reimer v. Cantillon*, 4 Id. 85; *Thomas v. Davis*, 1 Dick. 301. The cases on this question exhibit some conflict and contrariety, owing to various causes: many of those in which parol evidence has been excluded, are cases under the statute of frauds, or for specific performance, or where the effect of admitting the evidence would be to contradict or vary a written agreement, not to establish an equity dehors the instrument. It is said, that the mistake in this case, if any, was a mistake of law and not of fact. It was a mistake about title, which was compounded of law and fact. If the mistake had been in the agreement, it might be necessary to enquire whether it was a mistake of law or of fact; but here, the mistake was not in the agreement, but in the deed which was made to carry the agreement into execution. The distinction is established by the best authority. In 441 *Hunt v. Rousmaniere's adm'r*, 1 Peters 13, it is laid down as incontrovertible, that "where an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether by writing or by parol, previously entered into, but which by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement." See also *Brown & ux. v. Bonner*, 8 Leigh 1. If the deed of Chew to Pullen was a valid conveyance to the extent of the life estate of Mrs. Mullen which was sold, still the suit was not prematurely brought. Mullen and wife were entitled to have the remainder in fee released to them. The mistake is the ground

of the suit; and so soon as that was committed, a right accrued to them to have it corrected. The equitable title is in Mrs. Mullen; the naked legal title in Pullen, to whom it was conveyed by mistake. The holder of the equity may at once pursue the legal title. Though not an estate in possession, it is a vested and valuable right, of which the owner may make present use, and of which therefore she should not be deprived. But here, the sale was made by a trustee, and under the circumstances was absolutely void. The doctrine of caveat emptor applies in full force to a purchaser under a deed of trust: he must take care, that the provisions of the deed have been strictly pursued, and the sale fairly made. *Quarles v. Lacy*, 4 Munf. 251; *Lane v. Tidball*, Gilm. 130; *Gay v. Hancock*, 1 Rand. 72; *Chowning v. Cox*, Id. 306; *Gibson's heirs v. Jones*, 5 Leigh 370. Now, 1. this sale was made on insufficient notice. The deed required public notice. The notice was not advertised in a newspaper of Fredericksburg, but only by sending a notice through the town on the day of sale; and the sale was made within four or five

442 days after the default of payment. Yet the sale was of real estate \*and for cash. The sale was of the property of a wife to pay the debt of her husband; a circumstance, which required longer and more public notice to prevent the sacrifice, which, as might have been expected, resulted from the sale. 2. The deed conveyed the whole fee simple, but the trustee sold only an estate for the life of Mrs. Mullen. If the trustee had a right to sell less than the fee simple, there might have been some semblance of propriety in selling the estate for the life of the husband who owed the debt; or he might have rented out the property for three years, which would have discharged the debt. Indeed, the sale of the estate for the wife's life was so obviously improper and unjust, that it would never have been made but for the mistake of the trustee as to the quantity of estate conveyed to him. 3. If the trustee sold the estate as a life estate of Mrs. Mullen, and yet conveyed, and intended to convey, the whole estate vested in him, whether the absolute fee or the life estate, this was plainly a breach of trust; for if there was a doubt, it was the duty of the trustee to resort to a court of equity to clear it away. The effect of the breaches of trust, is to avoid the sale; *Taylor v. King*, 6 Munf. 358; *Denning v. Smith*, 3 Johns. Ch. Rep. 332; *Gibson's heirs v. Jones & ux.*, 5 Leigh 370. It is true, that Mullen and wife offered to take a release of the remainder in fee; which, however, Pullen, who had purchased only an estate for Mrs. Mullen's life, refused to accede to. They would have preferred that to a long and expensive litigation; and Pullen by refusing to release the remainder, when he knew he had purchased only the life estate, was guilty of a fraud, whereby he deprived himself of all claim to favour, which might otherwise have been extended to him by a court of equity, as an innocent purchaser. The prayer of the bill is in the alternative—for a cancellation of the sale—or for a release of the remainder—or for general relief;

and, even if there had been no prayer 443 for a cancellation \*of the sale, the court might have decreed it under the prayer for general relief. *Bailey v. Burton*, 8 Wend. 339. By the cancellation of the sale, Pullen loses nothing but a speculation; for in the account which has been taken, all his payments, and all his expenditures, have been allowed.

Patton, in reply. There was no breach of trust. If the trustee sold the absolute fee, he acted in strict conformity with the deed of trust which conveyed the fee; and this is what I say he did. If he sold, and intended to sell, an estate for Mrs. Mullen's life, he did so under a belief that her deed conveyed no more to him. How can a breach of trust be imputed to him? If he mistook the extent of the estate vested in him, and sold less than he might have sold, and paid the debt, what right have Mullen and wife to complain, that this misapprehension, resulting to their benefit, was a breach of trust? The appellees' counsel complains, that it was a breach of trust not to have sold the whole fee simple; and then, that it was a breach of trust, to sell more than there was any necessity to sell to pay the debt. The life estate is not alleged or proved to have been worth more than Pullen gave for it: and it paid the debt, and left a surplus of 30 dollars, which Mullen and wife received without objection to the sale, and kept for eight years without any complaint. There is, then, no ground to impute breach of trust, or abuse of trust, to the trustee. The utmost relief to which Mullen and wife can be entitled, is to a conveyance of the remainder in fee expectant on Mrs. Mullen's life; so as to give Pullen that which he really bought, and no more. I contend, however, that the mistake is one which equity cannot relieve.

PER CURIAM. It is expressly charged in the bill, that at the sale made by the trustee, he sold, and the appellant purchased, the life estate only of the fee- 444 male appellee; \*and the appellant, by failing to answer and permitting the bill to be taken for confessed, has admitted the truth of these allegations: such admission dispenses with the enquiry, whether it would have been competent to introduce parol evidence to prove a mistake made in the deed of the trustee, conveying the whole estate, instead of an estate for the life of Mrs. Mullen. It was not premature in the appellees to apply to a court of equity to correct this mistake, and to procure a reconveyance from the appellant of all interest vested in him by the deed from the trustee beyond the life estate. But after the lapse of time which has intervened between the sale and the institution of this suit, during which period the appellant has held possession, and made valuable improvements, without any objection or complaint on the part of the appellees that the trustee had proceeded irregularly or transcended his authority, it is now too late to disturb the sale, on account of any such supposed irregularity or want of authority; and the court should have done no more than correct the mistake by directing a reconveyance from the appellant to Mrs. Mullen, of all interest vested in him by the deed from

the trustee beyond her life estate. Therefore, the decree is erroneous, and is reversed with costs.

And this court proceeding to pronounce such decree as the circuit superior court ought to have pronounced, it is decreed and ordered, that the appellant do, by a proper conveyance duly executed and acknowledged, release and convey to Mrs. Mullen all interest in the house and lot in the proceedings mentioned, vested in him by the deed of the trustee, beyond the life estate of Mrs. Mullen, and also that the said appellant do pay unto the appellees their costs by them about their suit in the circuit superior court expended.

#### 445 \*Hairston v. Doe & d. Randolphs.

December, 1841. Richmond.

(Absent BROOKS, J.)

**Married Woman—Deed—Certificate of Privy Examination.**—Case at Bar.—Certificate of justices of privy examination of the wife to a deed of husband and wife, states, that the wife appeared before the justices, and separately and apart from her husband, acknowledged that she had willingly executed the deed on her part, and wished not to retract it; the deed was signed and sealed by both husband and wife in 1798, and the privy examination was had in 1816: *Held*, upon construction of the statute of 1814 (incorporated in the statute of conveyances, 1 Rev. Code, ch. 99, § 15), that the cer-

\***Married Women—Deed—Certificate of Privy Examination.**—Unless the certificate of the privy examination of the wife shows that all the requirements of the statute have been substantially complied with, the deed is void as to her. And a compliance with one requirement of the statute, by no means implies a compliance with another. In support of this general proposition, see the principal case cited in *Leftwich v. Neal*, 7 W. Va. 573; *Watson v. Michael*, 21 W. Va. 573; *McMullen v. Eagan*, 21 W. Va. 244; *Laughlin, etc., Co. v. Fream*, 14 W. Va. 334; *Bartlett v. Fleming*, 3 W. Va. 164; *Laidley v. Central Land Co.*, 30 W. Va. 512, 513, 4 S. E. Rep. 709; *Grove v. Zumbro*, 14 Gratt. 514; *Bolling v. Teel*, 76 Va. 495; *Hurst v. Leckie*, 97 Va. 563, 34 S. E. Rep. 464. But see *Pollard's Supplement*, ch. 103, § 2298 a.

**Same—Same—Defective Execution—Relief in Equity.**—The principal case is cited in *Wynn v. Louthan*, 86 Va. 947, 11 S. E. Rep. 873, for the proposition that the mode prescribed by statute, whereby married women may part with real estate, or any interest therein, is specific, imperative, and indispensable, allowing of no deviation; and no defective execution of a deed of a feme covert can be set up, cured or affected, by a court of equity. See *foot-notes* to *Grove v. Zumbro*, 14 Gratt. 501; *Countz v. Geiger*, 1 Call 190.

**Case Distinguished.**—*Tod v. Baylor*, 4 Leigh 498, is distinguished from the principal case, because, as the statute then was, it was unnecessary that the certificate should show, that the "deed was explained to the wife," as the statute did not, in terms, require it.

**Same—Same—Same—Same—Parol Evidence.**—And as to the point that parol evidence is inadmissible to prove or disprove the privy examination of a married woman, or in any manner to affect the certificate of such examination, see the principal case cited in *First Nat. Bank v. Paul*, 75 Va. 601; *Hurst v. Leckie*, 97 Va. 562, 34 S. E. Rep. 464.

See the principal case cited in *Hockman v. McClanahan*, 87 Va. 39, 12 S. E. Rep. 230.

tificate is defective in not shewing that the deed was explained to the wife, or that she was in any way apprised of its contents and purpose, and therefore the rights of the wife did not pass by the deed.

In ejectment for 1660 acres of land in Henry, by Richard, William and Burwell Randolph, lessors of the plaintiff, against Hairston, in the circuit superior court of Henry, and thence transferred to that of Halifax, where the cause was tried, a special verdict was found shewing the following state of facts:

Mary, the wife of David Meade Randolph, was on the 1st January 1798 seized in a fee of a parcel of 1660 acres of land in the county of Henry, the premises in the declaration mentioned; and David Meade Randolph and Mary his wife, by deed of bargain and sale of that date, in consideration of £450, conveyed the land to George Hairston. The deed was signed and sealed by both the husband and wife; and upon full and due proof of execution by the husband, was admitted to record by the county court of Henry, in February 1798. No privy examination of the wife in respect to the deed, or any proceeding of the kind, was had at the time. But in February 1816, Mrs. Randolph, her husband being then still living, appeared before two aldermen and justices of the peace of the city

446 of Richmond, "and then and there acknowledged the original deed; and they endorsed on the deed a certificate of the acknowledgment in the following words:—"City of Richmond, to wit: We J. P. and W. H. F. magistrates of the said city, do hereby certify, that Mary, wife of the within named D. M. Randolph, both of them parties to the deed within executed, personally appeared before us, and separately and apart from her husband, and acknowledged that she had willingly executed the said deed on her part, and wished not to retract it. Given under our hands and seals this 20th February 1816." And this certificate, signed and sealed by the justices, was, together with the original deed on which it was endorsed, delivered by George Hairston, the bargainee, to the clerk of the county court of Henry, who recorded the certificate, and made a certificate of the recording thereof in the following words: "Henry clerk's office, 15th April 1816. The above certificate purporting the relinquishment of Mary Randolph, wife of D. M. Randolph, of her right of dower &c. to the land conveyed by the within indenture to George Hairston, was exhibited to me in my office, and admitted to record. (Signed) W. Reed, clerk H. C." Immediately after the execution of the deed in January 1798, George Hairston, the bargainee, took possession of the land thereby conveyed, and thenceforth ever afterwards continued to hold the same, without interruption, till his death in 1827. He devised the land to Marshall Hairston, the defendant in this suit. David Meade Randolph died about five years, and Mary Randolph his widow about three years, before the ejectment was brought. The lessors of the plaintiff were the heirs at law of Mary Randolph. And the question referred to the court by the special



verdict, was, Whether, upon the facts therein stated, the title of Mary Randolph in the land which the deed of January 1798 purported to convey, passed thereby to George Hairston, the bargainee?

447 \*The circuit superior court held that it did not, and gave judgment for the plaintiff. To which this court, on the defendant's petition, allowed a super-sedeas.

Cooke and Leigh, for plaintiff in error. The question is, whether it sufficiently appeared by the certificate of the aldermen of Richmond of February 1816, that Mrs. Randolph then acknowledged the deed of January 1798 to be her deed, in such manner and with such solemnities as the then existing statute law of Virginia required to make the deed of a feme covert binding on her? The regularity of the proceeding must be tested by its conformity with the provisions of the statute of 1814-'15, ch. 28, § 3, which was the law of the land at the time. But for the purpose of understanding the spirit of our legislation on the subject of conveyances of real estate by femes covert, it may be well to look back to former statutes in *pari materia*, and especially to compare the provisions of the statute of 1814-'15 with those of the statute of 1785, ch. 62, the construction of which has  
448 been the subject of adjudication.\* \*It

\*See the statutes of 1674, act 7, 2 Hen. Stat. at large, p. 317, 1705, ch. 21; 3 Id. 319, 1710, ch. 13, § 3; Id. 517, 1734, ch. 6, § 7; 4 Id. 400, 1748, ch. 1, § 5, 6; 5 Id. 410.

The provision of the statute of 1785, ch. 62, incorporated in the statute regulating conveyances of 1792, Rev. Code of 1794, ch. 90, § 6; Pleasant's Ed. p. 157, 8, was in these words: "When husband and wife have sealed and delivered a writing purporting to be a conveyance of any estate or interest, if she appear in court, and being examined privily and apart from her husband by one of the Judges thereof, shall declare to him that she did freely and willingly seal and deliver the said writing to be then shewn and explained to her, and wishes not to retract it, and shall before the said court acknowledge the said writing, again shewn to her, to be her act; or if before two Justices of the peace of that county in which she dwelleth if her dwelling be in the U. States of America, who may be empowered by commission to be issued by the clerk of the court wherein the deed ought to be recorded to examine her privily and take her acknowledgment, the wife being examined privily and apart from her husband by those commissioners, shall declare that she willingly signed and sealed the said writing, to be then shewn and explained to her by them, and consenteth that it may be recorded, and the said commissioners shall return, with the commission and thereunto annexed, a certificate under their hands and seals of such privy examination by them and of such declaration made and consent yielded by her; in either case, the said writing, acknowledged also by the husband or proved by witnesses to be his act, and recorded together with such her privy examination and acknowledgment before the court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower thereby intended to be conveyed or released, but be as effectual for every other purpose as if she were an unmarried woman."

The statute of 1814-'15, ch. 28, § 3, Sess. Acts, p. 76, provided, "That it shall not be necessary to obtain a commission from the clerk of the court of the

will be found, on examination of the series of statutes on the subject, that all of them previous to that of  
449 \*1785 only required that the feme covert should be examined by the court, or by the justices under the *dedimus potestatem*, privily and apart from her husband, and that she should give her free consent to the same, without requiring that the deed should be shewn and explained to her by the court, or by the commissioners: her free consent was all that was to be ascertained, and when ascertained by commissioners was all that they were to certify. The statute of 1785 was the first which requires, that in the privy examination of a feme covert, the deed should be shewn and explained to her, either by one of the judges of the court, or by the justices acting under the *dedimus potestatem*, and that upon such privy examination she should declare that she freely and willingly executed the deed; and when made by commissioners, that they should certify such privy examination by them, and such declaration made, and consent that it might be recorded, yielded by her, and return the certificate with the commission and thereunto annexed: the act of 1785 contained directions to the court, or the commissioners, how they should make the privy examination of the feme covert, and

county or corporation wherein any conveyance executed as aforesaid" [by husband and wife] "ought to be recorded, to take the acknowledgment and privy examination of any feme covert touching the same: and that it shall be lawful for any two justices of the peace in any county or corporation, within the U. States or the territories thereof, within which such feme covert may be, to examine her privily and apart from her husband respecting the said conveyance, and to take and certify her acknowledgment thereof to the following effect: "— county [or corporation] to wit: We, A. B. and C. D. Justices of the peace in the county [or corporation] aforesaid in the state [or territory] of —, do hereby certify, that E. F. the wife of G. H., parties to a certain deed for the conveyance of real estate to J. K. bearing date on the — day of — and hereto annexed, personally appeared before us in our county [or corporation] aforesaid, and, being examined by us privily and apart from her husband, and having the deed aforesaid fully explained to her, she the said E. F. acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it. Given under our hands and seals &c.' The privy examination and acknowledgment so taken and certified shall be admitted to record in any court wherein the deed to which it is annexed may be recorded, and shall be entered in the book of records immediately below and following the record of the said deed: and when so recorded, shall be effectual in law to pass the right of dower or other interest in real estate of such feme covert, in the same manner as if such privy examination and acknowledgment had been taken and certified by virtue of a commission issued in pursuance of existing laws."

So much of the statute of 1792 as remained unaltered by that of 1814, and the amendments made by the latter statute, were incorporated at the revision of 1819 into one provision, with some trivial amendments; 1 Rev. Code, ch. 90, § 15, p. 365, 6. — Note in Original Edition.



what they should do for the protection of her from the coercion of her husband, fraud or imposition; but it did not prescribe any form of the certificate of the commissioners when the privy examination was made by them in the country. The alterations made by the statute of 1814 consisted in the following particulars:

1. It dispensed with the necessity of a commission for making examinations of femes covert to deeds executed by husband and wife, and authorized two justices, without any such commission, to make such privy examinations: the former statutes required a dedimus potestatum in each particular case; this statute \*was a

general dedimus potestatum to all justices of the peace to make privy examinations in all cases. 2. The statute of 1814 gave (what that of 1785 did not give) a form of the certificate to be made by the justices of their privy examination of femes covert to deeds of husband and wife, and indicated the particular duties of the justices only by the form given for their certificate; yet it required them to certify the feme covert's privy examination and acknowledgment of the deed, not in that precise form, but to that effect. And 3. the statute of 1785 was very explicit in directing that the deed should be shewn and explained to the feme covert at the time of her privy examination, and by a judge of the court, or by the commissioners, before whom the proceeding was had: but the statute of 1814, in the form of the certificate it prescribed for the justices acting in the country, only required that the feme covert, "being examined by them privily and apart from her husband, and having the deed fully explained to her, should acknowledge the same" &c. without saying (at least, without distinctly saying) when or by whom it should be explained to her. If it was enough under the statute of 1785, much more is it enough under the statute of 1814, that it should appear from the certificate, that the feme covert had, at the time of her examination, knowledge of the contents and purpose of the deed, no matter how, when or from whom, she acquired that knowledge, and, having such knowledge, gave her free consent to the deed, uninfluenced by the power of her husband.

The main objection to the certificate of the aldermen of Richmond of February 1816, endorsed on the deed of January 1798, is, that it does not thereby appear, that Mrs. Randolph was privily examined by them and had the deed fully explained to her. It appears by the certificate, that she personally appeared before the aldermen, separately and apart from her husband,

and acknowledged that she had willingly executed the said \*deed on her part (this very deed, namely, which her husband and she had executed to Hairston in 1798) and wished not to retract it. She appeared "separately and apart from her husband:" separately is tantamount to privily, for the privy examination of a feme covert does not mean, a private or secret one, but only an examination in the absence of her husband, when she is under the protection of the justices and free from his control. She "acknowledged, that she

had willingly executed the said deed;" that is, she acknowledged in 1816, that she had, eighteen years before, willingly executed this deed to Hairston; she could not have made such an acknowledgment, unless she remembered the transaction, or had recently read the deed, or it had been otherwise explained to her; unless, in short, she was acquainted with the contents and purpose of the deed. She acknowledged that she had executed the deed "on her part;" shewing, that she knew it was a deed of her husband and herself; which she could not have known without having seen and understood the instrument. She acknowledged, that "she wished not to retract" the deed: how could she have had any wish on the subject, without knowing what the deed was? There is not the least reason to doubt the fairness of the transaction. The certificate leaves no doubt, that Mrs. Randolph in fact knew what she was doing, and, with full knowledge of the deed, gave her free consent to it. If the court should be of this opinion, and should yet think that these are inferences of fact from the certificate, and inferences which may be confirmed or refuted by proof of the degrees of Mrs. Randolph's intelligence or ignorance, or other circumstances, and that therefore these inferences ought to have been found by the jury; this will only shew, that the special verdict is imperfect, and that a venire de novo ought to be directed.

The case of Harvey & wife v. Borden, 2 Wash. 156, arose under the statute of 1748, ch. 1, § 6, which required 452 \*that the commission for making the privy examination of a feme covert to a deed of husband and wife should be directed to two or more commissioners, being justices of the peace; and in that case, it did not appear from the commission, or from the certificate to the commissioners who made the privy examination of the feme covert, or from any part of the record, that the commissioners were justices of the peace: and this court held, that though such commissioners should in fact be justices of the peace, yet it was not necessary, that it should be stated in the commission, or in their certificate of the execution thereof, that they were justices; and moreover, that, in the absence of proof to the contrary, the court ought to presume that they were justices. So, in Ware v. Carey, 2 Call 263, the commission for the privy examination of the feme covert, was directed "to — gentlemen," and was executed by two persons who did not state, in their certificate, that they were justices of the peace, nor did it appear by the record that they were so; but the certificate of the execution of the commission being returned to the county court and recorded, it was held, that it sufficiently appeared, that the feme covert had duly executed and acknowledged the deed. In those cases, the objections to the proceeding affected the very competency of the commissioners to the care of whom the law confided the rights of the feme covert; and though their competency did nowise appear, the court held that the deeds were well executed and duly acknowledged. The cases of Langhorne v. Hobson, 4 Leigh

224, and *Tod v. Baylor*, Id. 498, arose under the statute of 1792. In the first of them, the commission for the privy examination of the feme covert did not require the justices to shew and explain the deed to her, as the statute required they should; but the certificate of the execution of the commission stated, that she was examined privily and apart from her husband, 453 and that she acknowledged the \*deed, and declared that she did so freely and voluntarily &c. "the commissioners having read the deed to her," without stating that they had shewn and explained it to her: and this certificate was held sufficient evidence of a good execution of the deed by the feme covert. In *Tod v. Baylor*, the commission did not direct the justices to shew and explain the deed to the feme covert, nor did they certify that they had shewn and explained it to her; but they certified, that she made her acknowledgment to them of the conveyance of the land (mentioning the quantity) contained in the deed, freely and voluntarily &c. *Carr, J.*, held, that the due execution of the deed by the feme covert sufficiently appeared by the certificate, 1. because though the statute required that the deed should be shewn and explained to her by the commissioners, it did not require that they should certify that they had done so; and 2. because it appeared by the certificate, that she knew the contents and purpose of the deed, for she acknowledged the conveyance of the very quantity of land thereby conveyed. *Tucker, P.*, concurred in the same result, but only because the certificate shewed that the feme covert acknowledged the conveyance of the very land contained in the deed; and so, her knowledge of the nature of the act she was doing appeared from the certificate. But, certainly, her knowledge of the deed was only an inference from the facts stated in the certificate. These cases shew, that wherever a feme covert has given her free consent to a deed, in which she has joined with her husband, with knowledge of the deed, however acquired, and whether manifested directly or circumstantially by the certificate of her privy examination, the statutes, the commission for taking the privy examination, and the certificate of the execution thereof, have all been liberally construed to support the conveyance, not strictly, to invalidate it.

All the statutes on this subject, from the earliest to the latest, have been mainly 454 intended, to provide, at \*once, a method by which married women should be enabled to convey their interests in real estate, and, at the same time, to secure to them the deliberate exercise of their own free will in making such alienations. If it appear from the certificate of the wife's privy examination to a deed of husband and wife, that she gave her free consent thereto, uninfluenced by the power of her husband, and (in the language of the president of this court in *Tod v. Baylor*) with knowledge of the nature of the act she was doing; that has been always held sufficient under the former statutes. It is submitted, that it results by inevitable inference from the certificate of the privy

examination in this case, that Mrs. Randolph voluntarily joined her husband in the execution of the deed, and knew its contents and purpose at the time of her acknowledgment of it; and that this certificate would have been sufficient under any of the statutes previous to that of 1814, and is equally sufficient under that statute.

Howard and Robinson, for the defendants in error. "At the common law, a feme covert could make no deed. By statute, she can make a valid deed, if it be executed under those forms and with those solemnities required by law; but if any of these be omitted or mistaken, the deed is void;" per *Carr, J.*, in *Currie v. Page*, 2 Leigh 620. Has this deed been executed by Mrs. Randolph under those forms and with those solemnities required by the statute of 1814? or has any of those forms and solemnities been omitted or mistaken? A mere comparison of the certificate of the aldermen of Richmond of February 1816 with the provisions of the statute of 1814 were enough to shew, that the certificate does not shew a compliance with the requisitions of the statute. Indeed, if the court shall go the length of holding this certificate good, it may as well say at once, that an acknowledgment of a deed by a feme covert, in

455 exactly the same terms as an acknowledgment by a person sui \*juris, will be valid and binding. Passing by the omissions in the certificate to state, that Mrs. Randolph appeared before the magistrates of Richmond in their corporation, and that she, at the time of her appearance before them, acknowledged the deed as her act and deed; the certificate is plainly and materially defective in not stating that she was examined privily and apart from her husband (or privily examined at all) and that she had the deed fully explained to her. These substantial requisites of the statute could not be complied with by shewing that she knew what land the deed conveyed and to whom; though, by the way, the certificate shews neither. The object of the privy examination is something more: the statute constitutes the justices the advisers and protectors of the feme covert, and makes it their duty to inform her of her rights, and of the consequences of her joining or omitting to join her husband in the deed. If Mrs. Randolph had been informed, that notwithstanding her husband's deed, she, or her children after her death, would be entitled absolutely to the property, her conduct might have been very different from what it was without such information. A deed conveying land of her own inheritance, might in ignorance of her rights, and of the consequences, have been executed by her for a trivial consideration, or none at all; but when she was well informed, she might have altogether refused to execute or acknowledge it. Now, we cannot collect from this certificate, that any such information was communicated to or possessed by her. Every thing in the certificate may be perfectly true, and yet she may have executed the deed with no other knowledge but that which she derived from her husband; for (nothing appears except that she made the acknowledgment

separately and apart from him. Her husband might not have been present, and yet she may have only been asked, whether she acknowledged that she had willingly executed the deed and wished not to retract \*it, and have given an affirmative answer to that question. For aught that appears, she was not asked, whether or no she was apprised of the contents and purpose of the deed. It has been strenuously argued, that she must have known every thing which it behooved the commissioners to inform her of—the contents, the nature, the effect, of the deed. Suppose it possible, or probable, or indeed that it was proved, that she in fact had such knowledge; still, it does not appear from this certificate, of what is called her privy examination, that she had; unless her mere acknowledgment, that she had willingly executed the deed, and that she wished not to retract it, is sufficient evidence of her knowledge. Such an inference is not in itself necessary, or even fair. It is the inference which the law would draw from the mere acknowledgment of the execution of a deed by a person *sui juris*, but which, in the case of a married woman's acknowledgment of a deed, the law repels. The certificate of privy examination, and that duly recorded, is the only evidence of her execution of the deed, which the law respects. It has no consideration of the personal character of the feme covert; and pays no regard to her intelligence, prudence or discretion, or, on the other hand, to her ignorance or thoughtlessness: it regards all married women, without discrimination, as sub potestate viri, extends its guardian care to all alike, and requires the same solemnities in every case.

As to the former statutes on the subject, little light can be thrown on our question by adverting to any of them but the statute of 1792, which immediately preceded that of 1814, under which this proceeding was had. The act of 1792 required, that in making the privy examination of a wife to a deed of husband and wife, the deed should be shewn and explained to her, at the time, by the commissioners; yet it did not require, that the commissioners should certify that they had shewn and explained the deed to her; as was expressly held by 457 \*Carr, J., in *Tod v. Baylor*. But it cannot be doubted, that the statute of 1814 expressly requires, that the justices shall certify, in substance, that the feme covert had the deed fully explained to her. By the statute of 1814, then, the certificate in this case is naught. It is useless to enquire, whether or no it might have been held good, if the proceeding had been had under the statute of 1792? though, if it were necessary, it might be maintained, that the certificate contained no evidence of a compliance with the requisitions of the statute of 1792.

There are statutory provisions in Pennsylvania and in Maryland,\* made for the

same purpose, and substantially to the same effect; and these have been the subject of frequent adjudications in the courts of those states; and it has been settled, that the certificate of the privy examination of a feme covert, must shew a compliance with the requisitions of the law in all particulars. \*See the cases upon the Pennsylvania statute; *Watson's lessee v. Bailey & al.*, 1 Binney 470; *Evans v. The Commonwealth*, 4 Serg. & Rawle 272; *Watson v. Mercer & al.*, 6 Id. 49; *Fowler v. M'Clurg & al.*, Id. 143; *Jourdan v. Jourdan*, 9 Id. 268; *Steele v. Thompson*, 14 Id. 84, 92; *Jamison v. Jamison*, 3 Whart. 457; Cases upon the Maryland statute, *Webster's lessee v. Hall*, 2 Har. & M'Hen. 19; *Jacob's lessee v. Kraner*, 1 Har. & Johns. 291; *Peddycourt v. Rigges*, Id. 293; *Hawkins v. Burrass*, Id. 513; *Corporation &c. v. Hammond*, Id. 580; *Heath v. Eden*, Id. 751.

The registry of the certificate, in our case, was irregular. The statute of 1814 requires, that the certificate of the privy examination of a feme covert to a deed of husband and wife, shall be entered in the book of records immediately below and following the record of the deed. But, in this instance, the record of the certificate was detached from the record of the deed.

Leigh, in reply. The statute of Pennsylvania is like our statute of 1792: the Pennsylvania statute requires that the judge or justice, in taking the privy examination and acknowledgment of a feme covert, shall read or otherwise make known the full contents of the deed to her; and our statute of 1792, that the deed should be shewn and explained to her by the justices; neither statute requiring, in terms, that the certificate of the privy examination and acknowledgment should shew upon its face that the wife was informed of the contents and purpose of the deed. It is obvious, that the decisions of this court upon our statute, are contrary to the decisions of the courts of Pennsylvania upon their law: these, therefore, are of no authority here.

the judges of the supreme court, or before any justice of the court of common pleas of the county where the lands lie, and acknowledge the deed, which judge or justice shall take such acknowledgment; "in doing whereof, he shall examine the wife separately and apart from her husband, and shall read or otherwise make known the full contents of such deed or conveyance to the said wife; and if, upon such separate examination, she shall declare that she did voluntarily and of her free will and accord, seal and as her act and deed deliver the said deed or conveyance, without any coercion or compulsion of her husband, every such deed or conveyance shall be, and the same is hereby declared to be, good and valid in law, to all intents and purposes, as if the said wife had been sole and not covert at the time of such sealing and delivery."

The provisions of the statute of Maryland, as to this particular, may be seen in *Webster's lessee v. Hall*, 2 Har. & M'Hen. 19. They require "that the feme shall be privily examined out of the hearing of her husband, whether she doth make her acknowledgment of the same, willingly and freely, and without being induced thereto by fears or threats of, or ill usage from, her husband, or fear of his displeasure" &c.—Note in Original Edition.

\*The provisions of the statute of Pennsylvania are quoted in the case of *Watson's lessee v. Bailey & al.*, 1 Binney 470. A deed of husband and wife is to be executed by the husband and the wife; and, after such execution, they are to appear before one of

In 1826, after the judgment in *Watson v. Mercer & al.* in the supreme court of Pennsylvania, the legislature of that state passed an act curing any informality or omission in setting forth the particulars of the acknowledgments of *femes covert* in the certificates thereof; though this provision  
459 \*was confined to cases occurring before the 1st September 1826. See *Watson & al. v. Mercer*, 8 Peters 88. The Maryland cases that have been cited are yet more clearly irreconcilable with the adjudications of this court. As to the objection to the registry of the certificate of privy examination in the case at bar, it does not affect the merits: for, if this court shall affirm the judgment of the circuit superior court, on the single ground, that the registry of the certificate of the privy examination was not entered immediately below and following the deed, a new registry of the deed, and of the certificate immediately subjoined, may even now be made, and that will perfect Hairston's title, which will prevail in a new ejectment.

ALLEN, J. The directions of the statute of 1814 (incorporated in the general statute of conveyances at the revival of 1819) touching the acknowledgment of deeds by *femes covert*, are plain and explicit. The certificate of the justices must shew, that the *feme* personally appeared before them; that she was examined privily and apart from her husband, and having the deed fully explained to her, she acknowledged it to be her act and deed, and declared she had willingly signed, sealed and delivered the same, and that she wished not to retract it. It is conceded, that though the form of the certificate is given, if it is to the same effect, though not in the same words, it is sufficient. But the certificate must shew, that every thing was done, which is required by the law to be done. In the language of President Tucker in *Tod v. Baylor*, "Though we do not require the certificate to be in the express language of the law, neither do we dispense with any part of the law. We only consider the language used, as if it was the very language of the law." The certificate, in the case under consideration, varies from the form prescribed, in several respects; but enough  
appears upon its face, to shew

460 \*that the law was substantially complied with except in one particular: the justices do not certify that the deed was fully explained to the *feme*, nor is there any thing in the certificate from which, in my opinion, we are authorized to infer, that at the time of the acknowledgment of the deed she had knowledge of its contents. It has been argued with much ingenuity, that, as it appears from the certificate, that she acknowledged she had willingly executed said deed on her part, that implies a consent, and that she could not consent to that of which she was ignorant. The argument strikes me as more specious than sound. We can easily imagine that a wife might be readily brought to yield her consent to an act of this kind desired by her husband, though ignorant of its character. But with the plain requisitions of the statute before us, such speculations are unnecessary. At common law, she could not

convey. The statute points out a mode by which a valid conveyance may be made. It is an innovation on the common law, and its terms must be substantially complied with. By it, the certificate must in some form shew, not only that she acknowledged the conveyance, and that she willingly signed, sealed and delivered the same, and wished not to retract it, but that it was explained to her. The explanation is to be made, that she may have knowledge of the contents; but if the acknowledgment implies consent, and consent implies knowledge, then the simple acknowledgment would have been sufficient, and the other requirements would be supererogatory. The case of *Tod v. Baylor* was relied on as an authority in favour of this certificate. It arose under the act of 1792. That act provided, that the wife being examined privily and apart from her husband by the commissioners, should declare, that she willingly signed and sealed the said writing, to be then shewn and explained to her by them, and consents to its being recorded;

and that the commissioner should re-  
461 turn a certificate of such \*privy examination, and of such declaration made and consent yielded. That statute did not, in terms, require that it should appear in the certificate, that the deed was explained to her. And upon this construction of the law, Judge Carr based his opinion: "It is clear," he says, "the commissioners are directed to shew and explain the deed to her, on her privy examination; but this need not be certified; for the law expressly limits the certificate to the privy examination, the declaration, and the consent." Judge Cabell gave no opinion, nor did Judge Brooke as to this point. Tucker, P., in reviewing the statute, seems to concur with Judge Carr as to what must appear on the certificate. The words "to be then shewn and explained to her," he remarks, "stand out, as it were, from the rest of the clause, and seem merely directory." In another part of his opinion, he states that her knowledge of the nature of the act done, should appear from the certificate; and then proceeds to argue that the certificate there, did shew her knowledge of the nature of the act done. It appeared from the certificate, that she acknowledged the conveyance of the land contained in the deed; and how, he asks, could the commissioners certify that fact, unless she knew that that deed did convey that land? It was by reference to the land, the precise quantity, to the fact that that deed conveyed that quantity, that the wife's knowledge of the nature of the act done appeared on the face of the certificate. Take the case either way, it is no authority for the proposition now contended for. Either the act of 1792 did not require the fact to appear, as Judge Carr held, and therefore the certificate was sufficient; or if it did require that her knowledge of the act done should appear, as may be implied from one part of the president's opinion, the certificate shewed such knowledge. But he did not maintain, that such knowledge of the nature of the act done would have appeared, if the commissioners had merely certified that  
462 the deed was acknowledged \*before

them. In that case, they did certify her acknowledgment of the conveyance, that it was done freely and voluntarily, without the threats or persuasions of her husband, and that she was willing the same should be recorded; yet it was not upon any of these expressions the judge predicated her knowledge of the act done: the certificate went further, it certified her acknowledgment of the conveyance of the very land contained in the deed, and from this her knowledge appeared on the face of the certificate. The statute of 1814 requires, in terms, that the certificate shall shew, that the deed was explained to her. But here, nothing but a simple acknowledgment of the deed appears. The case of *Tod v. Baylor*, considered under another aspect, is authority in support of the view I take of our existing law. The statute of 1792 provided that where husband and wife had sealed and delivered a writing, —and the wife appeared in court, and on her privy examination, she should acknowledge she had sealed and delivered &c. but if she should appear before commissioners, then she should declare she had willingly signed and sealed said writing. At common law, the sealing and delivery are the essence of the execution, and constitute the deed. The statute in the commencing clause so treats it—“where husband and wife have sealed and delivered a writing,” and makes the acknowledgment of sealing and delivery, if made in court, sufficient. But when it comes to provide for an acknowledgment before commissioners, another term was inserted; she was to declare she had signed and sealed. In *Tod v. Baylor*, one of the deeds was not signed, and Judges Brooke and Tucker held that signing could not be dispensed with, against the express language of the statute; and Judge Carr, though he doubted on this point, yielded to the opinion of his brethren. So, in this case, the certificate must in effect shew that the deed was explained; acknowledgment alone was not considered by the legis-

463 islature “as shewing this, or they would not have required it in addition the acknowledgment; nor, in *Tod v. Baylor*, was it held to amount to knowledge of the nature of the act done. How, then, (in the language of the judges in that case, when treating of the signing,) can we dispense with the express language of the statute?

There is good reason for requiring a substantial compliance with all the requisitions of the statute. The statute of fines, 18 Ed. 1, provided, that “if a woman covert be one of the parties, then she must be examined by four of said justices, and if she doth not assent thereunto, the fine shall not be levied.” Coke, in his commentary on this statute, 2 Inst. 514, says, “the examination must be solely and secretly, and the effect thereof is, whether she be content of her own free will, without any menace or threat, to levy a fine of these parcels, and name them under her, every thing distinctly contained in the writ, so as she perfectly understand what she doth.” This statute had received, therefore, a construction in practice, which required an explanation to the wife, and her knowledge of the nature of the act done. The first of our statutes,

that of 1674, after reciting that the legal way of passing estate where the inheritance is in a feme covert, was by fine and recovery, but we having no fines and recoveries in this country, it was usual to take the acknowledgment of the husband and wife in the general and county courts, proceeds to enact that such acknowledgment should be good and effectual against the husband and wife, as if the same had been done by fine and recovery. The same reference is made to the fine and recovery in subsequent statutes down to the statute of 1748 inclusive. The examinations under most of those statutes being made in court, the practice no doubt conformed to that which was required under the statute of fines. It was unnecessary to give more specific directions, as the courts ac-

464 quainted “with the practice which that statute had given rise to, would, acting under a similar statute, conform to it. But when the commission was authorized, the law was made more specific. The commission pointed out their duties to the commissioners; and they were required to shew by their certificate, a performance of such as were deemed most essential. The statute of 1814 dispensed with the commission. The law itself is a commission to any two justices to make the privy examination and take the acknowledgment of the feme; not only to any two justices of this commonwealth, but of the whole union. The statute gives the form of the certificate, and requires it to be in that form, or to that effect. The certificate they are required to make, points out to the justices the duties they are to perform. It comes in the place of the knowledge the courts were presumed to possess of the practice under the statute of fines, and of the instructions to the commissioners, communicated by the commission. Whilst a compliance with all the terms of the law, is required to appear on the face of the certificate, we have a reasonable assurance that the leading object of the statute will be secured; that is, the providing the wife with an opportunity, after a full understanding of the nature of the act she is about to do, of exercising her own free will.

The certificate in the present case does not, in terms, state that the deed was explained to the wife; and there is nothing on the face of it to the same effect, which justifies the inference that it was explained, or that she had knowledge of the nature of the act she was doing; on the contrary, every word of the certificate may be true, and yet she may never have read the deed, or heard its contents. Therefore, I think, the certificate is defective and the deed not valid as to her.

STANARD, J., concurred.

465 \*CABELL, J. In the case of a deed executed by a person not under the disability of coverture, the law infers, prima facie, that the party executing it had sufficient knowledge of the nature and effect of the deed, and that he acted freely and voluntarily. Therefore, nothing farther is required, than proof of the mere execution of the deed. But the law makes no such inference in the case of married

women, who, being under the power and dominion of their husbands, may sometimes be coerced to that which they would not willingly do; and, even where there is no coercion, they may be deceived as to the nature and effect of the act proposed to be done, by the representations of their husbands, in which they, generally, repose an unsuspecting confidence. To guard the wife against these dangers, the law is not satisfied with her mere acknowledgment of the deed. Such acknowledgment does not and ought not to imply, that she acted either voluntarily, or with proper knowledge. It may, in fact, have been made in terror of her husband, or in ignorance of the nature and effect of the deed. The law, therefore, has wisely ordained that, to give validity to the deed of a married woman, it must appear, that in executing the deed, she acted both understandingly and willingly.

The certificate before us is fatally defective. It does not appear that Mrs. Randolph was acquainted with the nature and effect of the deed. The certificate does not state, that the deed was explained to her by the justices; nor does it state any circumstance, from which her knowledge of its contents can be fairly inferred.

The judgment must be affirmed.

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**\*Brooks v. Calloway.**

December, 1841, Richmond.

(Absent BROOKS, J.)

**Slander—Insulting Words—Duelling Law—Justification.**—To an action for insulting words under the statute to suppress duelling no plea of justification can be received.

**\*Slander—Insulting Words—Duelling Law—Justification.**—As the law formerly was, the truth of the allegation could not, in a suit for insulting words under the statute, be pleaded in bar of the action, but, as the majority of the court held in *Moseley v. Moss*, 6 Gratt. 534, might be given in evidence in mitigation of damages. See the principal case cited in *Moseley v. Moss*, 6 Gratt. 541, 548; *Sweeney v. Baker*, 13 W. Va. 204; *Hogan v. Wilmoth*, 16 Gratt. 87; *Chaffin v. Lynch*, 83 Va. 112, 113, 120, 121, 1 S. E. Rep. 803.

But see principal case cited in opinion of JUDGE ALLEN in *Moseley v. Moss*, 6 Gratt. 553, where that judge said that the same reasons which induced the court, in the principal case, to hold that a plea of justification was not admissible in bar of actions founded on the statute, should exclude such evidence when offered in mitigation of damages.

**Same—Same—Same—Same—Present Rule.**—But the statutes now provide that in any action for defamation, the defendant may justify by alleging and proving that the words spoken or written were true. Va. Code 1887, ch. 164, sec. 3375; W. Va. Code, ch. 130, sec. 47, p. 881.

And this statute was construed in *Hogan v. Wilmoth*, 16 Gratt. 80, as changing the law theretofore existing in Virginia, and as permitting to be filed, as a plea in bar of an action for insulting words spoken or written, their truth, thus putting on the same footing in this respect common-law and statutory actions for defamation.

In *Chaffin v. Lynch*, 83 Va. 121, 1 S. E. Rep. 803, the court, in discussing this statute, said: "And it cannot be doubted that if the statute had been the same as it now is when *Brooks v. Calloway* and *Moseley v.*

**Practice—Bills of Exception—Certificate of Facts—Evidence Conflicting.**—Where the evidence on the trial of an issue is conflicting, and the court is satisfied with the verdict, and a new trial is asked and refused, the court is right not to certify the facts proved.

**Same—Continuance.**—A party having had two, if not three, continuances, and leave to take his depositions to be read in chief, is neither entitled to another continuance, nor to have the trial of the cause put off for another day during the same term.

Moss were decided, those cases would have been decided the other way, without the help of the statute, subsequently passed, permitting the truth to be pleaded in justification, as it may now be done." See 4 Min. Inst. (4th Ed.) 466, and *foot-note* to *Moseley v. Moss*, 6 Gratt. 534.

The principal case is cited in *Royall v. Thomas*, 28 Gratt. 137.

**Same—Jury Best Judges of Issues.**—As to the point that a jury is the best and safest tribunal for determining the issues in an action for slander, see the principal case cited in *Corr v. Lewis*, 94 Va. 26, 26 S. E. Rep. 385.

**Same—Pleading under Statute.**—In *Hogan v. Wilmoth*, 16 Gratt. 84, the court said: "It is true, there is some apparent conflict between the decision of the court in *Moseley v. Moss* and its previous decision in the case of *Brooks v. Calloway*, 12 Leigh 466, inasmuch as the court, in affirming in the last-mentioned case the judgment of the circuit court, rejecting the plea of justification to the first count of the declaration—which, whilst it averred the words complained of to be slanderous, was plainly defective as a common-law count for defamation—proceeded on the assumption that said count might be relied on, under the statute, though it neither averred that the words were insulting, nor made any reference to the statute, to indicate that the action was founded on it. It is to be observed, however, that in *Brooks v. Calloway*, there was no demurrer to the declaration. \* \* \* whilst in *Moseley v. Moss*, there was a demurrer."

See generally, monographic *note* on "Libel and Slander" appended to *Bourland v. Eldson*, 8 Gratt. 27.

**†Practice—Bills of Exception—Certificate of Facts—Evidence Conflicting.**—Upon the point, that a court cannot be required to certify the facts proved, where the evidence is conflicting, see *Nease v. Capehart*, 15 W. Va. 300; and the principal case cited in *Tallafarro v. Franklin*, 1 Gratt. 345, 346, and *note*; *Morgan v. Fleming*, 24 W. Va. 192.

**Same—Same—Certificate of Evidence—Principal Case Overruled.**—But in *Muse v. Stern*, 82 Va. 37, the court said: "This court having gone thus far in opening the door for the admission of evidence, in *Powell v. Tarry*, 77 Va. 263, took another step forward, and in that case held that whenever the inferior court, for any cause, could not or would not certify the facts, that it must, upon the application of the party aggrieved, certify the evidence. Thus expressly overruling *Grayson's Case*, 6 Gratt. 724, upon this particular point, and by necessary implication, overruling *Brooks v. Calloway*, 12 Leigh 466, and *Tallafarro v. Franklin*, 1 Gratt. 332, on the same point." See monographic *note* on "Bills of Exception" appended to *Stoneman v. Com.*, 25 Gratt. 887.

**Continuance.**—The principal case is cited with approval in *Logie v. Black*, 24 W. Va. 22, 23.

See *foot-note* to *The Bland and Giles County Judge Case*, 33 Gratt. 445, and monographic *note* on "Continuances" appended to *Harman v. Howe*, 27 Gratt. 676.

**Same—New Trial—Improper Remarks by Court.\***—The court, on the trial of an issue, makes a remark calculated to prejudice the minds of the jury against the defendant, but at the same time tells the jury, that that remark has nothing to do with the cause, and ought not to influence their verdict; and a verdict is rendered for the plaintiff: **Held**, such remark is no ground for reversing the judgment on the verdict.

Action for slander, by Calloway against Brooks, in the circuit superior court of Campbell. The declaration contained two counts. The first alleged, that Calloway had been called upon to give a deposition for the plaintiffs in a certain suit in chancery wherein Andersons were plaintiffs, and Brooks the defendant in this action was defendant, that certain written interrogatories had been on that occasion propounded to Calloway, which he proceeded to answer and fully and truly answered, and that Brooks, the defendant in that suit as well as in this, being present, addressed to Calloway, then under examination, the following slanderous words—"beautiful deposition; there is not a word of it true, and you know it, Mr. Calloway; you are a most infamous man." But this count did not allege, that the matters contained in the interrogatories and answers thereto were pertinent or material to the issues in the suit in chancery in which the deposition was taken, or \*that Calloway had been sworn before he gave his answers to the interrogatories and before the words complained of had been spoken by Brooks. The second count, after stating that Calloway had actually given the deposition in the suit in chancery of Andersons v. Brooks, and had made oath to the same, and that the matters therein deposed to were pertinent and material to the issues in that cause, alleged, that Brooks spoke the following slanderous words of Calloway to third persons—"he (Calloway) has stated in his deposition matters and things which are not true, and he must have known that they were not true;" meaning that Calloway, in giving his evidence therein, had committed wilful and corrupt perjury. Neither of the counts founded the action on the statute to suppress duelling, Supp. to Rev. Code, ch. 228, § 8, p. 284, and both concluded, generally, that the plaintiff had sustained damages &c.

Brooks pleaded the general issue to the whole declaration; and tendered two special pleas of justification to part of the words charged in the first count, viz. the words—"you are a most infamous man." The first of the special pleas justified the speaking of those words, by a general allegation that Calloway was a person of notoriously bad character; and pleaded not guilty as to the other words complained of in that count. The second special plea justified the speaking of the same words, by alleging that Calloway had presented a forged order for goods to certain merchants, and had on

that forged order obtained the goods from them, knowing at the time that the order was a forgery. The court rejected these two special pleas.

At April term 1837, the cause was continued generally. At the next September term, it was continued for the defendant. At April term 1838, the defendant obtained rules upon two of his witnesses, to shew cause why they should not be fined for their failure to attend according to summons;

and then the cause was continued, without \*saying whether for plaintiff or defendant. At September term 1838, the cause was continued for the defendant Brooks; and (as the record stated) by consent of the plaintiff, the defendant had liberty to take the depositions of all his witnesses, to be read in chief, upon giving the plaintiff reasonable notice &c. and by consent of parties in proper person, it was ordered, that this suit should not abate by the death of plaintiff or defendant.

The cause being set for trial on the first day of April term 1839, and being called for trial on the third day, Brooks moved that it should be laid over till the next day, or, if the court should refuse that, then he asked for a continuance, on the ground of the absence of material witnesses whom he had summoned. The court refused the day's delay, or to continue the cause; founding the refusal, it seemed, on the leave which, with the plaintiff's consent, it had given the defendant, at the preceding term, to take the depositions of all his witnesses to be read in chief; although the defendant stated on oath, that he could not know how to examine his witness till the plaintiff had examined his own; that the depositions would not avail him as fully as an examination in open court; and, moreover, that he had understood that the leave was intended to authorize him to read sundry depositions which were filed in another cause.

Upon the trial of the general issue, the plaintiff having introduced a witness to prove that the evidence contained in his deposition in the case of Andersons v. Brooks, the truth of which the defendant had impugned, was pertinent and material to the issue in that cause, the defendant's counsel objected that this could only be proved by the record of the case itself, and that no inferior evidence was admissible; whereupon the court ruled, that the plaintiff might read the bill and answer in that suit, to shew the materiality and pertinency of the deposition to the points there in issue. The defendant insisted, that not the bill and answer only, but the

\*whole record, must be read; but the court permitted the bill and answer only to be read, for the purpose of shewing the materiality and pertinency of the deposition, and for no other purpose: and the judge said, that if the whole record should be introduced, "it would prove that the defendant was a slanderous man, from the efforts made in that cause to impeach the character of so many witnesses who testified against him, and made without success; but he at the same time told the jury, that the statement so made by him in regard to the contents of the record, had nothing

\*Practice—New Trial—Improper Remarks by Court.—The principal case is cited with approval by JUDGE LEE in *McDowell v. Crawford*, 11 Gratt. 390, but distinguished by JUDGE MONCURE on p. 407 of the same case.

See monographic note on "New Trials."



to do with this case, and should not be regarded by them as any thing in their decision of this cause." The defendant's counsel excepted.

The jury having found a verdict for the plaintiff for 750 dollars damages, the defendant moved the court for a new trial on the ground that the verdict was not warranted by the evidence. The court was satisfied with the verdict, and overruled the motion. The defendant tendered a state of the facts proved at the trial, and prayed the court to certify it, or to correct it if imperfect, and to certify the true state of the facts proved. This the court refused to do, because the evidence in the cause was conflicting, and it was the province of the jury to judge of its credit, assigning its reasons at large.

The defendant again excepted; setting forth, in the bill of exceptions, 1. the bill and answer, and this deposition of Calloway, in the case of *Andersons v. Brooks*, read for the purpose of shewing that the deposition was pertinent and material to the matters in issue in that cause; and 2. the parol evidence—That, after the taking of the deposition had been commenced, and Calloway had written his answers to all the questions put to him by the plaintiffs in the chancery cause, but before he had been sworn as to the truth of those answers, Brooks came, with one of his counsel in the chancery cause, to the place where the deposition was being taken, and then the questions and answers were read over

470 to him \*by his counsel; and, immediately afterwards, Brooks, in the presence of the counsel for the plaintiffs, and of the counsel for the defendant, in the chancery suit, no other persons being present, addressed to Calloway the words charged as slanderous in the first count of the declaration: that after the deposition had been taken, Brooks applied to many persons, to obtain their testimony for the purpose of impeaching the character and credit of Calloway, and actually obtained the depositions of most of the persons he applied to, and filed them in the chancery cause; that to some of the persons so applied to, he represented the statements made by Calloway in his deposition as being wholly false, and to others he said, that the deposition contained nothing but lies; and Brooks avowed to most, if not to all, the persons he applied to, that his object was to do away the effect of Calloway's deposition, alleging that unless he could do so, the deposition was calculated to do him serious injury. A large number of witnesses were then examined, on both sides, as to the general character of Calloway previous to the publication of the words charged in the declaration as slanderous; and the testimony on this point was conflicting, some of the witnesses expressing the opinion that Calloway's character was good, and others, that it was bad.

The court then gave Calloway judgment for the 750 dollars damages assessed by the jury. And to that judgment, this court, at the instance of Brooks, awarded a superseas.

Leigh, for plaintiff in error.  
Grattan, for defendant.

ALLEN, J. The first count in the declaration does not allege, that the answers to the interrogatories were material, or that Calloway had been sworn before he gave

his answers: the words spoken do not 471 constitute \*slander at common law, and this court can only be supported under the statute against duelling. The second count is for words actionable at common law, the charge amounting to perjury. The defendant pleaded the general issue to the whole declaration, and tendered two special pleas of justification as to part of the words in the first count. Objection being made to the special pleas, they were rejected.

Upon these proceedings, the question now for the first time is presented for determination, whether it is competent to justify words actionable only under our statute against duelling. The history of that statute is familiar to all; it was an extreme measure, almost of questionable authority, and only to be justified by the enormity of the evil it was intended to cure. It makes killing in a duel murder in the first degree, incapacitates persons challenging or accepting a challenge from holding office, and prescribes a test oath to all taking office under the commonwealth. The effect of the statute has been most beneficial; the practice has been repressed. It exists almost a solitary example of legislation carried to the extremity of rigour, where the severity of the enactment has not defeated the policy of the law. In view of these benefits, but dreading the example, the convention to amend the constitution gave a constitutional sanction to a provision to effect this particular object; thereby shewing their sense of the benefits of this law; but guarding, by a sanction of it, from the application of the precedent to any other case, under the maxim *expressio unius exclusio alterius*. Whilst the legislature was, by this strong measure, seeking to eradicate the evil, it could but not occur to it, that it was equally incumbent upon it, to provide some remedy for those injuries which most frequently led to the practice. The common law remedy by action of slander, had been found totally inadequate. Persons who might be accused of offences

with any show of probability, rarely 472 \*thought of appealing to the (so called) code of honour. But personal insults, imputations upon the individual, or those having claims to his protection; to such indignities all might be exposed. The man of fair character might smile at the charge of theft or perjury, but stand ready, at the peril of his life, to resent a personal insult or indignity to himself or his wife or other relative. The insulting character of the words does not depend upon their truth or falsehood. They may be true, and their very truth give venom to the sting of insult. For such insults the legislature intended to provide a remedy, and by doing so, to deprive the offender against the duelling law, of the plea he offered in extenuation of his course: that the laws of his country afforded no adequate redress for insults and injuries to the wounded feeling of an honourable man. The statute declares "that all words which,



from their usual construction and common acceptance, are considered as insults, and lead to violence and breach of the peace, shall hereafter be actionable, and no plea, exception or demurrer, shall be sustained in any court within this commonwealth, to preclude a jury from passing thereon, who are hereby declared to be the sole judges of the damages sustained;" with a proviso giving the courts the right to grant new trials. Looking to the policy of the statute, what constitutes the gravamen of the action given by it? Clearly, it seems to me, the insult to the feelings of the offended party. The court cannot say, whether the words are or are not insulting; that depends on the place, the manner and circumstances in which they are uttered. The literal meaning of the words may import praise; but, if spoken ironically and with intent to wound, they may amount to the keenest insult. A man in that society where insults are most sensibly felt, may be told he is unfit for such company, that he is not a man of veracity; or his intellect may be disparaged in insulting terms: for such

473 injuries the law intended to \*provide redress. But if he sues, and is met with a plea of justification, and his whole life is to be investigated before an assembled community, his feelings would be doubly outraged. The law which proffers redress for insult, would furnish the opportunity of aggravating the outrage, and be itself an insulting mockery. So, in regard to allusions to personal defects, family misfortunes, and the like; insulting, and tenfold more so because of their truth. Were such insults intended to be redressed? The maxim, that where the words spoken are true it is *damnum absque injuria*, cannot apply, it seems to me, to actions under this statute. The insult is the ground of action, and that the law considers injurious, whether true or false. No good can result, either to society or individuals, from tolerating insulting language. It imports nothing to society that a man's personal defects, his family misfortunes, his mental peculiarities, &c. should be insultingly proclaimed to him. Whenever such insults are given, the jury are to pass upon them. No plea is to be received to preclude them from passing on the fact whether the words were spoken, whether from their usual construction and common acceptance they are insulting, and if so, what damages shall be allowed. But if a plea of justification is allowable, if true it bars the action, and no matter how insulting the words, or how great the damage, no redress can be afforded. It is said that if the statute is to receive this construction, words actionable at common law are also insults, and cannot be justified. To this it may be answered, first, that the statute does not in terms change the common law as to words theretofore actionable; and secondly, the legislature may very well have intended to leave cases of that kind as they were at common law. Crimes are rarely imputed without some ground of suspicion. If the party charged has been guilty, duty to society may justify the promulgation of the fact, that others may be on their guard against the perpetrator. No such excuse can

474 be \*alleged for insults. It seems to me, the expression of the law that no plea, exception, or demurrer shall be sustained to preclude a jury from passing thereon, extends to pleas of justification; and that, unless we give such construction to the statute, the whole object of the law will be defeated: whereas the other construction tends to advance the policy of the legislature. By subjecting the party to an action for the insult, without regard to the truth or falsehood of the insulting language, insults are repressed, and the controversies from which duels most generally arose, will be of rare occurrence.

With respect to the motion for a continuance: if the question were open, I should be of opinion, that where the law does not give the right to continue, as in cases of revivor against a personal representative, but the application is to the discretion of the court, an appellate tribunal ought not to look into the question whether this discretion was properly exercised. The court below sees the party, hears his statement, and has had an opportunity of forming a correct opinion in regard to his motives. The party who applies is a witness in his own behalf: the application being addressed to the court, it must decide upon the credit to be given to his statements. Men of loose moral character are not restrained in such cases from making affidavits through fear of punishment. The facts, so far as they are open to examination, may be true; the witness may have been summoned, and be absent, without default of the party, and he will say he believes him to be material; but there is no means of ascertaining whether that belief is well or ill founded. It seems to me, the supreme court in *Woods &c. v. Young*, 4 Cranch 237, laid down the correct rule. The rule, however, has been settled otherwise in Virginia. But I am not disposed to extend it further than the court has already gone, and enquire whether, in refusing to lay a case over to another day of the term, the court

475 has exercised its discretion \*properly. That will depend on an infinite variety of circumstances; the condition of the docket, the business in court, &c. To ascertain whether the court, in refusing to continue until the next term, exercised its discretion properly, we must look at the previous proceedings. At the April term 1837 the issue was made up and a general continuance entered. At September term 1837 the case was continued for defendant. At April term 1838, the defendant moved for a rule against his absent witnesses, and the cause was continued; it does not appear at whose cost, but the fair inference from the previous part of the order is, that the defendant moved for the continuance. At September term 1838, the cause was again continued at the costs of the defendant, and leave given to take the depositions of his witnesses. At April 1839 he again moved for a continuance, and took the exception under consideration. The history of the case is a sufficient reply to the defendant's objections. *Milstead v. Redman*, 3 Munf. 219, was a much stronger case for a continuance. There the defendant obtained a continuance at November; at

March, there was a verdict for the plaintiff, and a new trial; at May, the cause was continued for the defendant; and at August term, he again moved for a continuance, because of the absence of two material witnesses, who had acknowledged service of the subpoena, and the husband of one of whom stated she was too ill to attend court. The motion to continue was overruled, and this judgment was affirmed. In this case, there had been three successive continuances, as I infer from the orders, at the instance of the defendant. This was the fourth application, and this after leave to take depositions had been given. As to the alleged misunderstanding of the terms of the order, the story is improbable. He had just obtained a continuance upon the terms of consenting on the record that the action was not to abate by the death of either party; the parties were personally present in court, and assented to

476 \*the entry; and how a party could construe an order made in his presence giving leave to take the depositions of his witnesses, on account of whose absence he had just obtained a continuance upon submitting to terms, into leave to read depositions taken in another cause, is somewhat surprising. I think he was properly ruled into a trial.

As to the hasty expression of the judge, referred to in one of the bills of exceptions, I pass it with the remark, that the exception is taken to the decision excluding, as I think most properly, the depositions taken in another cause. The expression used by the judge in excluding these depositions was not intended for the jury. So he informed them, and that it should not be regarded by them as anything in the decision of the cause. Nothing is more common than an instruction to the jury to disregard evidence improperly admitted. The jury is presumed to possess ordinary intelligence, and to be able to discriminate between what is proper for them to consider in forming their conclusions, and what, though occurring in their hearing, is no part of the case. Here the court did all it could do to correct the inadvertence into which it had fallen.

After the verdict, the defendant moved for a new trial, upon the ground that the evidence did not warrant the finding, and because the damages were excessive. The new trial was refused, and the defendant's counsel drew up a statement of the facts supposed to be proved, and asked the court to examine the statement and add to and correct it, that it might appear of record what facts, in the opinion of the court, were proved on the trial. But the court refused to certify that the statement drawn up was a full and correct statement of all the material facts proved; or to correct the statement, so as to make it conformable to the truth. The reasons given for this refusal by the court in this case, are, I think, conclusive: that the testimony was 477 conflicting, and it was the duty \*of the jury to decide upon its credibility; that it was the province of the court to grant a new trial in cases only where there was no sufficient evidence to warrant the finding; that the decision of the court on a

motion to set aside the verdict is evidence of its opinion that the jury had or had not submitted to them evidence, which, according to their belief of its credibility, warranted the verdict; and, therefore, the court overruled the motion for a new trial, because, in its opinion, there was abundance of testimony to warrant the finding, if the jury believed the plaintiff's witnesses. In this view of the court below, I fully concur. But it was strenuously argued, that enough does appear to satisfy the mind that the damages were excessive, and therefore the judgment should be reversed and a new trial awarded. How can that appear to this court, when the facts upon which the jury proceeded are not before us? But, so far as the facts do appear, it seems to me, the jury may have been fully warranted in the giving the verdict they did. Brooks had filed an answer to a bill preferred against him by a third person: Calloway was called upon to give his deposition, and in doing so, contradicted Brooks's answer. This may have been unpleasant to Brooks; calculated to excite him; but Calloway, if his deposition was true, was blameless. The law compelled him to give it; and when examined as a witness, if his testimony conflicts with an answer sworn to by a party in the cause, does that authorize an imputation of perjury? It further appears, that after the words charged in the declaration were uttered, Brooks applied to many persons to examine them as witnesses to do away Calloway's testimony, as contained in his deposition. This he had a perfect right to do, either by shewing the deposition was false, or that the witness has made conflicting statements, or by impeaching his general character. But, to many of the persons so applied to, he represented the statements of Calloway in his deposition as wholly false, and to others 478 \*that the deposition contained nothing but lies. This course was unwarrantable; it was calculated to make an improper impression on the minds of those he intended to examine as witnesses. I cannot say, in a case where these circumstances of aggravation appear, that the jury, whose peculiar province it is to estimate the damages, have erred so grossly, as to justify this court in setting aside their verdict, and that too where the judge who heard the testimony refused to disturb it, and where all the facts which operated on their decision are not in the record.

I am for affirming the judgment.

The other judges concurred. Judgment affirmed.

#### 479 \*Hicks & Others v. Goode.

January, 1842. Richmond.

[37 Am. Dec. 677.]

**Witness—Competency—Oblige in Bond.**—Four commissioners under decree in chancery for sale of land, are named obligees in bond for the purchase money; and suit is brought on the bond, against the obligor, in the name of the four obligees, for the benefit of another person claiming the beneficiary interest in the debt: one of the obligees and plaintiffs, having no interest in the case except as being obligee and plaintiff, is a competent witness for defendant on a plea of non est factum.

**Non Est Factum—Want of Affidavit—Objection in**

**Appellate Court.**—In debt on a bond, defendant pleads that bond was delivered as escrow upon conditions which were not performed, et sic non est factum; the plea is not verified by affidavit of the party according to statute 1 Rev. Code, ch. 128, § 88, but plaintiff makes no objection for want of such affidavit, and the plea is received by the court, issue joined upon it, trial, verdict and judgment for defendant: the want of the affidavit to the plea, is not a good objection to the judgment in an appellate court.

**Joint Bond—Escrow—Execution by Other Obligor—Case at Bar.**—A bond prepared, intended and purporting on its face, to be the joint bond of G. and J. to four commissioners under decree in chancery for sale of land, is signed and sealed by G. and by him delivered to one of the obligees, upon condition that J. also shall execute it, otherwise it shall not be binding on G. but be null and void; J. never executes it; in debt on the bond against G. he pleads, that the bond was delivered to the obligee as an escrow, to be his deed only upon the condition that J. also should execute it, which J. never did, et sic non est factum: **Held**, the plea is a good bar. **Dissentiente ALLEN, J.**

**Escrow—Delivery to Grantee—Deed Incomplete on Its Face.**—The rule of law, that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on con-

**\*Escrow—Delivery to Grantee—Deed Incomplete on Its Face.**—The doctrine that a deed cannot be delivered to the grantee as an escrow is applicable only to the case of deeds which are, on their face, complete contracts, requiring nothing but delivery to make them perfect according to the intention of the parties; and it is not applicable to deeds which, on their face, import that something more is to be done, besides delivery, to make them complete and perfect contracts according to the intention of the parties. In support of this proposition, the principal case is cited in *Tardy v. Shelby*, 84 Ala. 327, 4 So. Rep. 278; *American Button-Hole, etc., Co. v. Burlack*, 35 W. Va. 654, 14 S. E. Rep. 321; *Wendlinger v. Smith*, 75 Va. 317; *Ward v. Churn*, 18 Gratt. 807.

The principal case is distinguished in *Miller v. Fletcher*, 27 Gratt. 407; *Nash v. Fugate*, 32 Gratt. 602, 603.

In *Lytle v. Cozad*, 21 W. Va. 200, the court said: "There are also older cases in Virginia, in which the court held, that when an instrument was incomplete on its face and indicated that others were intended to sign it, it was not binding on those who did sign it, although the condition may not have been known to the obligee when it was delivered to him. See *Ward v. Churn*, 18 Gratt. 801, and *Preston v. Hull*, 23 Gratt. 600."

The principal case is cited in *Ward v. Churn*, 18 Gratt. 808, for the proposition that, where an instrument indicates on its face that others are to execute, besides those who did execute it, it may be shown by evidence that the delivery, though made to the grantee or obligee, was conditional upon the execution of the instrument by the other parties, and not absolute. See the principal case cited in *Harris v. Harris*, 23 Gratt. 779; *Lytle v. Cozad*, 21 W. Va. 200; *Baylor v. Dejarnette*, 13 Gratt. 172; *Mackey v. Mackey*, 29 Gratt. 168.

See *foot-note* to *Miller v. Fletcher*, 27 Gratt. 408.

**Same—Effect of Premature Delivery.**—The principal case is cited in *Humphreys v. Richmond, etc.*, R. R. Co., 88 Va. 454, 13 S. E. Rep. 965, to the point that a delivery of the deed by the depository of the escrow, before the conditions are performed, is null and void.

See generally, monographic note on "Deeds"

dition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect according to the intention of the parties; not to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties.

Debt, in the circuit superior court of Mecklenburg, in the names of Reuben Hicks, James Harrison, Pascal Hicks and Littleberry Baugh, commissioners 480 &c. \*suing for the benefit of Robert Jackson, against Goode, on a bond for 590 dollars 62 cents. The declaration demanded that sum with interest from the 8th July 1827, and counted on the bond as the deed of Goode, and made profert of it, in the usual form.

Goode craved oyer of the bond; and it was in the following words:

"We John C. Goode of the county of Mecklenburg and Benjamin B. Jones of the county of Greenesville are held and firmly bound unto Reuben Hicks, James Harrison, Pascal Hicks and Littleberry Baugh, commissioners appointed by the county court of Brunswick to make sale of the land in the decree mentioned belonging to the estate of James Rawlings deceased, in the just sum of 590 dollars 62 cents, for value received, on or before the 8th day of July next. In witness whereof we have hereunto set out hands and seals this 13th day of July 1826.

John C. Goode, [Seal.]"\*  
[Seal.]

"Teate

"J. Rice as to J. C. Goode."

And then Goode pleaded in bar, that the supposed bond in the declaration mentioned, was made and signed by him on the day of its date, and by him delivered to Harrison, one of the obligees therein, as an escrow, to be by him kept, on this express condition, and none other, that Jones should sign and seal it as his act and deed, and should become thereby jointly and equally bound with Goode, as his joint co-obligor for the said sum of 590 dollars 62 cents due on the 8th July 1827, if Jones should refuse

481 or fail to sign, seal and deliver \*the bond, as joint co-obligor with Goode, then the same was not to bind Goode, and was to be redelivered by Harrison to him, and to be held null and void; and then the plea averred, that Jones never signed, sealed and delivered the instrument as his act and deed; whereby the instrument of Goode, so delivered to Harrison as an escrow, was wholly discharged, annulled and vacated; and so the same was not his

appended to *Flott v. Com.*, 12 Gratt. 564, and monographic note on "Bonds" appended to *Ward v. Churn*, 18 Gratt. 801.

\*There were two other bonds executed by Goode to the same obligees, for the same sum, and of the same tenor with this, only the money was payable at different dates. The bonds were given for instalments of the purchase money of the land therein mentioned.—Note in Original Edition.

deed: concluding to the country. The plaintiffs joined issue.

There were two trials of this issue, but neither jury could agree, and there was no verdict. The plaintiffs then asked and had leave to withdraw their replication to Goode's plea. And at a subsequent term, Goode offered two additional pleas: 1. That the supposed bond in the declaration mentioned, was, on the day of its date, presented to Goode by Harrison, one of the obligees nominally, having no interest therein, he having declined acting as one of the commissioners to whom the writing was executed, for him Goode to sign and execute, and that Goode signed it, and left it in the custody of Harrison as an escrow, to be by him kept, on this express condition and none other, that before the delivery thereof to the plaintiffs, Harrison should procure Jones to sign and seal it as his act and deed, and thereby become jointly and equally bound with Goode as joint co-obligor, and if Jones should not sign, seal and deliver it, as joint co-obligor with Goode, then it was not to bind Goode, but was to be delivered and returned to him, and to be held null and void; and the plea averred that Jones did not sign, seal and deliver &c. whereby the writing so left in Harrison's custody as an escrow, became and was wholly annulled &c. and so it was not Goode's deed. Concluding to the country. 2. The other additional plea was like the first, except only that this plea, alleging, that the supposed bond was delivered to Harrison as an escrow, to be delivered to the plaintiffs upon condition that

482 Jones also should execute it, and \*that Jones never executed it, did not state that Harrison was one of the obligees in the bond. This plea also concluded to the country. The former plea, and the two additional pleas, were not, any of them, verified by affidavit.

The plaintiffs objected to the admission of these additional pleas, not specially because they were not verified by affidavit, but in general terms; the court allowed them; and the plaintiffs excepted. The plaintiffs then put in replications to the pleas, traversing the fact that the bond was delivered by Goode to Harrison as an escrow, as Goode alleged, and concluding to the country. And Goode joined the issues.

Upon the third trial of the cause, the jury found a verdict for the plaintiffs; but upon the motion of Goode, the court set aside the verdict and ordered a new trial, to which the plaintiffs excepted.

It appeared by the bill of exceptions, that at the two former trials, neither of which resulted in a verdict, James Harrison, one of the obligees in the bond, to whom the pleas alleged it had been delivered as an escrow, had been offered as a witness for Goode, that the plaintiffs objected to his competency, that the court overruled the objection, and that he was examined in person. At the term next preceding that at which the third trial was had (when the cause was continued) the court said, that the counsel had better look to the question whether Harrison was a competent witness, before the then next term, intimating that Harrison might be made competent. But

Goode and his counsel made affidavit, that they understood the doubt suggested as to the competency of Harrison to refer to the fact of his being one of the obligees in the bond, not to any objection that could be removed by releases executed by Goode and Harrison to each other. At the third trial, the deposition of Harrison, which had been taken *de bene esse*, was offered in evidence for Goode. [This deposition

483 \*stated, that Harrison did not act, but declined to act, as one of the commissioners of the county court of Brunswick for the sale of the land of Rawlings's estate: that, wishing to purchase the land for the benefit of his children, he applied to Goode and to Jones (his wife's brother) to purchase it for them; Goode, in the absence of Jones, consented to do so provided Jones would become jointly bound with him for the purchase money, and Jones, in Goode's absence, consented; and this was made known to the commissioners on the day of sale: that the land was cried out at the sale upon Harrison's bid, and bonds for the purchase money were prepared, to be executed by Goode and Jones: that Harrison presented the bonds to Goode for execution, who executed them upon the express condition that Jones also should execute them, which Harrison promised to have done, before delivery to the commissioners, (the bond on which this suit was brought was one of them): that Harrison sometime afterwards delivered the bonds to one of the commissioners with a full communication of the condition on which Goode had executed them, the commissioner agreeing to procure the execution thereof by Jones; but he neglected it, and Jones died: that Harrison was to indemnify Goode and Jones, by paying the purchase money of the land himself, if he could, and in that case he was to have the property; if he could not make the payment, the land was to be made over to his wife and children, and to be held subject to the payment of the purchase money: and that Harrison put into Goode's hands, a bond of one Devenport for 1000 dollars, which Goode was to collect, and apply towards the payment of the purchase money; this was before Jones's death, when Goode expected Jones to join him in the bonds for the purchase money; and the witness supposed Goode still held Devenport's bond, or had collected it.] The plaintiffs' counsel objected to the reading of this deposition of

Harrison as evidence for Goode, the

484 \*court sustained the objection,\* the evidence was excluded, and a verdict was rendered for the plaintiffs. The ground on which Goode asked a new trial, was, that the exclusion of the evidence of Harrison as being a party interested in the cause, when it had been admitted on two former trials, and when it might have been obviated by mutual releases between Goode and Harrison, if the ground of objection to Harrison's competency had been understood and anticipated, operated as a surprise upon Goode at the trial; and the court also viewing it in that light, set aside the verdict, and ordered a new trial; to which the plaintiffs excepted.

Before the fourth trial of the cause, Goode

and Harrison executed mutual releases to each other, of all claims and responsibilities of either against or to the other, arising in any way out of the result of this suit, or of any other suit on the bonds of the same tenor taken for the purchase money of the land.

Upon the fourth trial of the cause, the deposition of Harrison (which had been taken again) was offered in evidence for Goode, and the plaintiffs' counsel objected to the admission of it on the ground that

Harrison was interested and incompetent; but the court overruled the \*objection, and the deposition was read; to which the plaintiffs' counsel excepted. The bill of exceptions set forth the new deposition of Harrison, and the mutual releases of Goode and Harrison to each other. [The new deposition shewed the same facts stated in the former, and the following additional facts—that the land (the purchase money for which was the consideration of the bond on which the suit was brought) had been since sold by Harrison to a new purchaser, with the knowledge of the commissioners who made the former sale and who were to convey the title to the purchaser, and with the knowledge also of Jackson for whose benefit this suit was brought, and who was the executor of Rawlings to whose estate the land belonged, and the agent of his widow and heirs or devisees; that Jackson declared himself perfectly satisfied with the new sale, of which he was to receive the proceeds, and told Goode that the affair was arranged, and he need not give himself any further trouble about it; and that, in consequence thereof, Goode gave Harrison a draft on Devenport for 400 dollars yet due of Devenport's bond which Harrison had transferred to Goode for his indemnity, and declared his readiness to make a settlement with Harrison of that transaction.]

The jury found a verdict for Goode; which the plaintiffs moved the court to set aside, and order a new trial: the court overruled the motion, and to that opinion the plaintiffs did not file exceptions. The court then gave judgment for Goode upon the

verdict. And this court allowed the plaintiffs a supersedeas to the judgment.

Macfarland and Rhodes, for the plaintiffs, I. submitted, that the court erred in setting aside the verdict rendered for the plaintiffs on the third trial, and granting a new trial, on the ground that Goode had been surprised by an opinion of the court on a point of law ruled at the trial; a kind of

surprise which was no good ground  
486 \*for disturbing the verdict; and besides, Goode, so far from being surprised, had been warned at the previous term, and would not take warning. And that the court erred too, in admitting Harrison's deposition in evidence for Goode; for Harrison was the real purchaser of the land, though Goode gave his bond for the purchase money, and if Goode should be compelled to pay the debt, Harrison would be bound to repay the money to him; and Harrison was one of four plaintiffs on the record, who, if they succeeded, would be entitled to costs as well as to the debt, and Harrison would be bound to reimburse to Goode both debt and costs. The mutual release could not affect the costs, and did not extinguish the interest which Harrison had to protect Goode from the recovery of both debt and costs. II. They contended that the court erred in admitting Goode's pleas: 1st, because (if for no other reason) they were, none of them, verified by his affidavit: they were special pleas of non est factum, 1 Chitt. Plead. 479, 2 Id. 463, pleas which the statute, 1 Rev. Code, ch. 128, § 33, p. 496, expressly provided should not be admitted unless the truth thereof be proved by the oath of the party. But 2ndly, they said, the pleas were in substance naught. The defence set up by them was, that the bond was signed and sealed by Goode, and by him delivered to Harrison, one of the obligees, as an escrow, upon condition that Jones should execute it as a joint co-obligor with Goode, otherwise it should be void as to Goode, and Jones having never executed it, therefore it was not Goode's deed. Now, it could not be doubted, that a delivery of a bond to one of several obligees enured as a delivery to all; and the law was well settled, that a deed cannot be delivered to a party himself as an escrow; that if a man make and deliver his sealed instrument to the party to whom it is made as an escrow to be his deed upon certain conditions, this is an absolute delivery, and the conditions are nugatory. They cited and ex-  
487 amined Shep. Touches. \*58, 9 Harg. Co. Litt. 36 a, note 3; Whiddon's case, Cro. Eliz. 520; Hawksland v. Gatchell, Id. 835; Williams v. Green, Id. 884, S. C. Mo. 642; Blunden v. Wood, Cro. Jac. 85; Thoroughgood's case, 9 Co. 137; Degory v. Roe, Mo. 300; S. C. 1 Leon. 152, and Johnson & others v. Baker, 4 Barn. & Ald. 440, 6 Eng. C. L. R. 479. The last case would probably be relied on as an authority for the defendant; but, they said, it was decided without a careful consideration of the authorities, and yet it would be found, on examination, not to contradict them. It was an action of covenant on a deed of composition between debtor and creditors, brought by creditors who executed it, on one of the covenants to them, against the

\*The ground on which the court thought Harrison's evidence incompetent, apparently was, that, as by the understanding between him and Goode, Harrison was to pay the purchase money if he could, and then to have the land: and as Harrison had transferred to Goode Devenport's bond for 1000 dollars, of which Goode had collected part, to be applied to the payment of the purchase money: if Goode succeeded in his defence against the actions of the commissioners on the bonds, and was thereby exempted from the payment of the purchase money, he would be bound to return to Harrison Devenport's bond, and pay him the money he had collected upon it: and so Harrison had an interest in the success of Goode's defence of this cause. On the other hand, if the plaintiffs recovered of Goode, and he paid the purchase money, he would have a right to the land: and then, Harrison would have a right, upon reimbursing the purchase money to Goode (part of which he had paid by the assignment of Devenport's bond) to demand a conveyance of the land by Goode to him: and Harrison would be accountable to Goode for the whole purchase money.—Note in Original Edition.

surety for the payment of the composition; who pleaded, that the deed was delivered as an escrow, upon condition that it should not be delivered to the plaintiffs, but should be void, unless it should be executed by certain other creditors, but they never executed it, and so it was not his deed; issue was joined on this plea; it appeared at the trial, that before the execution of the deed, it was agreed, in the presence of the surety who was to become bound for the payment of the composition, that it should be void unless all the creditors should execute it, and subsequently, though at the same interview, the surety executed the deed in the ordinary way without saying any thing at the precise time of the delivery; and the deed was delivered to one of the creditors, who was to get it executed by the others; and it was held, that the condition previously expressed, though not introduced into the act of delivery, was sufficient to make this a delivery of the deed as an escrow, and as it appeared that this condition was not complied with, the plaintiffs were not entitled to recover. Now, they remarked,

1. that the question was not distinctly presented by the pleadings in that case, whether the plea was a good bar or not; the pleadings admitted that, if true,
- 488 it was a bar: 2. that that deed \*was not, like this, a plain deed of grant or obligation; it was a deed of mutual and dependant covenants; a deed of composition whereby payments were to be made to all creditors, each and all of whom were to covenant on their part to release their claims, and if any should not release, the whole purpose of the deed would be defeated: 3. each of the creditors as covenantees had several and distinct interests; they were not joint parties: and 4. it did not appear, that the deed was delivered to a party as an escrow; it was indeed delivered to one of the creditors; but he was not a party at the time of the delivery, unless he had then executed it, and it was not stated as part of the case that he had done so, and was a party. That case, therefore, not only stood alone, but it was not an authority in point to sustain the judgment in this case.

Lyons and Stanard, for the defendant, answered, 1. that the unexpected opinion of the court at the third trial upon the question of the admissibility of Harrison's deposition, deprived Goode of that evidence, in itself conclusive of the truth of his plea, upon an objection which, if it had been anticipated, could easily have been obviated; and the final result of the case approved the justice of the court in setting aside the verdict rendered at the third trial. It was true the court had given an intimation of the objection to the competency of Harrison's evidence; but it was not just to say that Goode would not take the warning; he did not understand it. Then, as to the question whether Harrison was a competent witness; if Harrison ever had any such interest in the cause as rendered him incompetent (which they denied), the deed of mutual release between him and Goode extinguished all and every interest he could have in the result of the controversy. Neither Harrison, nor the other nominal plaintiffs, had any interest in the costs;

Jackson for whose benefit the suit was brought, not the plaintiffs in whose names he brought it, and who had no

489 \*interest in it, was entitled to costs if he recovered judgment, and responsible for costs if he was cast. II. The plea first pleaded was not, any more than the two additional pleas, verified by Goode's affidavit; yet that plea was received without objection, the plaintiffs joined issue upon it, and two trials were had of that issue; and when the two additional pleas were offered, the plaintiffs did not object to them because they were not sworn to, but (as their bill of exceptions shewed) because they did not present a good bar. They never took exception to the pleas for want of the affidavit of the party in the court below, where the defect could, and doubtless would, have been supplied; in effect, they waived the objection there; and it was too late now to make it here. Upon the merits, they maintained, that the pleas presented a good bar. The rule of law that a deed cannot be delivered as an escrow to the party to whom it is made, but only to a stranger to the contract—that if a deed be delivered to a party to whom it is made as an escrow to be good upon certain conditions or otherwise to be void, the conditions are nugatory, and the delivery absolute—had reference to deeds perfect and complete upon the face of them, and to deliveries thereof to a party or parties in interest entitled to the benefit. The rule was not, in its principle or its reason, at all applicable to a case like the present, of a bond which imported, upon its face, an incomplete contract when Goode parted with it, according to the intention of all parties, and required clearly, that it was to be completed by Jones's execution of it as a joint obligor, and this bond, so incomplete and so afterwards to be completed, delivered, not to a party having any beneficial interest in it, but to one of four nominal obligees, all of whom were naked trustees for the benefit of others. They enforced this distinction with great earnestness, and examined the authorities to shew that it was just and even necessary. But taking the case in the point of view in which

490 the "plaintiffs' counsel regarded it, they relied on the case of Johnson v. Baker as an authority directly in point for the defendant in this case: they said, it was even a stronger case than this. They then adverted to the difference between the two additional pleas. The first of them stated, that Harrison, to whom the bond was delivered as an escrow, was one of the obligees, but alleged that he was only a nominal obligee, for that he did not act as one of the commissioners who sold the land for the purchase money of which the bond was intended to be taken; he was not really an obligee even in trust for others; he was not, in truth, a party. But in the other additional plea, it is pleaded that the bond was delivered as an escrow to Harrison, without stating that he was one of the obligees; non constat from that plea, that the Harrison to whom the bond was delivered as an escrow, was the same Harrison who was named as one of the obligees. Issues were joined upon both the pleas; the

jury found for Goode upon both issues; and though the plaintiffs moved for a new trial, they took no exception to the opinion of the court overruling that motion. Upon the verdict on the last issue, Goode was entitled to judgment; and no exception being taken to the refusal of the court to set aside the verdict, as being contrary to evidence upon the last issue, this court could not look into the evidence to see whether or no the verdict was warranted by it; and if it could, yet seeing that substantial justice had been done, it would not disturb the verdict.

CABELL, J. I am not disposed to controvert the distinction between a deed delivered as an escrow to the party to the deed, and one that is delivered to a stranger. While it is universally conceded, that where a deed is sealed and delivered to a stranger, as an escrow, until certain conditions are performed, and then to be delivered to him to whom the deed is made, to take effect \*as the deed of him who sealed it, such deed, even although the other party get it into his possession, is as inoperative, until the conditions are performed, as if it had never been delivered at all; yet it seems to be settled also, that if a deed be sealed and delivered to the party himself to whom it is made, as an escrow, but to become the deed of him who sealed it on certain conditions, in such case, let the form of the words be what it may, the delivery is absolute, and the deed shall take effect presently as his deed, and the party is not bound to perform the conditions. Co. Litt. 36 a. Shep. Touchs. 58, 9. The reason assigned by Coke is, that "the delivery is sufficient without speaking of any words (otherwise a man that is mute could not deliver a deed) and tradition is only requisite; and then when the words are contrary to the act which is the delivery, the words are of none effect;" for "non quod dictum est, sed quod factum est, inspicitur." In the case of *Williams v. Green*, Cro. Eliz. 884, the reason assigned by the court is, that if it were allowed, "a bare averment, without any writing, would make void every deed." As already observed, I shall not controvert the propriety of this distinction. But I must say, that the reasoning on which it is founded, is not only very technical, but it is unsatisfactory to my mind; for it is not every tradition, or passing of a deed from the hands of one to the hands of another, that will constitute a legal delivery of it as a deed. Something at least is due to the intention with which the tradition is made; and such intention, on such an occasion, is generally gathered from our words, rather than from our actions. Therefore, I am not disposed to carry the doctrine farther than it has already been carried by the adjudged cases.

I have not observed a single case in which the doctrine has been applied to any deed which was not, on its face, perfect and complete, requiring nothing to be done to give it full efficacy as a deed according to the intention \*of the parties, but the mere delivery of it as a deed. This is necessarily the case, where the tradition is to the party himself; for, in such case, the instrument becomes, by the mere tradition, ipso facto, the present deed

of the party; which could not be, if the deed were not in itself perfect and complete as an instrument, according to the intention of the parties, as gathered from the instrument itself. All the cases will accordingly be found to relate to conditions extrinsic and de hors the deed. Let these principles be applied to this case.

The deed on which this suit is brought, commences, "We John C. Goode and Benjamin B. Jones are held and firmly bound &c. in the just and full sum &c. on or before &c." and concludes "witness our hands and seals &c." Then comes the signature of Goode, with a seal annexed; and under it, where the name of the other obligor ought to be, there is a seal, but no signature: and it is attested "J. Rice, as to J. C. Goode"—Can any thing be more manifest, than that this deed was not intended to be the several deed of Goode? Is it not clear, that it was not intended to be even his joint and several deed? It is purely and merely joint; importing a joint obligation with Jones—and this was the intention of all the parties to the deed, at the time Goode signed and sealed it. A thousand witnesses would not prove this more strongly, than it is proved by the form and tenor of the instrument itself. This being the case, and the deed having been made part of the declaration by the oyer craved of it, a question might be made whether Goode might not have successfully demurred to the declaration; or, if oyer had not been craved of the deed, whether he might not have successfully opposed its introduction as evidence, as being variant from the deed described in the declaration, which pleads it as the several obligation of Goode. The exigencies of this case do not require me, nor do I mean, to give any opinion on those points.

But the question does arise, and I am \*obliged to decide, whether the fact pleaded and proved by Goode, that the execution of the deed by Jones was to be the condition of its being obligatory on him, be one of those conditions which the law will disregard, merely because of the tradition by him of the instrument, in its present form, to one of the obligees? I am clearly of opinion, that it is not. The case does not come within the reason of the rule. The fact alleged is not contrary to, but is consistent and conformable with the face of the instrument itself, and the act of the parties. Nor is there any of the danger relied on in the case in *Croke*, of defeating a solemn deed by mere averment; for, as just observed, the averment in this case is consistent with the deed itself. There is also another most remarkable feature in this case, which eminently distinguishes it from all others: the fact on which Goode relies, is not only consistent with the tenor of the deed itself, but is admitted, and even sworn to, by that one of the obligees to whom the delivery was made; who is also one of the plaintiffs in the cause, and who, notwithstanding, has become a voluntary witness on the part of the defendant. In such a case, it seems to be idle to talk of a rule, which is founded on the danger of admitting perol averments repugnant to the acts of the parties. I think the judgment must be affirmed.



BROOKE and STANARD, J., concurred. ALLEN, J. I concur in affirming the judgment, but not for the reason assigned. The second of the additional pleas alleges a delivery as an escrow to Harrison, without shewing that he was one of the obligees; to this plea there was a general replication, upon which issue was joined; and upon that issue, as well as on the others, there was a verdict for the defendant. The fact that Harrison was an obligee, came out in the evidence at the trial. But there  
494 was no exception to the refusal \*of the court to grant a new trial. And even if the evidence could be looked into, the same evidence which shewed that Harrison was an obligee, shewed also that the parties did not contemplate the delivery of the instrument as a deed. Under such circumstances, the court, in the proper exercise of its discretion, would have been justified in refusing a new trial. On this ground, I am for affirming the judgment. Judgment affirmed.

#### 495 \*Stephen Martin v. John Martin.

January, 1842, Richmond.

**Arbitration and Award—Objections to Award—Omissions and Incorrect Recitals\*—Case at Bar.**—S. brings detinue against J. for one slave, and J. detinue against S. for three slaves, and J. brings also an action of debt against S. and the parties agree to refer all matters in difference in the three suits to two arbitrators and their umpire, whose awards, or the awards of their umpire, to be made the judgments of the court; which submission is made a rule of court: the arbitrators proceed to arbitrate the two actions of detinue, and make an award therein, without arbitrating the action of debt: in their award, the date of the submission is not recited, and the submission is recited as referring to arbitration the two actions of detinue only: and the award in J.'s action of detinue against S. gives J. the three slaves demanded in his declaration, and two other slaves, increase of a female slave demanded, born after the action brought: **HELD**, neither the omission to state the date of the submission in the award, nor the recital of the submission as referring the two actions of detinue only, nor the failure to proceed to arbitration of the action of debt, is a good ground of objection to the award under the terms of this submission.

**Detinue—Female Slave—Recovery of Increase—Quere.**†—Whether, in detinue for a female slave, her increase born pending the action can be recovered? Whether, in the trial of such action by jury, verdict can properly be rendered, and judgment given, for such after-born increase? Whether there is any difference, in this respect, between a trial by jury and an arbitration, so that if a jury cannot properly render a verdict for such after-born increase, the arbitrators may award the same? Two judges of this court hold the affirmative, and two the negative.

**Arbitration and Award—Rejection of Excess in Award.**—It seems, that where an award settles matters of difference that are, and other matters that are not, within the submission, the court may reject

the excess, and render judgment on so much of the award as is within the submission.

Upon writs of supersedeas to two judgments of the circuit superior court of Bedford, the case was thus:

Stephen Martin brought detinue against John Martin for a slave named Charles: John brought detinue against Stephen, for three slaves, a negro woman named Lucy, and two negro boys, William and Caesar, sons of Lucy: and John also brought  
496 an action of debt against \*Stephen.

The parties agreed to refer the causes to arbitration, and their submission was made a rule of court and entered of record, under a caption in which all the three causes were mentioned, in the following words: "By consent of the parties all matters of difference between them in these suits are referred to the final determination of J. F. Sale and J. Wilson, or to an umpire to be chosen by them in case they disagree, and their awards or the awards of their umpire to be made the judgments of the court; and it is ordered accordingly." The arbitrators, under a caption mentioning the two actions of detinue, omitting the action of debt, made the following award: "Pursuant to an order of the circuit superior court of Bedford made by consent of the parties in the two causes before mentioned depending in the said court, we, the undersigned arbitrators in said order mentioned, have this day, in the presence of the parties and at their request, both professing to be ready for trial, proceeded to adjust the differences between them in the said suits, and after the statements and the witnesses introduced by the parties, we do award, that the suit of Stephen Martin against John Martin shall be dismissed, and that the plaintiff pay the defendant his costs expended in that suit. And, in the last mentioned cause of John Martin against Stephen Martin, we award, That the plaintiff recover against the defendant, the negro woman Lucy in the declaration mentioned of the value of 600 dollars, the negro boy William in the declaration mentioned of the value of 325 dollars, the negro boy Caesar in the declaration mentioned of the value of 175 dollars, a negro girl (name not known) a child of the said Lucy born since the institution of this suit of the value of 200 dollars, and an infant negro girl, a child of the said Lucy, also born since this suit was brought, of the value of 100 dollars; if the said negroes may be had; if not, then the prices aforesaid of them or of such of them as may not  
497 be had; and the \*costs of the said plaintiff expended in the said suit. Given under our hands &c."

This award being returned to court, Stephen Martin filed seven exceptions to it: five of which were founded on allegations of fact, imputing error in the proceeding of the arbitrators: the other two presented the following objections to the award—1. That it was not in pursuance of the submission, nor did it decide all the matters submitted; and 2. that the award was not within the submission.

The court overruled the exceptions, and gave judgments according to the award; judgment in the action of detinue of

\*See monographic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

†See monographic note on "Detinue and Replevin" appended to Hunt v. Martin, 8 Gratt. 578.



Stephen Martin against John Martin, dismissing the suit with costs; and, in the action of detinue of John against Stephen, judgment for the plaintiff, not only for the three slaves, Lucy, William and Caesar, which were claimed in the declaration, but for the other two children of Lucy born since the institution of the suit, which therefore were not demanded but which were awarded to him by the arbitrators.

Upon the petition of Stephen Martin, this court allowed him writs of supersedeas to the judgments.

The cause was argued here, by Grattan for the plaintiff in error, and by Robinson for the defendant.

I. Grattan objected, that the award was not made in pursuance of the submission: for 1. the submission was not identified in the award, either by reference to the date of the rule of court whereby it was made, *Turner v. Moffett*, 2 Wash. 70, or by a correct recital of the terms of the submission whereby the three suits between the parties were referred to arbitration, not the two actions of detinue only, as was stated in the award. 2. The award did not extend to the whole subject submitted: it determined the matters in difference between the parties in the two actions of detinue, leaving the action of debt undecided, and in-  
498 deed unnoticed; which vitiated \*the whole award, *Randall v. Randall*, 7 East 81; *Ingram v. Milnes*, 8 Id. 445; *Mitchell v. Staveley*, 16 Id. 58; *Winter v. Munton*, 2 J. B. Moore 723; 4 Eng. C. L. R. 421; 1 Wms. Saund. 32, note 1.

Robinson answered, that in *Turner v. Moffet* there was a misrecital in the award of the date of the submission; here, the award omits the date of the submission, and therefore, there could be no misrecital or variance. The submission was ascertained by the caption to the award shewing the cases arbitrated, and the caption to the cases on the record shewing the cases referred. As to the objection, that the award did not determine the whole subject submitted, it was answered by the terms of the submission: the three cases were referred, and the awards of the arbitrators or the awards of the umpire were to be made the judgments of the court; so that the arbitrators might have made three several awards in the three cases, or one award in all three, or one award in two of the cases, and another in the third, or one award in the two cases leaving the third to be afterwards arbitrated. Non constat but that there had been another arbitration of the action of debt.\* Besides, it appeared, that the two

cases of detinue were arbitrated "at the request of the parties, both professing to be ready for trial," that is, to proceed in the arbitration.

II. The second question was, whether the award was not vitious, because it extended to matters not submitted to arbitration?

The objection under this head was,  
499 \*that the award in the action of detinue of John against Stephen, and the judgment of the court, gave him two infant slaves, children of the woman Lucy, born since the suit was instituted, who were not demanded in the declaration, and the right to whom, therefore, was not a matter in difference in that suit. Supposing this objection well founded, another question of practice would arise, Whether the court should have given John judgment only for the three slaves demanded in his declaration and awarded to him, leaving him to prosecute a new action for the two infant children of Lucy? or should have set aside the award as wholly vitious?\*

The court was unanimous in the opinion, that the first set of objections to the award were rightly overruled by the circuit superior court. But as to the second objection,

ALLEN, J., said—The action of John Martin against Stephen Martin was brought to recover three slaves, one a female. The case was referred to arbitrators, who awarded to the plaintiff the three slaves named in the writ and declaration, and two other infant slaves, children of the female born after the institution of the action. The order of reference under which the arbitrators proceeded, referred all matters in difference in the suit. It is contended, that the arbitrators were limited by the terms of the submission to those matters which could have been passed upon by the verdict of the jury, if the case had gone to trial; and if so, the plaintiff must shew that this increase of the female slave could have been recovered in that action, otherwise the arbitrators have exceeded their authority.

The action of detinue is little used in England: the defendant was entitled to his wager of law; in consequence of which, it

has seldom been resorted to in modern  
500 \*times, and the decisions of the courts in the action are very scant. The importance of slave property has led to the revival of the action with us, and it has become a convenient and valuable remedy. The damages recovered in an action of trover, the substitute for detinue in England, would furnish no adequate remedy in respect to this species of property; for, owing to the attachment springing up between master and slave, no damages would compensate for the loss. In reviving this obsolete action, and adopting it as a remedy in this particular case, we use it for the assertion of a right unknown to the common law. The title of masters to slaves rests upon the municipal law of our own State. The rights and duties of owners, the mode acquiring and transmitting title, all depend upon our own statutes, which

\*It did not appear by the records in this court, what had become of the action of debt of John v. Stephen Martin. Robinson said he was informed by his client, that the arbitrators, after their award made on the two actions of detinue, gave notice to Stephen Martin that they would proceed at a day named to arbitrate the action of debt; but Stephen did not attend, and no award was made; and that the order of reference as to this case was then set aside, the cause tried, and verdict and judgment rendered for John Martin. If these facts should be deemed material, they might be ascertained by a certiorari bringing up the record of the action of debt.—Note in Original Edition.

\*The arguments of counsel on this point are not reported, because it is very fully argued in the opinions of the judges.—Note in Original Edition.

(for this purpose) are Virginia common law. One principle of law respecting this property, is, that as a general rule, the issue follows the condition of the mother. Indeed, the rule may be considered as universal: I can hardly imagine a case which would form an exception to it. The case of a gift of the mother by, will, and of the issue thereafter to be born, to a different person, is supposed to constitute an exception. It has never been decided that such a gift of the afterborn issue is valid; and it would seem to be inconsistent with the previous absolute donation of the mother. But be that as it may, it would form an exception (and one of rare occurrence) to the general rule, that he who shewed title to the mother, thereby shewed title to the issue; that one follows as an incident to the other, and that the establishment of right to the one, concludes the title to the other, except in the possible case above alluded to, or where there has been an alienation of the issue after the title thereto had accrued. Such being the law as to the rights of the owner, and there being no statutory remedy for the assertion of these rights, the courts were called on to furnish

one: and the obsolete action of detinue <sup>501</sup> was revived, and adopted for this purpose. The right being ascertained and regulated by law, cannot be altered or impaired by judicial decision. But, it seems to me, the court is by no means transcending its authority, when it moulds and adapts the remedy so as to be adequate to the assertion of the right. This, indeed, constitutes one of the peculiar excellencies of the common law. While rights are held inviolate, remedies may be modified and regulated so as to conform to the changing condition of society. If no change could be made in the application of remedies to the ever varying and expanding relations of men in an improving community, without legislative enactment, society would move in trammels, and the courts be always behind the age. Accordingly, we find that while the forms of action have continued unchanged, there is scarcely one which has not undergone modifications to adapt it to the changed condition of society. In regard to this very subject, we have a striking illustration of this proposition. There was no form of action known to the common law, by which the right to freedom could be tried. The laws upon the subject of villenage had no application to the condition of slaves in Virginia. Our courts, without any legislation, have moulded the ordinary action of trespass for false imprisonment, in form an action to recover damages for a tort, into a suit to try the right to freedom. Where is the incompatibility of moulding the action of detinue so as to render it adequate to the purposes to which it is applied? The argument ab inconvenienti, if a different practice should prevail, is entitled to some weight. Humanity dictates that the child should not be separated from the mother; and where the right to one, is determined by the adjudication of the question as to the other, why should the plaintiff, having recovered the parent, be turned round to a new suit to recover the child? Again; the owner

being out of possession may not know, <sup>502</sup> and has no means of ascertaining, the names of the issue, or the times of their birth. The controversy may be protracted; and if the possession is adverse, and has continued for five years, the title is perfect. Such adverse possession must commence at the moment the child comes into being: and, unless the real owner has in every instance instituted a new action for the increase, within the five years, his right will be barred. This would be holding out inducements to wrong doers to protract such controversies, with the hope of securing a title to the increase.

It is supposed, that if the jury should include the increase, the defendant might be surprised by evidence touching their value, of which no notice was given by the pleadings. This in practice could be easily obviated, by requiring the plaintiff to file a specification of the children born after the institution of the suit, before the trial. The courts too, by granting new trials, could always guard against any injustice from surprise.

It is said, if the afterborn children may be recovered, then, if the plaintiff, through ignorance of the existence of such children, neglects to give evidence of such fact, his right may be lost. I do not think so. In many cases, though the plaintiff might have blended distinct claims together in the same action, his failure to do so will not preclude a recovery in another suit for a claim of which no evidence was given in the first action. The action of assumpsit presents a familiar illustration of this rule. So, if the afterborn children should die before trial, the same rule which governed in the case of Austin's ex'or v. Jones, Gilm. 341, would apply: for such issue the jury would probably allow nothing.

For the reasons before indicated, direct authority could not be expected in any of the English cases. But, in adopting the action of detinue for the assertion of this right, the courts have availed themselves of a form of action which did admit anomalies, when viewed with reference to the strict rules of pleading, which distinguish <sup>503</sup> it from other actions, and, in effect, justify the modification here proposed. According to the old authorities, the defendant may plead in this action, that the goods were delivered to him by the plaintiff and A. *æqua manu*, upon a condition which he knew was not performed, and pray that A. be garnished. So, if A. bails goods of C. to B. in detinue by C. against B. he may plead bailment by A. to be redelivered to him, and pray that he may be garnished. 6 Com. Dig. Pleader. 2 X 9, p. 405-6. Upon this plea a *scire facias* issued against the garnishee: if he appeared and interpleaded, and the plaintiff succeeded, he had judgment against the original defendant for the recovery of the thing detained, and for his damages, though these could not exceed the amount laid in the declaration; and he might also recover damages against the garnishee for the delay after the writ purchased, and these damages might exceed those laid in the declaration, for (as it is said) it was not against him. Id. 2 X 12; 1 Roll. Abr. 578;

Pilford's case, 10 Co. 117; *Ld. Ellenborough's* opinion in *Ushur v. Dunsey*, 4 Mau. & Selw. 99. See too, 1 Roll. Abr. 578; Bro. Abr. 227, 8 Vin. Abr. Detinue, D. 6, p. 38. Here, then, is an instance in this action, where a departure was allowed from all the rules of pleading applicable to other personal actions. A stranger not named in the writ or declaration, was brought into the case; if he interpleaded, the suit proceeded against both, and judgment was rendered against both. The action therefore did admit of one essential difference from all others. And when revived in this country, and adapted to the assertion of a right to property in slaves, is it more incongruous to admit it to be so moulded as to be an adequate remedy, than it was to permit this interpleader and judgment against a third person?

By the old common law, the writ of replevin was resorted to, for the redelivery and recovery of the specific chattel; a

remedy, in some respects, more effectual than \*the action of detinue. The gist of the action was the tortious taking. *Vaiden v. Bell*, 3 Rand. 448; *Pangburn v. Patridge*, 7 Johns. Rep. 140; *Marshall v. Davis*, 1 Wend. 109. In the last case, it was held, that replevin would not lie unless the taking was tortious. In *F. N. B. 69*, it is said, "A man shall have a replevin of divers cattle that are taken; and if a man take divers cows or sheep, and afterwards they have calves or lambs, the plaintiff shall have his replevin of them all, as well as of the cows and sheep which were taken." And in a note to this passage it is said, "Where, on the issue that he did not take, and the special matter found, it shall be adjudged for the plaintiff." This, though not directly in point, is a strong authority in support of the view I take of the case under consideration. When *Fitzherbert* wrote, the rules of special pleading were rigorously enforced. The tortious taking, we perceive, in an action of replevin was the gist of the action. Unless the plaintiff made that out, he failed. But in the case put, where there had been increase from the cows and sheep after the taking, though the tortious taking could not be predicated of such after increase, yet upon the special matter being found, the plaintiff had judgment. As to the increase an exception was made. So here, though regularly a plaintiff may not be permitted to recover more than he declares for; in this particular case, and in this form of action, shewn in other respects to have admitted of essential departures from the ordinary rules of pleading, it seems to me, the increase may be recovered; that the analogies of the law justify such a modification of the action; and that substantial justice will be promoted by allowing it.

There is another view of this particular case, which, perhaps, would justify the award; though I have not fully satisfied myself as to this point. There would be no doubt of the right of a court of equity, in a proper case, to give a decree for the increase of slaves, born during

\*the pendency of the suit. The arbitrators are a domestic tribunal, se-

lected by the parties. The title to the slaves named was in controversy; that controversy embraced, and the settlement concluded, the title to the increase. The parties appeared, and there is no allegation that the defendant was surprised by the arbitrators considering a matter not embraced in the submission. They were an equitable tribunal. By their award they have gone no further, than (if I am correct) a court of equity would have gone. The objection to the power of the court of law to render judgment for such increase, is technical: the arbitrators were bound by no such formal rules. And as the controversy submitted to their decision, did, in effect, embrace the increase, as well as the mother, it seems to me, they were justified in including all in their award.

But on the first ground, I think the increase might have been recovered in detinue; and I am, therefore, for affirming the judgment.

STANARD, J. It was objected, that the arbitrators exceeded their authority in awarding the issue born after the institution of the suit, and that the judgment is erroneous in sanctioning the award. If the objection is well founded, it will not avoid the award as to the matters confessedly within the submission. It was an excess easily severable from the matter which was submitted; and the court in giving judgment on the award should have rejected the excess, and sustained it so far as it was within the submission. *Lyle v. Rodgers*, 5 Wheat. 394, 409; *Cargay v. Aitcheson*, 13 Price 639; *S. C.* 2 Barn. & Cress. 170; 2 Bing. 199; 9 Eng. C. L. R. 52, 380.

Upon the question whether the objection is well founded or not, after the most careful consideration of it, and of the argument upon it, I think the objection must be sustained. The matter in difference

in the action \*of detinue demanding three slaves by name, was referred to the arbitrators: their authority did not extend beyond the matter in difference in that action. Whatever was recoverable in that suit, had it proceeded to trial and judgment in the ordinary course, constituted the matter in difference, and every thing not so recoverable was extrinsic to the case, as to which evidence would have been inadmissible at the trial, and judgment would have been extrajudicial and erroneous. The question, then, is resolvable into this: could the increase of the female slave born pending the action of detinue for the mother, have been recovered, if the case had proceeded to trial, verdict and judgment? The well informed counsel for the defendant in error, seeing that this was probably the equivalent question, maintained the affirmative, on the ground that the increase is but a mere incident, like interest on principal money, or profits of property detained. This argument from analogy, though most ingeniously urged, I think is not sound. To hold it so, might in this case subvert the purposes of justice, but would lead to very different results if established as a general proposition. If it be established that the increase of slaves is like interest or profits, and on that

analogy the recovery of the increase be allowed in this action, then the principle would apply in a case where, the increase not being recovered in the action for the parent, a subsequent action shall be brought for the increase. If in a suit for money or property, in which interest or profits are recoverable as incidental to or accessories of the principal subject, such interest or profits be not recovered, no new action can be brought for them; and, if the increase of slaves born pending a suit for the parents, be considered incidents or accessories of the principal subject claimed in the pleadings, a subsequent suit for such increase would be equally inadmissible. The consequence would be, that the true owner,

507 and "ignorant or not having proof of the fact of increase pending his suit, would lose his remedy for the increase. And cases in which the plaintiff may be ignorant of the fact of such increase having been born, or may want proof of it, will, probably, be of much more frequent occurrence than those in which his information and proof will enable him to recover them. Again, to hold that such increase is recoverable in the action for the parent, might lead to surprise and injustice. The defendant has no warning that the plaintiff alleges the birth or existence of such increase; and the plaintiff may introduce evidence as to this matter, of which the pleadings have given the defendant no notice, and by mistake or fraud make proof of increase that never existed or had ceased to exist. And in respect to the increase which had been born but had died, what would be the rights of the parties? Much embarrassment might arise from the application of the principle of Austin's ex'or v. Jones, Gilm. 341, where judgment was given for the plaintiff, though it was ascertained by the verdict of the jury, that the slave was dead. In one view of that case, if the increase born pending the suit is to be considered as part of the subject embraced and recoverable in the suit, then its death pendente lite would not exempt the defendant from a recovery of its value. In another view, the argument of Judge Roane in that case goes far to sustain the propriety of excluding the proof that there was such increase, and consequently of denying the right of recovery: he intimated, that the defendant might have protected himself by pleading *puis darrein continuance*, because such plea would have put the allegation of the fact of the death of the slave on the record, and that would have let in proof of it. If the death cannot be proved to exonerate the defendant from the charge for the slave that may have died, unless that fact be pleaded in the ordinary course, proof of the birth not stated in the pleadings should not be let in to increase the charge.

508 \*My opinion is, therefore, that the arbitrators, so far as their award embraced the increase of the female slave born pending the suit, exceeded their authority; that to that extent the court below ought to have rejected the award, and should have given judgment upon it in like manner as if it had said nothing about the increase;

and that this court, reversing the judgment, should render such judgment as that court ought to have rendered.

CABELL, J., concurred in the opinion of Judge Allen, and BROOKE, J., concurred in that of Judge Stanard.

And the judges of this court being equally divided in opinion, therefore, the judgment was affirmed.

#### Governor for Cockrell v. Williams.

February, 1842, Richmond.

**Insolvent—Schedule—Equity of Redemption—Sale of by Sheriff.**—A ca. sa. being served on C. he surrenders, in his schedule, his equity of redemption in certain slaves then under mortgage; and the sheriff, without redeeming the mortgage, or exposing the slaves to the view of the bidders, sells the equity of redemption: **HOLD.** If the sheriff had no right to make the sale, nothing passes by it; if he had a right to make it, he committed no breach of the duties of his office in making it; and so, either way, no action lies for C. against him.

Debt, in the circuit superior court of Jefferson, in the name of the governor, at the relation of Cockrell, against Williams, the sheriff of the county, on his official bond. The declaration set out the bond, and then the condition thereof in *hæc verba*, which provided, "that the sheriff, in all respects, should truly and faithfully execute and perform the duties of his office;" and "assigned as the breach of the condition, that sundry writs of *capias ad satisfaciendum* having come to the sheriff's hands against Cockrell, and these being served on Cockrell, he took the oath of an insolvent debtor, and surrendered in his schedule, among other things, all his equity of redemption in certain slaves, which he had conveyed by deed of trust to one Kennedy, trustee, to secure a debt due to W. & J. Lane; and that the sheriff did not, as required by law, sell the property contained in the schedule for the best price that could be had for the same, but, on the contrary thereof, although the said slaves were of far greater value than the amount for which they were mortgaged by the said deed of trust to the said Lanes, yet, by reason of the misconduct and malpractice of the sheriff, in not causing the deed of trust to be paid off and removed by a sale of so many of the slaves as might be required therefor, before his making sale thereof under the said insolvency, and in not exposing to the view of the purchasers the slaves aforesaid to be sold, at the time and place of sale, the same were sold at a price far less than their real value. By reason whereof, action accrued to the plaintiff to demand and have the penalty of the bond. Yet the defendant had not paid the same to the plaintiff &c.

The defendant put in a general demurrer to the declaration, in which the plaintiff joined.

The court held, that the law upon the demurrer was for the defendant, and gave him judgment: to which the plaintiff applied to this court for a supersedeas; which was allowed.

Mason and Cooke for plaintiff in error. There was no counsel for the defendant.

BALDWIN, J. This is substantially an

action by an insolvent to recover damages from the sheriff for selling the equity of redemption in certain slaves surrendered in \*his schedule. That such is the true nature of the case appears from the face of the declaration. The declaration alleges that the relator took the oath of an insolvent debtor in due form of law, surrendering in his schedule all his interest, being an equity of redemption, in the slaves, which slaves had been previously conveyed by him in a deed of trust to secure a debt therein recited; and there is no averment that the slaves ever came to the possession of the sheriff. It must be taken, therefore, that the sheriff undertook to sell, and in point of fact only sold, the insolvent's equity of redemption in the slaves: and the question is, whether he can be subjected to damages for so doing, in an action upon his official bond. The relator does not claim adversely to the deed of trust: on the contrary, he expressly recognizes its validity. The case in this respect is not like that of *Shirley v. Long*, 6 Rand. 736. There, the insolvent had made a fraudulent gift of his property to his children, and the right vested by law in the sheriff was not subject to, but in conflict with, that gift. He acquired the absolute title, and moreover the right of possession; and two out of the three judges expressed the opinion, that even upon the supposition that the sheriff acted irregularly, in selling the property when out of possession and during the adverse claim of the fraudulent donees, yet that the title passed to the purchaser. But, in the present case, the title and the right of possession were vested in the trustee, for the purposes of the trust; and the sheriff acquired the mere equity of redemption, and neither the right of property nor the right of possession. It is unnecessary to consider whether he had the legal authority under the statute to sell that equity of redemption. If he had not, then the sale was merely void, and the relator has been in no wise injured: he has not even been deprived of the possession of the property. On the contrary, if the sheriff

had legal authority to make the sale, 511 he cannot be made responsible \*for exercising it, in the absence of all irregularity, fraud or oppression on his part. It is true, the declaration alleges, that the property was sacrificed by the misconduct of the sheriff, in not causing the deed of trust to be paid off, by a sale of so many of the slaves as might be required therefor, and in not exposing the slaves to the view of the purchasers at the time and place of sale. But, as to the first, it is clear that the sheriff was not bound to redeem the property by paying off the prior incumbrance; and that he had no legal power to sell part of the slaves for that purpose, inasmuch as he could not transfer to the purchaser the title vested in the trustee: And as to the last, the sheriff, having neither the possession nor the right of possession, had not the means of exposing the property to the view of bidders, which moreover would have availed little or nothing, with the knowledge on their part that he could not give them the possession. In short, unless a man can be made liable for doing

a legal act without any improper motive, or for doing an illegal act which is merely void and occasions no injury to the complainant, this action cannot be supported. I have no hesitation in saying that the court below did right in sustaining the demurrer to the plaintiff's declaration.

The other judges concurred. Judgment affirmed.

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**\*May v. Boisseau.**

February, 1842. Richmond.

(Absent BROOKE, J.)

**Husband and Wife—Right of Survivorship—Set-Off by Husband's Creditors.**—M. gives his acknowledgment in these words—"Borrowed of Mrs. E. H. B. 750 dollars Nov. 5, 1829," the said Mrs. E. H. B. being then a feme covert: her husband dies: HELD, the action survives to her to recover the money; and no debt due from the husband can be set off against the claim of the wife.

This was an action of debt, brought in the circuit superior court of Chesterfield, by Sarah Boisseau, widow of Edward H. Boisseau, against John F. May, for 750 dollars lent to him by Sarah Boisseau during her husband's life. The declaration made profert of a due bill or promissory note, which was in these words: "Borrowed of Mrs. E. H. Boisseau 750 dollars, November 5, 1829. (Signed) J. F. May." The defendant pleaded nil debet.

At the trial, the plaintiff gave in evidence the due bill above mentioned; and then the defendant offered in evidence, a bond executed by Edward H. Boisseau, the husband, in his lifetime, to the defendant, dated the 26th November 1825, promising to pay him, on or before the 26th December then next ensuing, the sum of 1749 dollars; and a deed of trust, executed by Edward H. Boisseau, in his lifetime, dated the 29th May 1829, whereby he acknowledged the debt due to May of 1749 dollars with interest from the 26th November 1825, by the bond above mentioned, and a further debt of 4504 dollars with interest from the 29th May 1829, for which debts the deed provided security; and he offered further evidence, by endorsements by him made on the said bond for 1749 dollars, and on the deed of trust, that he had given Edward H. Boisseau full credit for the 750 dollars for which this suit was brought, which endorse- 513 ments were as follows: \*endorsement on the bond, "1829, November 5. By this amount per my due bill to Mrs.

**\*Husband and Wife—Chose in Action—Right of Wife by Survivorship—Set-Off by Husband's Creditors.**—The principal case is cited with approval in *Perkins v. Clements*, 1 Pat. & H. 148, 149, 150, 151.

In *Mutual Benefit Life Ins. Co. v. Atwood*, 24 Gratt. 509, the court said: "In *May v. Boisseau*, 12 Leigh 512, all the judges were of opinion that an acknowledgment of debt to a wife would at once enure to the husband, and not survive to the wife, unless it appeared on the face of the contract, or otherwise, or by legal intendment, that the consideration moved from her—that she was the meritorious cause of the contract; but they held in that case that the court might so intend from the acknowledgment alone, if nothing should appear to the contrary." See monographic note on *Husband and Wife* appended to *Cleland v. Watson*, 10 Gratt. 159.

Boisseau, which you are to return, and take a receipt in part hereof for 750 dollars;" endorsement on the deed of trust, "The debt herein first mentioned as due by bond, will be entitled to a credit for 750 dollars received from Edward H. Boisseau on the 5th November 1829, for which he took a due bill or memorandum from me as for so much borrowed of his wife by me, when the said memorandum is returned or cancelled. (Signed) J. F. May." And that the defendant had allowed Edward H. Boisseau credit for the 750 dollars for which this suit was brought, in part of Edward H. Boisseau's bond to him for 1749 dollars. The plaintiff's counsel objected to the introduction of this evidence, and the court excluded the same; to which the defendant excepted. And the evidence (exclusive of the bond for 1749 dollars, and the deed of trust, and the endorsements thereon) being all the evidence in the cause, the defendant moved the court to instruct the jury, that if they believed the facts, above stated as having been proved by the defendant, the plaintiff was not entitled to recover in this action; but the court refused so to instruct the jury, and instructed them, that the right of action upon the due bill on which the action was brought, was in the plaintiff, she having survived her husband; to which opinion the defendant excepted.

Verdict and judgment for the plaintiff for 750 dollars, with interest from the 5th November 1829 till paid, and the costs; to which judgment, May obtained from this court a supersedeas.

Macfarland and Rhodes, for plaintiff in error.

Taylor and Leigh, for defendant.

ALLEN, J. It may be considered as well settled, that where the consideration moves from the wife, as for her personal \*services, or for a debt to her  
514 dum sola, or on account of her real estate, or for a legacy to her, or where a bond or promissory note is given to her, which of themselves import a consideration, she may join her husband in an action, and the cause of action will survive to her. The authorities are reviewed and commented on in the case of Philliskirk & ux. v. Pluckwell, 2 Mau. & Selw. 393, and Nash v. Nash, 2 Madd. 133. The first case was on a promissory note given to the wife. The circumstances under which it was given are not set forth; but Lord Ellenborough said—"If it had been necessary to state a consideration, there might have been weight in the argument; but here, is not the wife the meritorious cause of the action? She is the donee of the promissory note, and it is acquired through her, and the note is a thing which of itself imports a consideration." The case of Nash v. Nash was in chancery; but the question arose on a promissory note given to the wife. The facts shewed she was the meritorious cause, and it was held the action survived.

The instrument of writing in the present case is not a promissory note. It is not an engagement to pay to the wife, by an instrument which in law is presumed to have been made upon an adequate consider-

ation. The instrument is mere evidence of a consideration, from which a promise may be implied. But does it furnish conclusive evidence, that the consideration moved from the wife? It does not to my mind. Property in possession of the wife, by legal intendment, belongs to the husband. If, in reality, this had been the money of the husband, lent by the wife, could it be maintained, that, by taking an acknowledgment of the loan to herself, the interest of the husband was thereby divested if she survived? Upon proof of the fact, would not his representative be entitled? If he would, what is there to prevent the maker, who has a claim against the husband, from shewing the same fact?

515 We must look in this \*case to the consideration set out: there being no express promise, importing a consideration moving from the promisee, we must see the consideration set out from which the implied promise is raised. That consideration is money loaned by the wife; it may or may not be the separate estate of the wife: being personalty, in legal intendment, it belonged to the husband.

In the case of Holmes & wife v. Wood, cited in Weller v. Baker, 2 Wils. 424, assumpsit was brought for a cure by the wife and for medicines and plaisters. It was held, on demurrer, that the husband and wife could not join for the medicines and plaisters: they belonged to the husband. But it might with as much reason have been insisted there, that the medicines and plaisters were the separate property of the wife, as it could be here, that making an instrument acknowledging the borrowing of money from the wife, was conclusive evidence that the money was the separate estate of the wife.

The court, it seems to me, by excluding the evidence of setoff offered by the defendant, undertook to decide the question of fact upon the face of the instrument. The instrument furnished evidence, strong evidence, that the money was hers, and that the defendant knew it. The setoffs offered would in my opinion have strengthened the presumption arising from the face of the instrument. For, if the defendant had not known he was dealing in reference to the separate funds of the wife, the regular course would have been, to have executed a receipt to the husband for so much paid, instead of making the instrument he did. But these were circumstances to be considered and weighed by the jury.

I think therefore, the court erred both in excluding the proof offered by the defendant, and in giving the instruction in the terms it did. By declaring the right of action was in the wife, having survived to her, it undertook to determine upon the weight of the evidence, and in effect decided

516 that the instrument, on its face, conclusively \*shewed that the consideration moved from the wife. The proper instruction would have been, that, if from the facts the jury believed the consideration stated moved from the wife, then the right of action was in the wife, and the defendant, in that case, would not be entitled to setoff against her demand, the debt due to him by her deceased husband.

STANARD, J. The material question argued at the bar, and I think the only one that arises on the record, is that propounded by the instruction moved for by May. If the action is sustainable, it is so because the right to it survived to the wife, notwithstanding her coverture at the time the acknowledgment was given. If it did survive, the separate debt of her husband could not (but under special circumstances, which do not appear) be used as a setoff to extinguish her claim; and if it did not survive, the setoff was of no use, because there was no claim to be repelled or satisfied by the setoff.

The criterion by which the question whether the action survived to the wife is to be resolved, is furnished by ascertaining, whether, in the particular case, had the husband sued in his lifetime, he might have sued in the joint names of himself and his wife? If the claim be such, that the husband must or might have joined his wife in the action for it, then, if it remains at his death outstanding and unappropriated by him, the action survives to and may be brought by the wife. The question, then is, whether if the action had been brought by the husband in his lifetime, he could, on what appears, have brought and maintained it in the name of himself and wife? The counsel for the plaintiff in error, by an ingenious and discriminating analysis of the many cases bearing on the question (the seeming conflict and incongruity of which induced the court, in one of them, to characterize them as a farrago), deduces

the conclusion, that the wife may be joined, wherever the \*contract is made with her and the contract per se imports consideration, dispensing with the averment of consideration in the pleadings, or where, on the face of the pleadings, the wife is the meritorious cause of the action. If this deduction be accurate, still, for the adjudication of the question whether the particular case comes within the latter part of it, it is necessary to enquire what are the cases in which the wife can justly be said to be the meritorious cause of the action? Confessedly among these are the cases in which the transaction or contract, which is the foundation of the action, is with the wife for her special service, or the consideration is one in which she has an interest, or which her husband claims through her. In these, she may be joined in the action, and it will survive.

Here, the action is brought for a debt, and the declaration vouches an acknowledgment of that debt to the wife. The debt contracted is for money borrowed of the wife. If the money borrowed was the money of the husband, then neither the services of the wife are the foundation of the action, nor is the consideration one in which she had any interest, or which the husband claims through her; and so, she could not be joined in an action for it: but if the money was the wife's as between her and her husband, then she might well be joined. Could she have such title? This was denied by the counsel for the plaintiff in error; and he maintained the broad proposition, that, though the wife may be entitled to separate interest to

which the rights of the husband would not attach, yet when money comes to her possession, though it be the produce of her separate estate, it instantly becomes the money of the husband. That proposition is inconsistent with well settled doctrines. So far from money, the proceeds of separate property of the wife, being subject, so soon as it reaches her hands, to the marital right, it does not become so even when it reaches the hands of the husband; and if \*it comes to his hands, and he uses it without the wife's consent, express or implied, he becomes indebted for it, and his estate is liable for the debt. 2 Roper on Prop. 227; Parker v. Brooke, 9 Ves. 583. The wife, then, may have had an interest in that which is the subject of this action; and the transaction out of which the action arises, is one between her and the plaintiff in error.

It is equally true, that the acknowledgment alone does not conclusively shew, that she had such interest: the money may have belonged to her husband; and if so, no action could have been supported in the name of the husband and wife during the coverture, or in her name after his death. When nothing but the acknowledgment appears, how is the question to be decided, whether this is to be considered a claim in which the wife had an interest, or one for which the husband only could sue?

My first impression was, that this was a question for the jury; and, in that view, that while the court was right in overruling the motion to instruct the jury that the action could not be sustained, it was wrong in instructing them that the action survived; for by that instruction, the court decided the question of fact, that the wife was entitled to the money which was the consideration of the acknowledgment, and so improperly intercepted the decision thereof by the jury. And pursuing this view, I should have concurred with Judge Allen in the result—to send the cause back, with directions to receive all the evidence, and leave to the jury the decision of that question of fact, under an instruction that they were at liberty to infer interest in the wife from the acknowledgment of the debt being made to her, and that the indebtedness of the husband to the party who gave the acknowledgment, strengthened the inference of such interest in the wife. But, a further consideration of the case has

satisfied me that the instruction was proper. The exception ascertains all the evidence in the case, given or offered, and the instruction to the jury was sought by the plaintiff in error upon the whole evidence. The acknowledgment was of a transaction between the wife and him. That transaction was one which entitled her to the action, if the consideration was one in which she had an interest not absorbed by the marital rights of her husband. It imported an admission by the plaintiff in error, that such interest existed; and although such admission might not preclude evidence of a state of facts shewing the non-existence of such an interest, yet none such was in proof or offered to be proved. It was incumbent on the plaintiff in error, to furnish such proof:



and the instruction of the court, that the action survived, taken in reference to the case before it, is nothing more than that it was incumbent on him, to control the implication from the transaction and the acknowledgment, by proof of other facts which had not been furnished. Where the consideration does not appear, the court intends, if the contract or transaction be with the wife, that she is the meritorious cause of it. So, in the case of *Philliskirk v. Pluckwell*, 2 Mau. & Selw. 396, Rayley, J., supported the action in the name of the wife, the note being given to her—saying, it did not appear, negatively, "that the wife was not the meritorious cause of the action," and because it might have been given for a debt due to her *dum sola*. If when no consideration appears, and the contract is with the wife, the court sustains the action in her name, because the consideration may have come from her, and will so intend unless the contrary appears; when the consideration which does appear, is one in which her interest is acknowledged by the contract, and which she may possess, and that interest is not disavowed by the husband, the court will make the intendment, unless the contrary appears.

520 \*The accuracy of this deduction depends on the compass given to that part of it, which refers the right of joinder of the wife in the action to her merit or agency in causing it. My impression is, that the rule furnished by a correct generalization, more fitted for practical use, may be thus expressed—Wherever the action is on an express contract with the wife, or the husband and wife, the wife may be joined, unless the consideration averred in the pleadings, or shewn in proof on the trial, be one in which the wife cannot be intended to have an interest; and in every such case, if the interest of the wife be not disaffirmed by the husband by the appropriation of the cause of action to his sole use, the wife surviving will be entitled to it. The cases from which the rule is extracted, which reconciles many seeming discrepancies, are *Hilliard v. Hambridge*, Aleyn 36; *Pratt & ux. v. Taylor*, Cro. Eliz. 61; *Breshford v. Buckingham*, Cro. Jac. 77; *Abbot v. Blofield*, Id. 644; *Bedgood v. Way & ux.*, 2 W. Blacks. 1236; *Philliskirk & ux. v. Pluckwell*, 2 Mau. & Selw. 393; *Nash v. Nash*, 2 Madd. 133; *Garforth v. Bradley*, 2 Vess. Sr. 676; *Richards v. Richards*, 2 Barn. & Adolph. 447; 22 Eng. C. L. R. 119; *Wills v. Nurse*, 1 Adolph. & Ell. 65; 28 Eng. C. L. R. 40.

CABELL, J. It is important to understand the true nature of the question raised by the bill of exceptions in this cause. I do not understand it as relating to the form of the action, but to the right of the plaintiff to bring any action for the debt claimed in the declaration. The writing described in the declaration, is not a specialty; nor is it a promissory note for the payment of money; for there are no words which indicate a promise, or obligation, or accountability, on the part of the defendant. It is a mere acknowledgment of having borrowed money from the plaintiff. It might therefore admit of question,

whether the plaintiff could declare  
521 \*upon it, as she has done, as a

promissory note, or instrument creating, *proprio vigore*, an obligation to pay; or whether the action ought not to have been either debt, or *indebitatus assumpsit*, for money borrowed; in both of which cases the note would be used merely as evidence of the debt. But such a question relates merely to the form of the action, and could only be raised by demurrer to the declaration. The true question intended to be raised by the bill of exceptions in this case, is whether, admitting the form of the action to be correct, the right to institute it survived to the wife on the death of the husband? It is certain that the court below so regarded it.

It is undeniably true, that all choses in action due to the wife, whether they come to her before marriage, or during the coverture, may be sued for and recovered by the husband; the former, by suit in the name of the husband and wife; the latter, by suit in the name of the husband and wife, or in the name of the husband alone. It is equally true, however, that if the husband fail to recover them during the coverture, the right to recover them survives to the wife. Co. Litt. 351. The husband, in this case, having died before the wife, the question whether the action survived to the wife, would seem to be resolvable into another, viz. whether the chose in action evidenced by the writing described in the declaration, was, or was not, in its origin and nature, a valid chose in action due to the wife, or to the wife and to the husband jointly? If the writing in this case had been a promissory note, I think there could have been no doubt on the subject. In *Philliskirk v. Pluckwell*, 2 Mau. & Selw. 393, the action was brought in the name of husband and wife, on a promissory note executed to the wife during coverture, for value received. It was objected, that as the note appeared to have been given to the wife alone, during coverture, and did not state on the face of it, that it was

522 on account of any \*meritorious consideration moving from her, the husband alone ought to sue; but it was held, that a promissory note to the wife imports of itself a consideration on the part of the wife, and shews her to be the meritorious cause of the action; and consequently that the action was well brought in the name of husband and wife. And wherever the action might have been brought in the name of husband and wife, the action survives to the wife on the death of the husband. And these principles were recognized in *Nash v. Nash*, 2 Madd. 133.

But although this is not a promissory note, does it not sufficiently appear, that the wife was the meritorious cause of action? Here is and acknowledgment by the defendant, that the money claimed in the suit was borrowed by him of the plaintiff. A wife may have in her hands, money, over which she has a control as independent of her husband as if she were a feme sole. It may be money which she holds as executrix, administratrix, trustee or attorney in fact; or it may be money which has been conveyed to trustees for her separate use and benefit, and which has been put into her hands by her trustees, for supply-



ing her wants as occasion may require. In all such cases, the law recognizes the rights of the money, as distinct from those of her husband. If the money had been borrowed as the money of the husband, the written acknowledgment given by the defendant as evidence of the transaction, ought, regularly, to have stated, and probably would have stated, that the money was borrowed of the husband and not of the wife; or if the money had, in fact, been the husband's, I presume it would have been competent to the defendant to prove the fact on the trial, and thus to shew that this never was a chose in action of, or due to, the wife. But no such evidence was offered. The case stands on the mere acknowledgment of the defendant. What is its effect, as testimony, in the cause?

523 \*Let it be remembered that the defendant, by his motion, has referred its effect to the decision of the court. I am clearly of opinion, that as a married woman may have money separate and distinct from all right or control on the part of the husband, such an acknowledgment as that contained in the declaration (an acknowledgment that the money was borrowed of the wife) is not only proof of the fact of borrowing, but imports of itself, *prima facie*, that the money was the wife's, and not the husband's; and that, there being no opposing testimony, this presumption becomes conclusive. If this be so, it is manifest that the chose in action was due to the wife, and that she is the meritorious cause of the action; and, consequently, that the action survived to her on the death of the husband.

I am therefore of opinion, that the court below acted correctly in refusing to give the instruction that was asked, and in giving that which it did give. There was no invasion of the rights of the jury; for where, as in this case, all the facts are admitted, except such as the law implies from those which are admitted, it is the province of the court to decide the question, whether the action survives or not.

I shall now briefly advert to that part of the defendant's exceptions relating to the exclusion of certain evidence offered by him—[Here the judge stated the evidence]. The purpose of the defendant May, in offering the bond and deed of trust in evidence, was to prove that Edward H. Boisseau was, at the date of the note sued on, and had been for a long time before, indebted to him, in a much larger sum than the amount of the note sued on, and his purpose in offering the endorsements in evidence, was, to prove that he "the defendant had allowed Edward H. Boisseau a credit for the money specified in the said note, in part of the debt due by the bond." Now, without deciding whether the court

524 testimony, I \*am clearly of opinion, that, admitting it to have been erroneous, it is an error of which the appellant cannot take advantage. No man is allowed to take advantage of an error which did not, and could not, injure him. This testimony would have proved almost to demonstration, that the money borrowed was not the money of Edward H. Boisseau, and

in so doing would have destroyed the pillar of May's defence. It also disproves the fact that credit had been given for the money on the penal bill; the credit was entered upon a condition that has not been performed.

The judgment is affirmed.

Dishazer v. Maitland.

Same v. Same.

March, 1842, Richmond.

(Absent BROOKE and BALDWIN, J.)

**Demurrer to Evidence\*—Exception to Evidence—Waiver.**—Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception: the demurrer does not waive the exception.

**Ancient Deed—Admissibility in Evidence.**†—A deed more than thirty years old, but not accompanied by possession, is not to be admitted in evidence without proof of execution.

I. The first of these suits was an action of trespass *quare clausum fregit*, brought by Maitland against Dishazer in the county court of Charlotte. Plea, the general issue.

At the trial, Dishazer set out with the purpose of demurring to the evidence;

525 but as the evidence was offered, \*he excepted to the admission of it.

He filed as many as six exceptions. One only need be noticed.

Maitland having deduced the title from the original grantee to William Downman, offered in evidence a deed dated the 1st September 1789, from Downman to Robert Donald, Simon Frazer and John Murchie, merchants and partners, conveying the land to them, under whom Maitland claimed. And it appeared, that this deed was proved by the oath of one of four subscribing witnesses, in the county court of Charlotte, in December after its date, and continued for further proof; and that the deed was found in a bundle of partly proved deeds in the clerk's office. But no proof was offered that Donald, Frazer and Murchie, or either of them, or that Maitland claiming under them, ever was in actual possession of the land under the deed. Dishazer moved the court to exclude the deed from going in evidence to the jury; which motion the court overruled, and admitted the evidence; and Dishazer excepted.

Maitland, on his part, further proved, that he paid the taxes on the land from 1790 to 1815, both inclusive; and again, from 1816 to 1827, both inclusive. And the proof of Dishazer's trespass was, that he went on the land in 1827 and cleared a part of it, and thenceforth and still lived there; but he shewed and pretended no title.

After having taken exceptions to the admission of the evidence, Dishazer demurred to the whole evidence; and the jury found for Maitland 100 dollars damages, subject to

\***Demurrer to Evidence.**—The principal case is cited in *Muhleman v. National Ins. Co.*, 6 W. Va. 514. See monographic note on "Demurrer to the Evidence" appended to *Tutt v. Slaughter*, 5 Gratt. 364.

†**Ancient Deed—Admissibility in Evidence.**—The principal case is cited in *Caruthers v. Eldridge*, 12 Gratt. 679. See monographic note on "Deeds" appended to *Flott v. Com.*, 12 Gratt. 564.

the opinion of the court upon the demurrer. The court held, that the law upon the demurrer was for Maitland, and gave him judgment. Dishazer applied by petition to the circuit superior court of Charlotte for a supersedeas, which that court denied. And then he applied to this court for a supersedeas; which allowed it.

II. The other case was ejectment brought by Maitland against Dishazer, to recover the same land. The \*declaration counted on two demises; the first from Maitland, the other from Robert Maitland, Robert Donald, and Simon Frazer, each of one undivided third.

At the trial, Maitland having deduced the title to William Downman, offered in evidence the deed of Downman to Robert Donald, Simon Frazer and John Murchie, of the 1st September 1789, under which Maitland claimed. This deed had been proved by one of four witnesses in the county court of Charlotte at December term 1789, and was found in a parcel of unproved deeds in the clerk's office. No subscribing witness was called in court to prove it; Maitland proving, that he had made diligent enquiry after the subscribing witnesses, and could get no account of them, except that they had all died many years ago, and that he could find no one acquainted with their handwriting. It further appeared, that neither Downman, nor any one claiming under him, ever set up any claim to the land in opposition to the deed. But it also appeared, that no one lived on, or was in actual possession of, the land, until Dishazer took possession thereof some four or five years before the commencement of this suit. Dishazer moved the court to exclude the deed from going in evidence to the jury; the court overruled the motion; and Dishazer excepted.

There was a verdict and judgment for Maitland, upon the first demise in the declaration: to which this court upon the application of Dishazer allowed a supersedeas.

The cause was twice argued here, with great earnestness, by Stanard for the plaintiff in error and C. and G. N. Johnson for the defendant.

There were two questions: 1. Whether the demurrer to evidence in the action of trespass, was a waiver of the exceptions taken to the admission of evidence? On this point, the cases cited and examined were *Hyers v. Wood*, 2 Call 574; *Biggers's adm'r v. Alderson*, 1 Hen. & Munf. 51, and *Ware v. Stephenson*, 10 Leigh 155.—2. Whether the deed of the 1st September 1789, not proved in the county court of Charlotte according to the statute of conveyances, nor proved at the trial, and not having been followed by actual possession in the bargainees, or Maitland claiming under them, was yet an ancient deed, which required no proof of execution?

ALLEN, J. On the trial of the action of trespass, the defendant filed several bills of exceptions to the admission of testimony offered by the plaintiff. The evidence being received, he then demurred to the whole testimony. It was objected that the record does not notice the bills of exceptions, except as they appear in the

demurrer to the evidence. That shews, however, that the exceptions were regularly taken and signed, and the parties, perhaps to avoid the trouble of reducing the evidence to writing again, embodied the bills of exceptions in the demurrer. Unless the defendant, by demurring, is to be considered as waiving his objections to the admissibility of the evidence, I think he is entitled to the benefit of his exceptions.

In *Biggers's adm'r v. Alderson*, 1 Hen. & Munf. 53, 61, there was an exception to the admissibility of the evidence, and a demurrer. Judge Tucker thought the court erred in admitting the testimony, but that the error, if any, was cured by the demurrer, which he considered as a waiver of the exceptions. The evidence, as set out in the demurrer, differed from the description of it in the bill of exceptions. The variance is adverted to by the judge, but whether it influenced his opinion does not appear. The other members of the court said nothing as to this point. No authority is cited by the judge, nor have we been referred to any, which goes to sustain the proposition. The functions of a bill of exceptions are distinct from those of a demurrer. The bill of exceptions raises the

question, whether the testimony is \*competent, or conduces to the proof of the fact to be ascertained. If the court decides the evidence to be competent, or that it tends to the proof of the fact to be ascertained, the party may except. The first is a question of law for the judge to determine before the evidence is received: how far it conduces to the proof of the fact, is a question for the jury. The party by demurring withdraws that question from the jury; and refers to the judge, the application of the law to the fact, admitted or proved. *Gibson & al. v. Hunter*, 2 H. Blacks. 205. What is there in the nature of the two proceedings, which precludes a party from availing himself of both? He considers the evidence illegal or irrelevant, and objects to its introduction: this has no bearing upon the application of the law to the fact which this evidence proves. Why should he be precluded, after objecting to the evidence as illegal, from still further contending, that upon the application of the law to the fact which the improper evidence proves, the party is not entitled to a judgment. The analogy derived from other pleadings justifies such a course. The defendant may demur and plead, and plead as many distinct matters as he thinks proper, although the matters of fact or law so relied on, may be inconsistent with each other. And from a parity of reason, there would seem to be no impropriety in objecting to testimony as illegal, and contending that upon the application of the law to the fact proved by such testimony, the party relying on it is not entitled to succeed.

Several bills of exceptions were taken, but I shall only notice one. The plaintiff, having deduced a title from the original grantee to William Downman, offered in evidence a deed from Downman to the persons under whom he claimed, dated the 1st September 1789, together with an order of the county court of Charlotte, made in De-

cember 1789, certifying that the deed was proved by one of the four subscribing witnesses thereto, and proved that the deed was found by him in an old bundle of 529 partly proved \*deeds in the clerk's office. This being all the testimony touching this matter set out in the bill of exceptions, the defendant objected to the paper going in evidence, and the objection was overruled. It has been repeatedly held in this court, that facts stated in one bill of exceptions cannot be noticed in considering another. *Brooke v. Young*, 3 Rand. 106; *Crawford v. Jarrett's adm'r*, 2 Leigh 639. The reason of the rule is very fully stated in the first case. Here, the bill of exceptions does not refer to any of the other bills, and nothing appearing in the others can be noticed. It is contended, upon this state of facts, the deed being of more than thirty years standing, proof of its execution was unnecessary. The bill of exceptions says nothing as to the possession of the land, whether it had accompanied the deed, or whether there was any actual occupation or possession in Maitland or those under whom he claimed, or whether there was an adverse possession. The general rule is that a deed appearing to be thirty years old may be given in evidence, without proof of its execution, if the possession be shewn to have accompanied it. Nothing of this kind appearing in the bill of exceptions (nor, I may add, in the record, for Maitland is shewn to have never been in possession), Maitland contends that, in the absence of such proof, he has given such an account of the paper, as under the circumstances ought reasonably to be required of him; that the account given repels all imputation of fraud, and affords a presumption that it is genuine. In *Jackson v. Blanshan*, 3 Johns. 292, it was held that an ancient will stood on the same footing with an ancient deed. The court differed as to the time necessary to bring a will within the rule of an ancient paper: upwards of thirty years having elapsed from the date of the will, and possession having been held under it for twenty-seven years, *Spencer, J.*, thought it might be read without proof of its execution; *Kent, C. J.*, and a majority of 530 \*the court held that it required thirty years possession. In *Shaller v. Brand*, 6 Bin. 439, which was also the case of an ancient will, *Tilghman, C. J.*, says, that though the antiquity of the writing affords some evidence in its favour, yet the main ingredient is possession. In 2 Bac. Abr. Evidence, p. 648, it is laid down, if a deed be of thirty years standing, and grantee in possession, such ancient deed shall be read without proof; *Gilbert's Ev.* p. 89, says, if possession has not gone along with an ancient deed, the presumption in its favour fails, if they give no account of its execution. And *Co. Litt. 6b*, "If all the witnesses to a charter of feoffment be dead, violent presumption is continual and quiet possession." See also *Earle v. Baxter*, 2 W. Blacks. 1228; *Doe v. Phelps*, 9 Johns. 169; *Carroll v. Norwood*, 1 Har. & Johns. 174. The counsel for Maitland have referred us to the case of *King v. Inhabitants of Farrington*, 2 T.

R. 466; but the case when examined conforms to the general rule as laid down in the authorities cited. The certificate of settlement had been granted more than thirty years, and the pauper, and his widow after his death, had resided under it in the parish of Farrington: *Ashhurst, J.*, relies on the fact, that it had been acted under and recognized for so long a period. *Buller and Grose, J.*, merely advert to its age. The case shews what would be equivalent to possession in a conveyance of land. The case in 1 Dallas 14, is briefly reported. The plaintiffs produced a deed bearing date sixty-three years before, and appearing ancient, but possession had not accompanied it; a witness was examined who had been well acquainted with one of the subscribing witnesses, had seen many deeds and papers believed to have been signed by him, and from this believed his name to the deed to be his handwriting, but never had seen him write. The court, on debate, thought this sufficient proof of the deed, considering its antiquity. The proof of execution was not dispensed with; the antiquity of the deed alone was not 531 \*held sufficient. The only case where a contrary doctrine has been established is the case of *Jackson v. Garraway*, 3 Johns. Ca. 283. *Radcliff, J.* (with whom a majority concurred, *Kent* dissenting), says, the English authorities on this subject plainly distinguish between an ancient deed supported by possession, and by other circumstances. But the authorities to which he refers, so far as I have examined them, do not sustain him. They will be found, as *Kent* remarks, to be mere loose dicta, that an ancient deed proves itself, and are silent as to the circumstance that possession must have accompanied it; but wherever we can discover the facts of the case in which these sayings occurred, we perceive that possession was an ingredient in the case. The whole current of authority shews that possession must have accompanied the deed. The rule is one of public policy, which cannot be relaxed without endangering titles. The mere production of a paper appearing ancient, of itself, furnishes but slight proof of its authenticity; if manufactured for the purpose, it would be difficult in most instances to prove fraud. But where quiet and long possession comes in aid of it, the presumption of fraud is repelled. With *Tilghman, C. J.* (in the case cited from *Binney*), I look upon the possession as the main ingredient to justify its admission without proof of execution.

I think, therefore, on the facts set out in the bill of exceptions, the court erred in permitting this deed to go in evidence. This view of the case renders it unnecessary to consider the other questions which were argued. If the deed from *Downman* was not admissible, no question of seisin, actual or constructive, arises.

If Maitland had no deed, the jury were not authorized to infer any seisin or possession from it.

The order of the circuit superior court denying the supersedeas to the judgment of the county court, is to be reversed, with costs. And the court, proceeding to

532 make \*such order as the circuit superior court ought to have made, awards a supersedeas &c.

In the ejectment between the same parties for the same land the title to which came into controversy in the action of trespass, Maitland, after deducing title from the original grantee to William Downman, offered his deed in evidence, and in addition to the matters stated in the bill of exceptions taken in the trespass case, he proved that he made diligent enquiry after the subscribing witnesses, and could get no account of them, except that they had died many years ago, and that he had endeavoured in vain to find some person who could prove the handwriting of the subscribing witnesses or one of them. It further appeared, that no one lived on, or was in the actual possession of, the land mentioned in the deed, from the date thereof until the defendant took possession of it within the last four or five years, and it did not appear, that the said Downman, or others claiming under him, set up any claim to the land in opposition to the deed. And this being all the testimony, the court admitted the deed. The objection to its reception was even stronger than in the action of trespass. There the bill of exceptions was silent as to possession; here, it is expressly stated, that no possession went with the deed. For the reasons already assigned, I think that was essential before proof of its execution could be dispensed with.

The judgment must be reversed, the verdict set aside, and a new trial awarded, on which the deed from Downman is not to be admitted as evidence upon the proof stated in the bill of exceptions.

Since the foregoing opinion was prepared, we have had the benefit of a re-argument on the first point. It has confirmed me in the correctness of my first impressions. The industry of the counsel has not enabled them to discover any case in which

533 it has been held, \*that the demurrer was a waiver of the bill of exceptions. The silence of the books is a persuasive argument against the proposition. We have been referred to two cases in which the point might have been made and decided, but was not considered by the court. The first is the case of Hyers v. Wood, 2 Call 574. It was a writ of right: on the trial, the defendant excepted to the introduction of evidence to prove non-tenure, and also tendered a demurrer to evidence, in which the tenant refused to join; and the defendant excepted to the decision of the court refusing to compel the tenant to join in the demurrer. It was contended there, in argument, that the defendant, by tendering the demurrer, waived the exception. The court did not notice the point, but sustained the decision of the court below in both respects. But it is to be remarked, that the question principally considered, was that presented by the bill of exceptions to the admission of the testimony. If the court had supposed the demurrer waived the exception, this was unnecessary. In Ware v. Stephenson, 10 Leigh 155, the plaintiff offered a witness,

who was objected to as incompetent, and the objection being overruled, the defendant excepted, and subsequently demurred to the evidence. The court gave judgment on the demurrer for the plaintiff. The questions arising on the exception and the demurrer were both argued. Judge Stanard held the witness to be competent, but that on the demurrer the law was for the defendant: and with him Cabell, J., and Tucker, P., concurred. Brooke, J., considered that the law on the demurrer was for the plaintiff, but did not advert to the question of competency presented by the bill of exceptions. The only case therefore which looks like an authority, is the case of Biggers's adm'r v. Alderson, 1 Hen. & Munf. 54. And there the question, in truth, did not arise. The defendant first offered im-

proper testimony; the plaintiff, to 534 counteract it, \*offered evidence equally inadmissible, to which the defendant excepted; and then the defendant demurred. Judge Tucker, in reviewing the case, shews that upon the whole evidence, excluding the improper evidence offered by the plaintiff to rebut the illegal evidence of the defendant, and giving to the defendant the benefit of his illegal testimony, the plaintiff was entitled to a judgment; and the other judges concurred. The questions arising upon both exception and demurrer were argued; nothing was said about one being a waiver of the other. The judge, it is true, said the demurrer was a waiver of the bill of exceptions; but it is manifest this was a loose expression not well considered. His attention was not drawn to the question, or the distinction between the two proceedings. For he remarks, that on a demurrer to the evidence, the court might disregard what was impertinent to the issue, or otherwise inadmissible: thus confounding one with the other, for if upon the demurrer the court will disregard inadmissible testimony, there would be no necessity for the exception. But the bill of exceptions is the act of one party, and denies the admissibility of the evidence tendered: the demurrer is the act of both, and presents the question of the sufficiency of the evidence received. The expression of the judge is a mere dictum, not entitled to the weight of an authority. It has been urged that no injustice will be done to the party by holding the demurrer to be a waiver, for if he wishes to rely on his exception, he may move for an instruction. The answer is obvious; the jury may find against the instruction, and the only remedy is a new trial; and after two new trials, the power of the court is at an end. His only protection against the prejudices of a jury may be the power to withdraw the application of the law to the facts proved by the evidence, from their determination. By demurring he subjects himself to the hazard of admitting

535 \*as facts, every thing a jury might have inferred from the evidence. But that evidence should be legal; and its legality can only be enquired into upon an exception to its introduction.

The other judges concurring, both judgments were reversed.

**Barksdale v. Barksdale.**

March, 1842, Richmond.

(Absent ALLEN, J.)

**Wills of Personality—Revocation—Case at Bar.**—Testator, in 1838, made a will, all written with his own hand, whereby he gave 30,000 dollars to his sister, 5000 dollars to S. S., and the residue of his estate to his father; in 1839, he signed another instrument, whereby, revoking all other wills before made, he gave T. Y. T. 5000 dollars, and the residue of his estate to his father, but this last paper was not written by him, and it was not duly attested according to the statute of 1834-5. HELD, the clause of revocation in the instrument of 1839, was not independent of the dispositions contained in it, so as to operate as a substantive declaration in writing revoking the will of 1838, but the revocation was made with a view to the new dispositions, and those being void for want of due attestation, the revocation is a nullity.

**Same—Same—Construction of Statute—Quere.**—Whether the statute of 1834-5 does not repeal the 9th section of the statute of wills touching revocations of wills of personality? Two judges held that it did, and the other two gave no opinion on the point.

William Barksdale made a will, dated the 4th June 1838, in the following words—"In the name of God, Amen. I William Barksdale of the county of Amelia, in the state of Virginia, do ordain this writing, written with my own hand this 4th day of June 1838, to be my last will and testament, hereby revoking all \*others whatsoever. I give and bequeath to my eldest sister, Frances P. Barksdale, 30,000 dollars. I give and bequeath to Susan Stott, 5000 dollars. All the rest and residue of my estate, whether real or personal, I bequeath to my father William Jones Barksdale of Clay Hill, Amelia. I also appoint him my sole executor: it is my will and desire, that my executor give no bond and security for the trust reposed in him. In witness whereof I have hereunto set my hand and affixed my seal the day and year above written." Signed and sealed by the testator.

At the July term of the general court, 1840, this will was propounded for probat by the legatee Frances P. Barksdale, an infant by Thomas Giles her next friend; and it was proved, that the will and the testator's signature was wholly written with his own hand.

William Jones Barksdale, the father, heir at law and distributee, of the decedent, opposed the probat, and produced in court another instrument of writing, dated the 2nd November 1839, purporting to be the last will and testament of the decedent, in the following words: "I William Barksdale of Amelia county, state of Virginia, being in feeble health though of sound mind, revoking all other wills and testaments which I may previously have made, do make this my last will and testament as follows, to wit: In the first place, all my debts must be paid.

\*Wills—Testamentary Revocation—Declaratory Revocation—Distinction between.—The principal case is cited with approval in *Dower v. Seeds*, 28 W. Va. 131.

+Wills of Personality—Revocation—Construction of Statute.—The principal case is cited with approval in *Dower v. Seeds*, 28 W. Va. 136.

In the second place, I give and bequeath to my friend Thomas Y. Tabb of Amelia county 5000 dollars, to be paid by my executor hereafter named on demand at any time after the expiration of two years after the date hereof. In the third place, I give and bequeath to my honoured father William Jones Barksdale of Amelia, all the remainder of my property, whether real or personal, including all bonds and other debts due to me. I constitute my friend Gustavus Myers of &c. my sole executor of this my last will and testament. Given under my hand and seal at the Hot Springs, this \*2nd day of November 1839." Signed and sealed by the decedent, and witnessed by S. Ford.

The subscribing witness, Ford, deposed, that he wrote the will for the decedent, who signed, published and declared the same as and for his last will and testament in the presence of him the witness; he believed the decedent was at the time of perfect sense and memory; and he subscribed his name as a witness in the decedent's presence: that the decedent, being then ill at the Hot Springs, requested the witness to write his will, saying, that he had left a will at home, but he did not believe it to be such a one as he ought to have made, inasmuch as he believed it to be wholly in discord with what he was convinced had been his grandfather's wishes and intentions when he left him his legacy, and inasmuch as the will he had previously made was inexpedient: that the decedent manifested great anxiety to revoke the old and to execute a new will, which the witness wrote for him, which he signed, which the witness witnessed on the 2nd November 1839, and which was the same paper now produced in court: and that the decedent, after the execution of this instrument, expressed very great satisfaction, in having done what he believed to be his duty, and what he considered, indeed, to be altogether right and proper: that the witness supposed, as he had often heard, that the legacy the decedent received from his grandfather amounted to 50,000 dollars. And it was agreed that the decedent died without having ever had any child, or been married; and that the only real estate he owned at the date of his will, or at the time of his death, was a small parcel of land of little value which his father had given him.

The general court held that the instrument of writing of the 2nd November 1839, was not a revocation of the instrument of the 4th of June 1838, which was proved to be wholly in the handwriting of William Barksdale deceased: therefore, the 538 court ordered, that the instrument \*of the 4th June 1838 should be recorded, as the true last will and testament of the decedent.

William Jones Barksdale applied to a judge of this court for a supersedeas to the sentence; which was allowed.

The cause was argued here by G. N. and C. Johnson for the appellant, and Leigh for the appellee.

It was agreed, that the paper of the 2nd November 1839 was not a will, since it was not executed according to the provisions of

the statute of 1834-5, which requires wills and testaments of personal estate to be executed with the like solemnities required for wills of real estate. But, as that statute makes no provision touching the revocation of wills of personal estate, the question was, whether the clause of revocation in the instrument of the 2nd November 1839, could be abstracted from the instrument, so as to operate as a revocation under the 9th section of the statute of wills, 1 Rev. Code, ch. 104, p. 377, which provides, that "no will in writing, or any devise therein, of chattels, shall be revoked by a subsequent will, codicil or declaration, unless the same be in writing?"

1. It was argued for the appellant, that the revocation of a will was wholly different from the making of one; which was proved by the fact, that the English statute of wills provided one mode of making a will of real estate, and another mode of revocation of such a will; and, therefore, notwithstanding the act of 1835 as to the making of a will of personalty, the mode of revocation remained the same as it had been before that statute was made. And for the appellee it was insisted, that the statute of 1835 as to the making, was a repeal of the 9th section of the statute of wills as to the revocation, of a will of personalty.

2. Taking the 9th section of the statute of wills to be still in force, the counsel 539 for the appellant contended, \*that the clause of revocation of all previous wills, contained in the instrument of the 2nd November 1839, might be abstracted from the paper, and was a declaration in writing by the decedent, which revoked the will of June 1838; and this the rather, because it appeared by the deposition of Ford, the subscribing witness, that the principal object of the decedent was to revoke the will of June 1838. The counsel for the appellee said, that the clause of revocation could not be abstracted from the paper of November 1839, so as to operate as an independent declaration in writing; that clause being there inserted, only to remove the former will out of the way, and to give effect to the new testament: that a mere revocation was certainly not intended, since the decedent not only gave to his father by the last will what he gave his sister by his first, but he gave by the last 5000 dollars to Thomas Y. Tabb, which 5000 dollars he gave by his first to Susan Stott. The authorities cited were *Eggleston v. Speke*, 3 Mod. 258; *Onions v. Tyrer*, 1 P. Wms. 353; *Ex parte Ilchester*, 7 Ves. 348; *Cogbill v. Cogbill*, 2 Hen. & Munf. 467; *Bates v. Holleman*, 3 Id. 502; *Hellyar v. Hellyar*, 1 Phill. 430; *Richardson v. Berry*, 3 Haggard, 149; *Langton v. Atkins*, 1 Pick. 541; *Rob. on Wills*, 251-5, 259, 366, and the English statute of frauds, 29 Car. 2, ch. 3, § 5, inserted in Appendix *Rob. on Wills*, p. 501.

BALDWIN, J. The case presented for our consideration, is one in which the testator disposed of his whole estate, real and personal, by a will executed with all due legal solemnities, but the probat of which is resisted by his sole heir and distributee, on the ground that it was subsequently revoked by an instrument in the

form of a last will and testament, and intended to operate as such, by which the testator devised and bequeathed his whole estate, real and personal, with an express revocation of all former wills. The 540 last mentioned paper is \*ineffectual as a will, not having been executed with the solemnities required by law, and has not been propounded as such, but is relied upon in opposition to the former will as a valid written revocation.

I deem it unnecessary to enquire whether, since our statute of 1835, intended to place the making of wills of personalty upon the same footing as wills of realty, a revocation of them can be effected by any declaration in writing, which would not be effectual for that purpose in relation to a will of lands. The obvious convenience and policy of extending the provisions of the statute to revocations, render it highly probable that the omission to do so is attributable to inadvertence. Whether the omission can be supplied by a construction of the statute according to its spirit, is rendered a matter of difficulty by the interpretation given to the English statutes of 32 and 34 Hen. 8, 29 Car. 2, ch. 3, and 12 Car. 2, ch. 12. See 1 *Rob. on Wills* 193; 1 *Wms. on Ex'ors* 79, 90. Waiving, in this case, that broad enquiry, it will be sufficient for my purpose to consider whether a clause of revocation can be valid, which is found, as in the present case, in an invalid will.

Upon the concession, that the provisions of the statute of 1835 are applicable only to the making and not to the revocation of wills, we must look to, and be governed by, the pre-existing law in relation to written revocations of wills of personals. This we find in the revised act of 1819, 1 Rev. Code, ch. 104, § 9, p. 377. The law is in these words: "No will in writing, or any devise therein, of chattels, shall be revoked by a subsequent will, codicil, or declaration, unless the same be in writing."

There are two modes of written revocation contemplated by the law just quoted, one by a will or codicil in writing, the other by a declaration in writing. For the sake of distinction, the first may be called a testamentary revocation, and the 541 last a declaratory revocation. \*It is true, the declaratory revocation may assume the shape of a last will and testament; but that is mere matter of form, if the paper be not also testamentary in its nature. The distinction between the two modes of revocation is not formal, but essential. In the testamentary revocation, the testator contemplates a new disposition of his property, and the revocation may be implied from inconsistency in the provisions of the two instruments, in which case it is a matter of comparison and construction; or it may be express, in order that the testator may do his new testamentary work without being in any wise fettered by the contents of his former will. The declaratory revocation, on the other hand, is always express, is not a matter of comparison and construction, and is in contemplation by the testator of that disposition of his property made by the law governing in cases of intestacy.

In every testamentary revocation, the

testator always acts upon the supposition that his whole purpose will be accomplished, that his entire testamentary act will be effectual, as well in regard to the new disposition of the subject, as the revocation of that which he had made by the former instrument; and his revocation is in fact part and parcel of his new testamentary action. This is manifestly true in relation to implied testamentary revocations; and, if not so obviously, it is to my mind equally true, in relation to those which are express. That the testator should ever proceed upon the hypothesis of the invalidity of the instrument which he employs to effectuate his object, is beyond my conception; nor can I conceive, when he makes a new disposition of his property, and *eo dem flatu* a revocation of a former disposition of it, how he can do so with any other expectation than that both will share the same fate. It seems to me necessarily to follow, that the invalidity of the instrument, which defeats the new disposition of his property, must also defeat the revocation of the former instrument.

542 \*It has been argued, however, with great ingenuity and force by the appellant's counsel, that the statute does not require that an express revocation must necessarily be by last will and testament; that any written declaration is sufficient for the purpose; that here we have such a declaration, and though we find it in a paper intended to operate as a last will and testament, which is nugatory as such, not having been written altogether by the testator, nor attested by two witnesses, yet that still it is a declaration in writing, which is all that the statute requires, and as such is unquestionable on the score of validity. All this I admit, upon the supposition of its having been shewn that the revocation contemplated by the testator was not a subsidiary conditional exercise of power, but an independent substantive act, without reference to the character of the instrument employed, and unaffected by the new disposition thereby made of his estate. But this, in my opinion, has not been shewn; and it seems to me, in the nature of things, cannot be shewn. How can we know, that the testator contemplated the revocation as effectual, though the testament itself should be unaccomplished? How could such an expectation exist, without a probability, in his mind, that his testament would prove abortive? and who ever made his last will and testament under the influence of such a belief?

In a case like this, no argument to prove the revocation substantive and independent, can, to my apprehension, avail any thing, unless it goes the length of proving that the testator intended to die intestate, which is impossible here, it being directly in the teeth of the testamentary provisions of the instrument. Any argument short of this, can only tend to raise a probability that the testator would have preferred, if the question had been presented to his mind, a total intestacy to the establishment of his former will. Nor would the argument be legitimate, as I conceive, even to that extent; \*for it must be founded, in the main, upon the testamentary pro-

visions of the last will. Now, though a regard to those provisions is perfectly proper, when we treat them and the revocation as one entire testamentary act, to stand or fall together, how can it be proper when we look to the revocation as separate and distinct, and of substantive and independent force and efficacy? If the whole instrument is to be considered a nullity for want of the solemnities required by law, we need look no further. But how can an argument in support of the validity of a part of it only, be derived from the testator's supposed intention as disclosed by other parts wholly invalid? Surely, no change of intention on the part of the testator can be inferred from the testamentary provisions of a will, which is void because not executed in the manner prescribed by law. 1 Rob. on Wills, 211, 212.

In my view of the subject, this being a question of express revocation, it would be wholly immaterial, whether the provisions of the will of 1839 were consistent or inconsistent with the provisions of the will of 1838. If the former, then the testator could had no design to abrogate the first will until the last was made effectual: if the latter, then his only purpose must have been to make a change of or amongst the objects of his testamentary bounty. In neither case could it have been his intention to die intestate, which would be the direct result of tearing the revocatory parenthesis from the inanimate paper of 1839, and giving it distinct vitality. Besides, no man, I should think, ever made provision by last will and testament for dying intestate. If such had been the testator's design, he would have torn up the will of 1838 or thrown it into the fire, or if out of his possession and control, would have simply executed a naked instrument of revocation.

Thus, though I grant and invoke the testator's intent upon this as on any other testamentary question, yet \*that intent, it must be admitted, is to be sought for only in legitimate sources, and is to be found, not in our speculations upon his probable wishes in regard to the transmission of his property, but in that deliberate and solemn authentication of them which the law, in its matured wisdom, has prescribed. Those wishes are often defeated by negligence or accident, and even by those guards which the law has thrown around the testator for his safety and the protection of the testamentary power itself; but, upon the whole, are best subserved and fulfilled by the uniformity and certainty which the required solemnities afford. I cannot, therefore, give any weight to the arguments employed to shew, that the testator's heir at law was ultimately the chief, though originally the secondary, object of his bounty; whether those arguments be founded upon the devises in the imperfect will of 1839, or the parol evidence (if admissible at all) of the testator's verbal declarations. One thing is certain, that to abrogate the perfected will of 1838, would transcend (to what extent cannot affect the principle) the testator's unauthenticated desires in behalf of his heir at law, inasmuch as the effect would be to make him



the sole, instead of the principal, beneficiary, to the exclusion of other objects of his regard, whether we look to the provisions indicated by the will of 1838, or by that of 1839.

I do not perceive, that the appellant's cause can acquire any aid from the supposed analogies derived from the doctrines of virtual revocations, founded on changes in the condition of the devisor or the subject devised, and the revocatory efficacy, in regard to the latter, of imperfect acts and instruments. Those are common law doctrines, existing as well before as since the various statutes of wills, and resting on maxims which have no application, so far as I can discern, to express revocations. Pow. on Dev. 420. If my memory serves me, they were mainly relied on for the purpose of illustrating \*the proposition, that revocation, and whether absolute or conditional, is a question of intention; a proposition which is not denied.

The foregoing view of the subject upon principle, seems to me to be adequately sustained by authority. In order to see the full force and application of the adjudged cases, it must be borne in mind, that we can gain no light from the English adjudications upon their statute in relation to the revocation of wills of personals, (29 Car. 2, c. 3, § 22,) the ecclesiastical law, which governed the making of such wills there, requiring no higher solemnities; that no similar question could arise here, in regard to revocations of devises of lands since our statute of wills, which placed such revocations and devises upon the same footing; and that we must, therefore, look to the English decisions upon the variant provisions in their statute of frauds in regard to devises and revocations of real estate. By the 5th section of that statute, devises of lands were required to be attested and subscribed in the presence of the devisor by three or four credible witnesses: by the 6th section, written revocations were required to be by will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses, declaring the same. Thus, the 5th section does not require the testator to sign in the presence of the subscribing witnesses, and his acknowledgment to them has been held sufficient; whereas the 6th section requires that the testator should sign in the presence of the witnesses. The difference in the language of the two sections has been attributed to inaccuracy in the composition of the statute. Rob. on Wills 193-4. Still, however, it has been made the foundation of distinctions between the authentication of devises and revocations. It has been held, that where a revocation is by will or codicil, it is sufficient that the paper be attested and subscribed as such according to the requisitions of the 5th section,

and that it need not be signed \*by the testator in the presence of the witnesses; that requisition of the 6th section being construed to be applicable, not to a will or codicil, but to other instruments of revocation. Rob. on Wills 194-5, and the cases there cited. Another question adjudicated by the courts is, whether a clause of revocation, contained in a will or codicil

by which the testator devises the subject of the former will, is effectual, if the will or codicil has not been duly executed as such, though the instrument has been executed according to the forms prescribed by the revoking clause of the statute. And that, it will be seen, is a question the same in principle as the one involved in the case we are now considering.

The doctrine settled by the English cases, is, I think, correctly recognized by the court of delegates in the case of Limberry v. Mason, 2 Com. Rep. 451, where it was held, that if there be an intention to revoke by a new will, and the instrument made for that purpose cannot take effect as will on account of some defect in the execution, it cannot be a revocation, because it was not intended to revoke the old will until the new one should be complete. In that case, it is true, there was no express clause of revocation, the revocation being by necessary implication from the conflicting provisions of the two wills; which cannot, it seems to me, be distinguished, in principle, from the case of an express revocation, and there is no distinction made in the English statute, nor in ours.

The doctrine is directly affirmed in the case of Eggleston v. Speke, where the decision was upon the very point, the second will having been duly executed under the revoking clause, but not under the devising clause of the statute, and containing an express revocation, as appears from the notice of it in 7 Ves. 379. The case of Onions v. Tyrer, 1 P. Wms. 343, was like the one last mentioned in all respects, except that it was made stronger by the circumstance, that the first will was

cancelled \*by the testator, under the impression that the second was made effectual, which cancelling was therefore treated as merely conditional. The decision of Lord Cowper was in accordance with the doctrine above stated, though he dwelt upon the circumstances, existing also as he said in the case of Eggleston v. Speke, that the devises in both wills were substantially the same, but expressing the opinion that the effect would be the same, to the exclusion of the heir at law, though the devise in the second will had been to a third person.

The same principle was sanctioned by the Lord Chancellor, Lord Alvanley, and Sir W. Grant, in Ex parte the Earle of Ilchester; they recognized the cases of Eggleston v. Speke and Onions v. Tyrer, as law, and held that the appointment of a guardian by a testamentary paper not duly executed to accomplish such appointment, did not revoke a previous testamentary appointment, though the revocation would have been good as a substantive act; the object being only to make way for another disposition, as was inferred from the nature of the act.

Some of the reasoning of Lord Alvanley, and of the remarks of Lord Cowper, may be open to criticism, and have been laid hold of by the appellant's counsel in resisting the principle indicated by their decisions. That the adjudged cases, however, and opinions of the courts, have been understood to establish the above stated doctrine,



in its full extent, may be seen by reference to several respectable elementary writers. Rob. on Wills 196-8-9, 200; 1 Wms. on Ex'ors 91; Pow. on Dev. 431-2-3. And observe the distinction deduced by Mr. Powell between revoking wills merely, and those which devise and revoke. The cases were luminously reviewed by Chief Justice Parker in the case of Langton v. Atkins; he regarded them as settling the principle held by the court in that case, that if the instrument propounded as a revocation, be in form a will, it must \*be perfect as such, and be subscribed and attested as is required by the statute; and an instrument intended to be a will, but failing of its effect, on account of some imperfection in its structure or for want of due execution, cannot be set up for the purpose of revoking a former will, for this substantial reason, that it cannot be known that the testator intended to revoke his will except for the purpose of substituting the other, and that it would be making the testator die without a will, though it was clearly his design not to do so. I feel no hesitation in admitting a proposition which seems warranted by the cases, that where the revoking clause has not this connection with the disposing part of the will, as where the dispositions relate to other property, without affecting the subjects of the first will, there is no reason why it should not operate as a revocation. 1 Rob. on Wills 200; Pow. on Dev. 433. But this proposition by no means breaks in upon what I consider the correct principle applicable to the present case, but on the contrary, to my mind, tends strongly to illustrate it.

Upon the whole, both upon principle and authority, I am well satisfied that there is no error in the sentence of the general court admitting to probat the will of 1838; and that it ought to be affirmed.

STANARD, J. I am of opinion, that the statute of 1835 repeals the provision of the 9th section of the statute of wills, in regard to the revocation of wills of personal estate; that revocations of wills of personals must now be executed in the same manner in which wills of personals are required to be made. If I thought otherwise, I should still concur in the opinion of Judge Baldwin.

BROOKE, J. There is no necessity to decide the question whether the statute of 1835 repeals the provision of the 9th section of the statute of wills; and therefore  
549 I \*give no opinion on that point, though my impression is that Judge Stanard's opinion is right. It is enough to say that I concur in the opinion of Judge Baldwin.

CABELL, J. I concur in the opinions of both Judge Stanard and Judge Baldwin. Sentence affirmed.

550 \*Byars v. Thompson.

August, 1841, Lewisburg.

(Absent CABELL and BROOKE, J.)

Arbitration and Award—Finality of Award—Reconsidering Award—Case at Bar.—B. and T. by arbitra-

tion bond, dated September 14, 1831, submit all matters in difference between them to three arbitrators: the arbitrators make an award on the 21st November 1831, which was on that day signed and sealed by them, and read, but not delivered, to the parties; and B. objecting to the award because interest to which he was entitled was not credited to him, the arbitrators reconsider the award, and on the 22nd November, allow the interest and reduce the amount before awarded against B. and award the reduced amount against him, and sign, seal and deliver the corrected award: HELD, the award of the 22nd November is the true award.

Same—Validity of Award—Date of Submission—Misrecital of.—The award misrecites the date of the submission to the 18th July, instead of the 14th September 1831: HELD, this misrecital does not invalidate the award made in other respects pursuant to the submission.

Same—Same—Delivery.—It is not necessary to the validity of an award, that it should be delivered, unless it is expressly provided by the submission that delivery shall be necessary to its validity.

Same—Same—Reservation of Right to Reconsider.—Arbitrators, in their award, reserve to themselves a right to reconsider a claim which they allow the party against whom they award; and then complete the award without reconsidering this claim: HELD, the reservation is void, and the award good for the sum awarded.

Same—Pleading and Practice—Declaration.—In an action of debt for the penalty of an arbitration bond, the declaration sets out the submission, and so much of the award as entitles the plaintiff to his action: HELD, it is not necessary, in such case, that the declaration should set out the whole award.

Evan Thompson and William Byars entered into a bond with condition to abide by an award, in the following words: "Whereas the undersigned, Evan Thompson and William Byars, have had many accounts of dealings one against the other, and said Thompson having sold Byars several tracts of land, and said Byars having made him sundry payments, yet the 551 said Thompson \*contends he is not fully paid for those lands sold to said Byars, and having instituted a suit in the superior court of chancery, to bring about a settlement, and for said Byars to shew how he has paid for the lands he has purchased of said Thompson; the parties, being desirous to bring about a speedy and effectual termination of all matters of disputes and controversies between them, deem it best to submit all differences to the final decision of Andrew Russell, Peter Mayo and John H. Fulton; who shall determine all disputes that may be found to exist between the parties; and they shall be completely authorized to decide according to law and equity, and correct all errors in all cases that may appear to them, and examine all accounts and agreements between the parties; and may add or diminish

graphic note on "Arbitration and Award" appended to Bassett v. Cunningham, 9 Gratt. 684.

Practice—Oyer.—As to the point that the right to craveoyer of papers mentioned in a pleading, applies, as a general rule, only to deeds and letters of probate and administration, not to other writings, see the principal case cited in Langhorne v. Richmond R. Co., 91 Va. 372, 22 S. E. Rep. 150.

\*Arbitration and Award.—See generally, mono-

as they in their judgment may deem to be justice towards the parties. And it is further agreed, that the parties shall have all legal evidence, and shall have the right to take depositions before two magistrates, by giving the other three days previous notice of the time and place of taking such depositions. And the award, under the hands and seals of the arbitrators, or a majority of them, is to be binding on the said Thompson and the said Byars; a copy of which is to be furnished to each of them. For the performance of the award to be made by the arbitrators, the said Thompson and Byars bind themselves, their heirs &c. each to the other, in the penal sum of 10,000 dollars. The said Thompson and Byars agree to meet at the house of Joseph Meek in the county of Washington, on this day, for the purpose of settling all the differences aforesaid, and hereby authorize the arbitrators to adjourn from time to time, and from place to place, as circumstances in their opinion may require, until the award shall be finished. Witness our hands and seals this 14th September 1821."

The arbitrators entered upon the arbitration on the day of the submission, and 552 after various adjournments, \*they signed and sealed an award, on the 21st November 1821. This award purported to be made in pursuance of a submission bearing date the 18th July (not the 14th September) 1821. It stated an account between the parties, shewing a balance due from Byars to Thompson, of 2183 dollars 82 cents, and awarded that Byars should pay that sum to Thompson. And it contained the opinion and decision of the arbitrators on sundry points of dispute between the parties; among which it is only necessary to notice the two following: "The claim made for damages by Byars in consequence of a refusal on the part of Mrs. Thompson to release her right of dower in the lands purchased by him, is rejected; it appearing to the referees, that the contract with Mrs. Thompson, made at the date of the release signed by her, to wit, on the 15th July 1819, operated as a release to Thompson by Byars." "The referees not deeming the evidence entirely sufficient in relation to the authority of Byars to charge Thompson with the sum of 150 dollars paid by Byars to Jacob Lyon on the order of John Tate deputy sheriff of Washington county, reserve to themselves the right to reconsider this charge against Thompson, and, if necessary, to erase it from the account." This award was signed and sealed by the arbitrators on the 21st November 1821, and was read, but not delivered, to the parties; and on the 22nd November, the arbitrators made a correction, which was endorsed upon it, in the following words: "Upon objections being made by Byars to the award, after it was signed and read to the parties, upon the ground that the referees had not allowed him any interest on the items in his account hereafter mentioned, they proceeded to consider the objections, and have made the following allowances for interest, which had been overlooked and omitted (then followed a statement of interest on four items,

amounting to 376 dollars 25 cents) which sum of 376 dollars 25 cents is to be 553 deducted from the balance \*made by the foregoing statement; which leaves a balance of 1807 dollars 57 cents, and which balance we award that Byars shall pay Thompson, one half in three months and the other half in six months, with interest on the whole from this date. Given under our hands and seals November 22nd 1821."

In 1829, Thompson brought debt against Byars for 10,000 dollars, the penalty of the arbitration bond, for the failure of Byars to abide by and perform the award. There were four counts in the declaration.

The first count, after making profert of the bond dated 14th September 1821, set out the substance thereof, and of the condition for the performance of the award, to be made by Russell, Mayo and Fulton, arbitrators mutually chosen by the parties to arbitrate all matters then in difference between them; and then alleged, that the arbitrators, on the 21st November 1821, in pursuance of the submission, made and published their award under their hands and seals, (of which also profert was made) of and concerning the matters in difference between the parties, and thereby awarded, that Byars should pay Thompson the sum of 2183 dollars 82 cents with interest from the date of the award; whereof Byars on the day of the date of the award had notice; yet he had failed and refused to pay the sum awarded to Thompson; by reason of which, action accrued to Thompson to demand the penalty of 10,000 dollars &c.

The second count was like the first, with these differences, that it alleged, that the sum of 2813 dollars 82 cents awarded, was the balance due by Byars to Thompson upon an account stated in the award, and that the arbitrators made and published it on the — day of November 1821, and had the same ready to be delivered to both parties.

The third count set out the bond or submission in hæc verba, and then averred, that the arbitrators, in pursuance 554 \*of the submission, made and published their award on the 21st November 1821, of and concerning the matters in difference between the parties, and set out so much of the award, in hæc verba, as was made on that day; in which award the date of the submission was recited to be the 18th July (instead of the 14th September) 1821; and, after stating the account between the parties, and the opinion of the arbitrators on various points of dispute between them, it was awarded, that Byars should pay Thompson the sum of 2183 dollars 82 cents with interest from the date of the award.

The fourth count made profert of the bond or submission, and set out the substance thereof; and then alleged that the arbitrators proceeded to arbitrate the matters in difference between the parties, upon due notice to each of them, and made and published their award under their hands and seals, on the 22nd (not the 21st, as in the other counts) November 1821, and thereby awarded that Byars should pay Thompson 1807 dollars 57 cents (instead of 2183 dollars 82 cents, as in other counts).

Byars cravedoyer of the arbitration bond

or submission, and of the award of the 21st November 1821, and of the correction thereof of the 22nd November; and then,

1. He demurred generally to each and every count in the declaration, and the plaintiff joined in the demurrer. And he tendered the following pleas:

2. As to the first, second and third counts of the declaration, that there was no such award as that mentioned in those counts.

3. As to the fourth count, that there was no such award as that mentioned in that count.

4. As to the first, second and third counts, that the arbitrators, in making the award therein set out, committed a palpable mistake, in point of fact and in law, in this, that they omitted and overlooked an allowance of 376 dollars 25 cents due from  
555 Thompson to Byars, for \*interest in the settlement of their accounts, which had been submitted to them; which omission was apparent on the face of the award of the 21st November 1821, and from the endorsement thereon, namely the correction of the 22nd of that month.

5. That there was no such submission as that stated, recited and alleged, in the award mentioned in the declaration.

6. That the arbitrators did not make an award pursuant to the submission in the declaration mentioned.

7. That they did not make an award under and in virtue of the submission.

8. That the arbitrators did not make an award under their hands and seals, of and concerning the matters submitted to them, and furnish a copy thereof to each of the parties.

9. That the award was void for matter appearing on the face thereof, and of the contract dated the 15th July 1819, by which Byars acquired the dower interest of Mrs. Thompson to a portion of the lands in controversy between the parties, referred to in the award, in this, that the said contract did not operate as a release to Thompson of the claim made by Byars for damages in consequence of Mrs. Thompson's refusal to release her right of dower in the lands purchased by Byars of Thompson.

The cause having been transferred to the circuit superior court of Wythe, that court, in September 1839, overruled the demurrer to the first, second and third counts of the declaration, and sustained it as to the fourth count; upon which the defendant withdrew the third plea, which applied to the fourth count. The court admitted the second and seventh pleas, and rejected the fourth, fifth, sixth, eighth and ninth pleas. The plaintiff then replied generally to the second and seventh pleas, and issues were made up.

Upon the trial, Thompson offered in evidence the arbitration bond or submission  
556 of the 14th September 1821, \*and

Byars objected to the reading of the same, but the court overruled the objection, and he excepted.

Thompson having given in evidence the submission to arbitration of the 14th September 1821 (there being no proof of any other submission, oral or written) also read in evidence the depositions of Peter Mayo and Andrew Russell, two of the arbitrators;

who proved the submission, and further testified, That they and John S. Fulton acted as arbitrators, and made, signed, sealed and delivered, the award to the parties; that the award was read to the parties, before it was delivered, which did not take place till after the objections made by Byars were considered, and the reduction from the sum awarded on the 21st November 1821 was made; that the reconsideration resulted in allowing credit to Byars for 376 dollars 25 cents, and that addition being made to the award, it was signed, sealed and delivered, by the arbitrators to the parties, on the 22nd November 1821; that by the additional writing, the arbitrators decided, and so expressed, that Byars should pay Thompson 1807 dollars 57 cents, one half in three and the other half in six months from the 22nd November 1821, with interest on the whole from that date; that the arbitrators intended the latter as their award, and acknowledged and delivered it as such—the additional writing was on the same paper which contained the first opinion expressed by the arbitrators; that as to the misrecital of the date of the submission in the award, that must have been an error of Fulton who drew up the award; there was no submission but that of the 14th September 1821. And having read these depositions, Thompson offered to read in evidence the award, to which the defendant objected, but the court overruled the objection, and permitted the award to be read. Byars excepted.

There was a verdict for Thompson, for the 10,000 dollars penalty of the arbitration bond, to be discharged by the payment of 2183 dollars 82 cents, with interest from the 21st November 1821.

557 \*Byars then moved the court to set aside the verdict, on the ground that it was contrary to the evidence; which the court overruled. Whereupon, he filed a bill of exceptions stating the whole of the evidence; which was, the arbitration bond or submission; the award, including the correction of the 22nd November 1821; and the depositions of Mayo and Russell, of which the substance is stated in the second bill of exceptions.

The court then gave judgment for Thompson upon the verdict; to which this court, upon the petition of Byars, allowed a supersedeas.

M'Comas, Johnston and Preston, for plaintiff in error.

Sheffey and Patton, for defendant.

TUCKER, P. In the examination of this case, I deem it fit to enter at once into an enquiry as to the merits and effect of the award in question, which is the foundation of the plaintiff's claim.

The first question that presents itself is, Whether the paper in the record purporting to be the award is to be taken as such inclusive or exclusive of the correction made on the 22nd November 1821? in other words, whether the instrument as signed on the 21st November, is to be taken as the true award, or whether the addition and correction which was superadded on the 22nd, before the delivery, is to be taken as a constituent part of the award itself? If the award was complete on the 21st—if the

arbitrators had discharged themselves of their duty, if they were in fact functi officio, then it is clear that all their power over the subject was gone. But if, on the other hand, it should appear, that the arbitrators had not discharged themselves of their duty; that the act was not factum but in fieri; that the paper as signed on the 21st was not their definitive judgment and so was not complete; that it had never been delivered as their award, but

558 was retained \*for further reflection and examination; and that the reading of it to the parties, was with intent to hear any objections on either part, that they might be duly considered and weighed before this tempus penitentiae should be closed forever; then it is equally clear to my mind, that the instrument as executed on the 21st November was not the true award, and that the award never was complete until the execution of the 22nd November, whereby the correction as to interest was made a constituent part of the award itself, and is not to be looked upon in the light of an ex post facto correction of an antecedent complete and final award.

The position I have here laid down is, I am persuaded, in strict concordance with the spirit of the cases upon the subject. It is admitted, indeed, to have been decided, that delivery is not essential to the validity of an award, unless made so expressly by the submission. That the award is ready for delivery, will suffice. *Brown v. Vawser*, 4 East 584; *Henfree v. Bromley*, 6 East 309; 17 Ves. 237. And when the arbitrators have finally discharged themselves of their duty, no resumption of their authority can be recognized, and every subsequent attempt to alter and correct their judgment can only be looked upon as void. Such was the case of *Henfree v. Bromley*, where by the submission the umpire was to make his award under his hand, ready to be delivered by a certain day. On the day, he awarded against the defendant £57. and signed the award; recommending, at the same time, by parol, that they should divide the costs. He put the award into his attorney's hands, who immediately sent notice to the defendant that the award was executed and ready to be delivered. Here, then, was a complete and final award, of which notice was given to the defendant, as executed and ready for delivery. It was, therefore, no longer in fieri. All power over it was gone. Yet the umpire,

hearing that the defendant refused to 559 pay his share of the costs, \*struck out the £57. and inserted £66. in order to cover them, and then he re-signed with a dry pen. This was, obviously, a new and distinct act of judgment, formed by him after his authority was spent and he was functus officio. And so it was decided.

But if the signing and sealing by the arbitrators was not with intent to determine and conclude their judgment, if they still retained the award in their own hands, with the view of hearing any objections that the parties might offer, and of weighing and deciding on them, if, in other words, the award was not only not delivered, but not ready to be delivered, then I think it equally clear that it is not their

judgment;—it is not their award. It wants that finality which is essential to every award. It wants that final determination of the judgment which is essential to a decision. It is a suspended and not a final judgment, and of course can be no award.

Such in my opinion is the case here. It is stated indeed, "that upon objections being made by Col. Byars to the award after it was signed and read to the parties," the arbitrators proceeded to consider them. This, I allow, is strong language. It speaks of the instrument of the 21st November as "the award," and states that the objections were made after it was signed and read. But though so called, we find from the testimony of the arbitrators, that it was not considered as their final award. The two arbitrators who gave testimony in the cause concur in stating, that the instrument was signed, sealed and delivered as an award to the parties, having been read in their presence before delivery, which (the delivery) did not take place till after the objections made by Byars were considered, and the reduction was made; this reconsideration produced a reduction of the amount, so as to give Byars a credit of 376 dollars 25 cents. This being made, an addition was made to the award, which was signed, sealed and delivered by 560 the arbitrators to the \*parties in the presence of each other on the 22nd November 1821. "In this addition to the award (they say) we decided, and so expressed that Byars should pay to said Thompson 1807 dollars 57 cents, one half in three months and the other half in six months from the 22nd November 1821, the date of the said additional writing, with interest on the whole from the said date. I intended (says Mayo, and Russell adopts his evidence) the latter as my award, and acknowledged and delivered it as such. The addition is annexed to and is on the same paper which contains the first opinion expressed by the arbitrators." From this testimony it is clear to my mind that the paper signed on the 21st November was not the definitive judgment of the arbitrators. It was indeed the opinion which they then entertained, but which they suspended until they could hear any objections which could be suggested by the parties interested; a course which I think not only legal but laudable.

I am then of opinion that the paper purporting to be executed on the 22nd November was the true award, and not that which had been signed and sealed the day before.

Before we pursue this conclusion to its consequences, it becomes necessary to enquire, whether the reservation of the power to reconsider a charge against the plaintiff of 150 dollars vitiates the whole award or not. I think it does not. The arbitrators have awarded to Thompson 1807 dollars 57 cents; and if this matter had been or should be decided in his favour, he would be entitled to 1957 dollars 57 cents. However the matter, then, as to that 150 dollars might be, Thompson is entitled without controversy to the 1807 dollars 57 cents. Byars has nothing to complain of, if we consider the award good, and the reservation only void.

He could only lose, and not gain, by the reconsideration of that question. If they had awarded against him a heavy sum, \*leaving undecided an important credit which would reduce that sum, he might well complain. But here, the effect of the reconsideration and change of opinion could only be to increase the demand against him. All then that he can ask is, that this reservation of a right to charge him at a future day the additional 150 dollars should be held void: and such I think it is unquestionably. But it does not affect the 1807 dollar. 57 cents which is substantive and unconnected with the question reserved, and for which the award is therefore good. If we consider—as perhaps we ought to do, in support of the acts of the arbitrators—the reservation as being only of the power of reconsidering the question at any time before the award should be delivered, then it would be valid indeed, but the result would be the same. For the delivery of the award without change as to the point reserved, must be regarded as concluding the question, and as evincing that after the exercise of the reserved right, the arbitrators had found no sufficient reason to modify their award as to the 150 dollars. In neither view, then, can the reservation in question have any effect upon the award between the parties.

What then are the consequences of this view of the award upon the present case? Let us look, first, to the pleadings.

There are four counts in the declaration, to all and each of which there is a demurrer. That demurrer, in the opinion of this court should not have been sustained as to either count. Preliminary to and as part of his demurrer, the defendant prayed oyer of the submission, to which he had a right, and which was accordingly read to him. He also prayed oyer of the award, to which he had no right; and that being also read to him, he objects, as fatal, the variance between the true date of the submission and the date recited in the award. In the opinion of this court, however, the plaintiff having in his declaration averred that the award was made in

\*pursuance of the submission, that matter was matter of fact for the jury, who might find upon evidence, that the date on the face of the award was mistaken. The second objection, that the arbitrators reserved a right to reconsider, is deemed of no weight, as that did not affect the award. The third objection was to the failure to aver that a copy of the award had been delivered. But this the court does not deem necessary to the validity of the award, and so not necessary to be averred. The fourth objection is the discovery of the error and its correction, and so the plaintiff improperly demanded 2183 dollars 82 cents, instead of 1807 dollars 57 cents. But it depended upon the testimony that as to be adduced, and not merely upon the paper as it appeared, whether the act of the 21st or that of the 22nd November was the true award. If upon trial of the issue of no such award, on the first three counts (to which alone this objection applies), it had appeared, that the paper, as sealed on the 21st, was final, and delivered

as such, then the objection was invalid. If, on the other hand, it appeared that the act was still incomplete and in fieri, then the paper as executed on the 22nd was the true award. The matter, then, depending on evidence as to the execution and delivery of the award, would not properly have been made the subject of demurrer to the declaration. I do not think, that either of the first three counts should have been adjudged bad on demurrer, although, upon the view of the case taken by this court, it is unimportant, since on the plea of no award, they are unsustained by the evidence. As to the fourth count, the court is of opinion, that it is good, and that the demurrer to it should have been overruled.

The objection to the first, second and fourth counts, that they do not set out, or profess to set out, the whole award, is untenable. It is not necessary to do so in the declaration. The only case in which it is necessary (if it be necessary in that) is when an action of debt is \*brought for the penalty of a bond conditioned to abide by an award, and the defendant, taking oyer of the condition, pleads no award, and the award is for the first time brought out in the replication. In such case, it has been said, that the replication must set out the whole award. But if it be so, it results from the technical rules of pleading, which have no application to a declaration on an award, as in this case, in an action for the penalty in an agreement for submission, in which the setting out so much of the award and the breach of it, as entitles the plaintiff to his action, is a necessary part of the declaration.

Next as to the pleas. The second was admitted. The third (which was to the fourth count) was a good plea, but was withdrawn because the count was declared bad. It may be filed again to that count if there be a new trial. The fourth plea is, that there was an error of 376 dollars 25 cents on the face of the award. This was not a good plea; not to the first three counts, because it contradicted the award, if the act of the 21st November constituted the award; nor to the fourth, because that demanded only the balance after correcting that error. The fifth and sixth pleas are covered by the seventh which was sustained, and there was neither necessity nor propriety in pleading the same matter over in several pleas. The eighth plea is, that a copy of the award was not furnished. This was not essential to the action, and so the plea was not good. The ninth plea was bad, because it called in question the award for errors alleged to appear on its face, which could not be established without reference to matter aliunde.

Looking then upon the declaration as good in all its counts the demurrer to the fourth count should have not been sustained, and the verdict upon the plea of no such award to the other three should have been for the defendant. There must then be a new trial upon those counts, unless the plaintiff shall release the excess \*of the verdict over the demand set forth in the fourth count, in which event judgment should be entered for the amount of that demand. If the plaintiff refuses to release,

the verdict must be set aside, and a new trial awarded of the issues upon the first three counts, and the untried issues upon the fourth.

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**\*Chapman v. Ross.**

August, 1841, Lewisburg.

(Absent CABELL and BROOKE, J.)

**Contract of Indemnity—Case at Bar.**—One Alexander devised land and mill seat to Ross, on condition that he should pay Chapman 250 dollars; Ross, apprehending the mill seat would be overflowed by a dam 11 feet 6 inches high which Summers claimed right to build on the stream below, refused to accept the land and mill seat devised to him and to pay the 250 dollars, unless Chapman would indemnify him against injury to mills he proposed to build, from the erection by Summers of such a dam below; and this being communicated to Chapman, he said, Summers had no right to erect such dam, and if Ross would accept the devise and pay the 250 dollars, he would indemnify Ross against all injury he should sustain from the erection of such a dam by Summers; whereupon, Ross accepts the devise, pays the 250 dollars, and builds mills at the mill seat to him devised, and then Summers builds his dam, and the waters overflow Ross's mill seat whereby his works are of no value. In assumpsit by Ross against Chapman, on the contract of indemnity, **Held.**—

1. **Same—Consideration.**—That the declaration setting out such a contract, shews sufficient consideration to support the promise to indemnify.
2. **Same—Statute of Frauds.**—That the contract is not within the statute of frauds, and, though merely verbal, is valid and binding.
3. **Same—Notice of Injury.**—That it is not necessary to allege in the declaration, notice to defendant of injury resulting from Summers's dam.
4. **Same—Evidence.**—That to entitle Ross to recover, it is essential he should prove that Summers had lawful right to erect his dam.

Assumpsit on special contract, brought by Ross against Chapman, in the circuit superior court of Monroe. The declaration contained five counts.

1. The first count alleged, that the defendant Henley Chapman and one John Chapman having sold to Matthew Alexander a parcel of land lying on Second Creek in the county of Monroe, Alexander, having sold part of the land to his son James, reserving the residue thereof on which there was a valuable mill seat and water power, by his will devised the residue, on which \*was the mill seat, to the plaintiff Ross, upon condition that he should pay 250 dollars to Henley and John Chapman, for which Alexander was bound. And Ross, apprehending that the mill seat might be rendered valueless, by the exercise of a privilege, supposed to exist in one Summers, to erect a dam 11 feet 6 inches high on the stream below, declined to pay the 250 dollars, unless the defendant Henley Chapman would indemnify him against all injury he might sustain in any machinery he might erect at the fall on the land devised to him, if Summers should have and exercise the right of erecting his dam 11 feet 6 inches high, and that dam, when erected, should injure Ross's machinery. And, thereupon, it was agreed between the plaintiff Ross and the

defendant Henley Chapman, that if Ross would pay the 250 dollars, Henley would indemnify and remunerate Ross for any injury that should result from the exercise of the real or supposed right of Summers to build a dam across the stream below, whereby Ross's machinery and water power should be impaired in value. And Ross, trusting to Chapman's promise of indemnity, paid the 250 dollars, and erected mills at the water fall on the land devised to him, of the value of 2000 dollars. And that Summers proceeded, rightfully and lawfully, to erect a dam on the stream below, not more than 11 feet 6 inches high, whereby a reflux of the waters was produced, which drowned the wheels of Ross's mills, and rendered his machinery useless, so that Ross had been compelled to abandon his mills and mill seat, and so had lost his whole machinery, and all profit from the same. 2. The second count alleged that Alexander devised to Ross a parcel of land lying on Second Creek in Monroe, on which there was a valuable mill seat, on condition, that Ross should pay Henley and John Chapman 250 dollars, for which Alexander was bound; and that Ross, apprehending that the land and mill seat might be rendered of little or no value by the

567 exercise of an acknowledged \*right on the part of one Summers to erect a mill dam of a certain height on the stream below, which might overflow the fall on the land so devised to Ross, and any machinery he might put there, refused to pay the 250 dollars, unless the defendant Henley Chapman would agree to indemnify him against all injury which might result to his mill seat and machinery, from the dam of Summers, should he afterwards exercise the right, real or pretended, of erecting a dam below of a certain height. And thereupon, it was agreed between Ross and Chapman, that Ross should pay the 250 dollars, and that Chapman would indemnify him against all injury which should result to him from the reflux of the waters from Summers's dam on any machinery that Ross should erect at the mill seat on the land devised to him. And under this agreement, Ross paid the 250 dollars, and built mills at the mill seat on the land devised to him, of the value of 2000 dollars. And Summers erected a mill dam below, as he lawfully might, which dammed back the waters on Ross's mill seat, and drowned his wheels and machinery, so that they were of no value, and Ross was compelled to abandon them &c. 3. The third count alleged, that in consideration that Ross would pay Henley and John Chapman 250 dollars, Henley agreed to indemnify him against any injury that might result to certain machinery which he proposed to build on Second Creek in Monroe, from the reflux of the waters to be caused by a mill dam which it was supposed one Summers intended to build on the stream below, not more than 11 feet 6 inches high. And Ross, trusting to Chapman's promise and agreement, erected valuable mills and machinery on the stream, and well and truly performed the agreement on his part, by paying the 250 dollars. And Summers erected a dam on the stream below, at a

place where his old dam stood, not more than 11 feet 6 inches high, which caused a reflux of the waters, whereby the 568 mill wheels of \*Ross's mills were drowned, so that they were of no value, and he had been compelled to abandon them &c. 4. The fourth count alleged, that Matthew Alexander having devised to Ross a parcel of land on Second Creek in Monroe, which he had reserved to himself out of the purchase of a larger parcel by him and James Alexander from John and Henley Chapman, on which parcel so devised to Ross, there was a mill seat which constituted its chief value; and having devised the same to Ross upon condition that he should pay to the Chapmans 250 dollars, being, one half of the amount due from Matthew and James Alexander; and Ross considering the land so devised to him of little or no value, except for machinery, and desiring to erect machinery thereon, and being informed that one Summers asserted a right to erect a dam 11 feet 9 inches high on the stream below; therefore, he declined to accept the devise so made to him, and to become responsible for the 250 dollars, unless he should be indemnified and saved harmless from injury to his machinery, to be caused by the exercise of the right claimed by Summers to erect a dam 11 feet 6 inches high on the stream below, and the consequent reflux of the waters. Whereupon, at the special instance and request of the defendant Henley Chapman, it was agreed between Ross and Henley, that if Ross would accept the devise made to him in the will of Alexander, and would pay the 250 dollars, he Henley would indemnify Ross, and save him harmless, from all injury which might result to the mills and machinery he intended to build, from the damming up of the waters of the stream by Summers, provided Summers's dam should not be more than 11 feet 6 inches high. And Ross, under the agreement and trusting to the promise of Chapman, accepted the devise, undertook to pay the 250 dollars, and had actually paid all but 33 dollars for which he had given his note. And Ross proceeded to build 569 mills at the mill seat on the land \*devised to him, which had cost him, and were worth, 1500 dollars. And Summers erected a dam below not more than 11 feet 6 inches high, which caused a reflux of the waters, which overflowed and drowned Ross's mill wheels and rendered his mills of no value, whereby Ross lost his machinery, labour and cost in the erection, and all profits therefrom. 5. The fifth count was like the fourth; only it alleged, that Chapman's agreement was to indemnify Ross against injury from the exercise by Summers of his real or supposed right to erect a dam 11 feet 6 inches high on the stream below, and that Ross had bound himself for (not that he had actually paid) the 250 dollars to the Chapmans. Yet the defendant, not regarding his several promises and agreements, though often requested, had hitherto, and still, failed and refused to indemnify Ross &c.

Chapman demurred generally to each count of the declaration, and pleaded non-assumpsit, and non assumpsit within five

years. Ross joined in the demurrer, and took issue on the pleas. The court overruled the demurrer, and there was a trial of the issues.

At the trial, Chapman moved three instructions to the jury, one of which the court gave with a modification, and refused to give the others; and Chapman excepted; but it is unnecessary to state the exception, since this court did not decide the points therein stated.

The jury found a verdict for Ross, for 734 dollars. Chapman moved the court to set it aside, and to direct a new trial, on two grounds, that the verdict was contrary to evidence, and if not, that the damages were excessive. The court thought the damages too high, and Ross released 234 dollars of them; upon which the court refused the new trial. Chapman filed a bill of exceptions, stating the facts proved at the trial.

It appeared by the bill of exceptions, that proof was made, that John and Henley Chapman sold Matthew Alexander a parcel of land lying on Second Creek in 570 \*Monroe, and gave him a bond with condition to convey the title, which they afterwards conveyed: that the purchase money to be paid was 3000 dollars; of which 2500 dollars was paid, and Matthew and James Alexander gave their joint bonds for 500 dollars, and James Alexander paid 250 dollars, leaving 250 dollars to be paid by Matthew, who died in 1825, without having paid the same. James Alexander met with Henley Chapman, and told him, that Matthew had devised a part of the land to Ross (being that part on which Matthew had intended to erect mills) upon condition that Ross should pay the 250 dollars; and that Ross, having understood, that Summers had the right to erect a dam 11 feet 6 inches high, on the stream below, which, he was apprehensive, would overflow the machinery should he erect mills on the land devised to him at the place contemplated, had refused to accept the devise, unless Chapman would agree to indemnify him against any injury which might result to his machinery when erected, by reason of Summers's dam on the stream below; upon which Chapman told him, that Summers had no such right, and that there should be no difficulty on that account, for that he would indemnify Ross against any injury he might sustain by reason of the reflux of the waters caused by Summers erecting his dam of that height, if Ross would accept the devise, and pay the 250 dollars. And this promise of Chapman was repeated on another day. In consequence of which, Ross accepted the devise, paid the 250 dollars, and built his mills, the wheels of which were afterwards overflowed by the reflux of the waters caused by Summers's dam. But there was no proof, that Summers was authorized by law to erect his dam on the stream below Ross's mill seat, or that Summers's mill was legally established.

The court gave judgment for Ross for 500 dollars; and this court, upon the petition of Chapman, allowed him a super-sedeas.

571 \*M<sup>c</sup>Comas, for the plaintiff in error,



submitted the question upon the demurrers to the declaration, to the court; objecting, that no consideration was laid, to support the agreement which Chapman was alleged to have made; and that the agreement alleged, being merely verbal, it was void by the statute of frauds, whereby it was provided, that no action shall be brought to charge any person upon any agreement for the sale of any lands, tenements or hereditaments—or upon any agreement which is not to be performed within one year from the making thereof—unless the promise or agreement, or some memorandum or note thereof, shall be in writing &c. 1 Rev. Code, ch. 101, § 1, p. 372. The agreement in this case, ran with the land, and defended the enjoyment of it; and it was to be performed at any distant day, when Summers should build his mill dam. Besides, the declaration did not aver notice to Chapman, that Summers had erected his dam, and that the reflux of the waters caused by the same, obstructed Ross's works. But his main objection was, that there was no proof, that Summers had lawful right to erect his dam, and therefore, the circuit superior court erred in overruling the motion for a new trial. It was impossible to suppose that Chapman contracted, or meant to contract, to indemnify Ross against the tortious acts of Summers.

Preston, for the defendant in error, said the demurrers were rightly overruled. As to consideration, the declaration alleged, that Chapman's agreement to indemnify Ross against loss by reason of Summers's dam, induced him to accept Alexander's devise of the land to him, and to pay the 250 dollars, which, unless he accepted the devise, he was nowise bound to pay; and that, upon the faith of that indemnity, he proceeded to build his mills, and had lost all benefit from them. "Damage to the promisee constitutes as good a consideration as benefit to the promisor." *Townley v. Sumral*, 2 Peters 170, 182. As to the

statute of frauds, he said, this was not an agreement which ran with the land, but was a personal contract between the parties; nor was it an agreement which was, by its terms, not to be performed within one year. It was to be performed whenever Summers should erect his dam, and thereby cause the mischief to Ross's mills, which Summers might have done within the year. *Fenton v. Emblers ex'or of May*, 2 Burr. 1278. It was not necessary to aver notice to Chapman of the injury to Ross's mills caused by the erection of Summers's dam; *Austin v. Richardson*, 3 Call 302. For the rest, the contract between Ross and Chapman, was, that if Summers should build his dam, and thereby cause a reflux of the waters which should obstruct Ross's works, whether Summers should have a legal right to erect such a dam or not, Chapman should indemnify Ross. Both parties assumed that Summers had or claimed a right to build his dam 11 feet 6 inches high, and upon the supposition that he had, Chapman agreed to indemnify Ross against the consequences.

PER CURIAM. The circuit superior court erred in refusing to grant a new trial. The verdict of the jury was not sustained

or justified by the evidence. The promise of indemnity, on Chapman's part, was, upon a fair construction of the evidence, nothing more than an indemnity against the lawful acts of Summers. Ross's redress for Summers's unlawful acts was against Summers himself. Chapman neither undertook, nor did Ross receive his promise as an undertaking, to defend him against the tortious acts of Summers. Under this view of the contract, it was incumbent on Ross to shew, that the act of Summers whereby he sustained injury, was not a tortious but a lawful act; that Summers had a lawful right to erect his dam 11 feet 6 inches high, and that so Chapman was liable on his assumpsit to indemnify him against the injury sustained by the exercise of such lawful right. But

it is expressly stated, that no such evidence was exhibited to the jury; so that their verdict was not sustained by the evidence. This court, (not deeming it necessary, in this aspect of the case, to decide upon the questions raised by the motion to instruct) is of opinion, that a new trial should have been granted.

Judgment reversed, and cause remanded for a new trial.

#### Kent v. Matthews and Jackson.

August, 1841, Lewisburg.

(Absent CABELL and BROOKE, J.)

**Principal and Surety—Case at Bar.**—M. and J. are bound as sureties for E. who conveys slaves to a trustee to indemnify them, and to secure divers other debts; and judgment against E. the principal and M. and J. the sureties, and judgments against E. for all other debts so secured, are recovered at the same time; after which the trustee appoints J. one of the cestuis que trust, his agent to carry the trust slaves to a southwestern market, and E. the mortgagor accompanies him, carrying out three other slaves; J. and E. co-operate in selling the trust slaves, and E. sells the other three slaves, for a gross sum of 12,825 dollars for both parcels of slaves, and bring back a bill of exchange for 2000 dollars, and 10,325 dollars in money: the trustee receives the bill of exchange from E. and makes efforts to get it cashed, but the acceptors having failed, without success, and sends it to an attorney for collection; of the 10,325 dollars, he, with the acquiescence of M. and J. permits E. to retain 1000 dollars, and receives 9325 dollars, out of which, with the acquiescence of M. and J. he pays no dividend to them or to the creditor to whom they are sureties, but applies the whole to the other debts secured by the mortgage; and after all these transactions, E. by deed of trust conveys his land to indemnify K. another surety for him, and the trustee sells the land under this deed, and K. becomes the purchaser: **Held,**

1. **Same—Lien of Contemporaneous Judgments on Land of Debtor—Subrogation of Sureties—Subsequent Mortgage.**—That the judgment against E. and M. and J. his sureties, gave the judgment creditor a lien on E.'s land, prior to the lien which K. acquired by his subsequent mortgage, and M. and J. are entitled to the benefit of that prior lien: that the other judgments of the same date against E. gave those judgment creditors prior liens on E.'s land, and their judgments being satisfied out of a fund in which M. and J. had a right to participate, they are entitled, by



subrogation, to the benefit of these liens also; and as these liens together bound the whole of E.'s land, therefore, not a moiety only, but the whole of the proceeds of the land sold under the subsequent deed of trust to K. is liable to be applied to the satisfaction of M. and J.'s claim.

2. **Same—Same—Same—Same—Marshalling Securities.**—That M. and J. being entitled to indemnity under a mortgage of slaves and to a lien by judgment on E.'s land, and K. having only a mortgage on the land, equity would compel the former to take satisfaction out of the mortgage of slaves, if that fund were equally certain and available, and leave the land for K.'s indemnification; but as it was uncertain when the bill of exchange for 2000 dollars would be collected, or whether it could be collected at all, the court will give M. and J. the benefit of their lien on the land, leaving K. to be subrogated to the benefit of the bill of exchange.

3. **Same—Same—Same.**—That, as to the 1000 dollars which was retained by E. out of the proceeds of sales of the trust slaves, and as to the application of the whole money received by the trustee, to the payment of other debts, without paying any dividend to M. and J. or to the creditor to whom they were sureties; as K. had no lien on E.'s land at that time, if the parties claiming under the mortgage of the slaves had wasted the whole fund, or released the mortgage, that would not have prevented them from resorting to the lien on the land for satisfaction, K. having then no lien with which their proceedings interfered.

4. **Same—Compelling Creditor to Resort to Principal—Subrogation.**—That a surety, before payment of the debt, has a right to resort to

equity against the creditor and the principal debtor, to compel the creditor to collect, and the principal debtor to pay, the debt out of any fund the debtor has subject to the debt; and when the surety pays it, he has a right to be subrogated to all the rights and securities of the creditor.

Robert English, with Robert Jackson, Stephen Catron and John P. Matthews, his sureties, executed a bond to John Foster administrator of David Pierce, dated 575 \*the 13th November 1833, for 1325 dollars, payable with interest from the date on the 10th March following; and on this bond Foster recovered judgment, in September 1835, against English, Jackson and Matthews, Catron being then dead.

English, by deed dated the 20th July 1835, and duly recorded the same day, reciting the liability of Jackson, Catron and Matthews, as his sureties to Pierce's administrator, and divers other debts by him owing, conveyed thirteen valuable slaves to Andrew Fulton, upon trust, that he, or such person as he should select, should make sale of the slaves, at such times or places as he, or the agent he should select, should think best for the interest of the creditors, and should apply the proceeds of sales to the payment of all the recited debts rateably, and pay the surplus if any to English. In the autumn of 1835, Fulton sent the trust slaves to the southwestern states, under care of the above named Robert Jackson (one of English's sureties) whom he selected as agent to effect the sales; and English accompanied Jackson, carrying with him three other slaves, not part of the trust subject, which he sold, and he co-operated with Jackson in effecting sales of the trust slaves. They returned in March 1836, bringing with them the proceeds of the trust slaves, and (mixed with them) the proceeds of the three slaves carried out by English, with Fulton's consent, and with the knowledge, if not the consent, of Matthews and Jackson, retained 1000 dollars, which was less than the amount his three slaves sold for; and English himself paid Fulton 9325 dollars in cash, and delivered to him a bill of exchange for 2000 dollars, payable twelve months after its date which was the 20th January 1836, drawn by one Noble on Ingersol & Co. of New Orleans, in favour of one Trefoe, accepted by Ingersol & Co. and endorsed by the payee Trefoe and two others; which bill had been taken in exchange for money received from the sales of the 576 \*slaves. Efforts were made by Fulton, and then by English, to get the bill cashed, but, the acceptors having failed, without success; and the bill was sent to an attorney at Natches for collection, and nothing more had been afterwards heard of it; but English, in July 1837, transferred the bill, then in the hands of the attorney at Natches, to Alexander Pierce, Alfred Moore, and John Fulton. The 9325 dollars which Andrew Fulton received of English, was paid to creditors secured by the deed of trust of July 1835,

ing thereto, first to exhaust his remedies against the principal. The court, however, seemed to think that he would not be so compelled.

\***Marshalling Securities—Subrogation.**—The doctrine is well settled that where a creditor has two funds, to which he may resort for the satisfaction of his debt, one of which is primarily liable, and the other only secondarily liable for the payment thereof, the person having the right to resort to the latter fund for the payment of his demand stands in the situation of a surety to the owner of the primary fund in the application of the equitable principle of substitution in behalf of sureties, and if the funds secondarily liable be applied by the creditor to the satisfaction of his demand the person who stands in the situation of such surety is entitled to be subrogated to all the rights and remedies held by such creditor for his indemnity. *Nuzum v. Morris*, 25 W. Va. 569, citing *Story's Eq. Juris.*, sec. 633; *Bart. Ch'y Pr.*, sec. 328; *White & Tudor's L. C. in Eq.* 149-151; 2 *Tuck. Com.* 492; *Morrill v. Morrill*, 53 Vt. 74; 2 *Mtn. Inst.* 173; *McClung v. Beirne*, 10 Leigh 304; *Kent v. Matthews*, 12 Leigh 574; *Eddy v. Traver*, 6 Paige 521; *Hase v. Ward*, 4 Johns. Ch'y 180; *Neely v. Jones*, 16 W. Va. 625. See monographic note on "Marshalling Assets" appended to *Carrington v. Didier*, 8 Gratt. 260; monographic note on "Subrogation" appended to *Janney v. Stephen*, 2 Pat. & H. 11.

†**Principal and Surety—Compelling Creditor to Resort to Principal.**—As to the right of the surety to the aid of a court of equity to compel the creditor to exhaust his remedies against the principal debtor, before resorting to the surety, see the principal case cited in *Southall v. Farish*, 85 Va. 409, 7 S. E. Rep. 534.

In that case it was left undecided, whether or not a creditor with the surety's money or its equivalent in his hands will be compelled, without resort-

before the deed of trust of the 7th November 1836, hereafter mentioned, was executed. All the creditors to whom Fulton paid the money, had recovered judgments for their debts in September 1835. No dividend was paid to Pierce's administrator, in part of the debt for which Jackson, Catron and Matthews were bound as sureties, though judgment for this debt also had been recovered in September 1835. And Matthews and Jackson were apprised of and consented to this application of the fund.

The three slaves which English carried with him to the southwest in the autumn of 1835, had been purchased by him of James Kent and of Wygall's administrator, and he had contracted a debt of 700 dollars to James Kent and a debt of 1195 dollars to Wygall's administrator for that purchase, for which debts David Kent was the surety.

By deed, dated the 7th November 1836 and recorded the same day, reciting that English was indebted to Alexander Pierce 273 dollars, that David Kent was his surety in two notes, one to James Kent for 700 dollars, and the other to Wygall's administrator for 1195 dollars, that English was also indebted to Tate, Hanson & Fulton 143 dollars, to Richard Johnston 91 dollars, and to M'Gavock & Co. 117 dollars, English, to secure these debts, conveyed to Thomas Boyd a parcel of land in Wythe county and three slaves, upon trust, that he should make sale of the trust subject, and,

577 out of the \*proceeds of sale, pay first the debt of 273 dollars due to Alexander Pierce, and the two debts of 700 dollars due to James Kent and 1195 dollars due to Wygall's administrator for which David Kent was surety, and then apply the surplus towards the other recited debts, rateably. After this deed was executed, Foster the administrator of David Pierce died, and Boyd, the trustee in this deed of November 1836, took administration de bonis non of David Pierce's estate. Boyd, as trustee, made sale of the land mortgaged by the deed, and David Kent became the purchaser for the price of 3000 dollars; out of which he insisted on retaining enough to satisfy the two debts he had paid as English's surety to James Kent and Wygall's administrator; and Boyd retained the legal title until the debt due him as administrator of David Pierce, should be satisfied. For the debts secured by this deed of November 1836, no judgments were ever recovered.

Matthews and Jackson, against whom, as sureties for English, judgment had been recovered by Pierce's administrator for 1325 dollars in September 1835, exhibited their bill in the circuit superior court of Wythe, against English, Boyd, David Kent, and all the creditors secured by the deed of November 1836; setting forth the facts above stated, and insisting, that the judgment recovered by Pierce's administrator gave him a lien on English's land prior to the debts secured by the deed of November 1836, and was therefore entitled to satisfaction, in preference to any of those debts, out of the proceeds of the land; and that they were entitled to be subrogated to the benefit of the judgment and its lien. They said that Boyd, the administrator of David

Pierce, would, perhaps, compel them to pay the amount of the judgment recovered against them, though they believed he would not press the collection unless the exigencies of Pierce's estate should 578 require it, but would \*await the termination of this suit. And they prayed, that David Kent might be compelled to pay Boyd the money he owed for the land, or to pay it into court; that so much thereof as was necessary should be applied to the satisfaction of Pierce's judgment; that Boyd might be enjoined from paying away any money he might receive for the purchase of the land until further order of the court, and general relief.

The injunction was awarded.

English, in his answer, referring to the deed of trust of July 1835, said, that the slaves thereby mortgaged were put into the hands of Fulton the trustee, and of the plaintiff Jackson whom he appointed his agent, to be disposed of according to the trust provided by that deed; that Jackson carried the trust slaves to the southwest, and there sold them for 12,325 dollars, of which he received 10,325 dollars in cash, and Noble's bill of exchange on Ingersol & Co. for 2000 dollars payable twelve months after its date; that Fulton permitted English to retain 1000 dollars of the money, and received 9325 dollars, and the bill of exchange for 2000 dollars, and these together were amply sufficient to pay all the debts secured by the deed of July 1835; that the collection of the amount due on the bill of exchange, or the getting it cashed, failed by reason of Fulton's negligence; and that he misapplied the cash (9325 dollars) received by him; for that he was bound by his trust to apply it, rateably, to and among all the debts secured by the deed, and that the rateable proportion which ought to have been, but was not, paid towards the debt of Pierce's administrator, ought to be credited against his claim upon English's land subsequently mortgaged to other creditors. And he denied the right of the plaintiffs to be subrogated to the lien of Pierce's administrator.

David Kent referred to English's answer, and adopted it as his own. He claimed, that the trust fund which went into Fulton's hands should be rateably dis- 579 tributed, \*and the dividend due to Pierce's administrator credited against the judgment; and that that trust fund should be exhausted, before the plaintiffs could resort to English's land for satisfaction.

Boyd, trustee in the deed of November 1836, and administrator de bonis non of Pierce, answered, that he retained the legal title of the land he had sold to Kent under the deed of trust, until the debt due to Pierce's estate, the judgment for which gave a prior lien on the land, should be paid; and insisted on his right to do so.

Matthews and Jackson amended their bill, and made Fulton, the trustee in the deed of July 1835, party defendant, and called upon him to render an account of the trust fund.

Fulton, in his answer, stated the facts in relation to the bill of exchange for 2000 dollars; the efforts he made to get it cashed,

and English's efforts for the same purpose; the insolvency of Ingersol & Co. the acceptors; the disposition that had been made of the bill, namely, the sending it to an attorney for collection; and English's subsequent transfer of it to Alexander Pierce, Alfred Moore and John Fulton. And he exhibited an account of the actual disposition he had made of the 9325 dollars which he had received.

As to the other defendants, the bill was taken for confessed.

It was admitted, that David Kent had paid the two debts of 700 dollars to James Kent and of 1195 dollars to Wygall's administrator, with interest upon them.

The court ordered David Kent to pay the 3000 dollars (the price for which he had purchased English's land from Boyd, the trustee in the deed of November 1836), into court, and directed the money to be lent out till the final decision of the cause. It also ordered Fulton to render an account of the trust fund under the deed of July 1835, and of his disposition thereof; and directed the commissioner to report how much was due upon the judgment of Pierce's administrator.

580 \*The money was paid by Kent into court.

The report of the commissioner shewed that Fulton had paid to creditors (other than Pierce's administrator) secured by the deed of July 1835, the whole of the amount of 9325 dollars he had received in cash of the trust fund; and stated, that Fulton had also received the bill of exchange drawn by E. B. Noble on Ingersol & Co. in favour of W. J. Trefoe, dated January 20, 1836, for 2000 dollars payable twelve months after date, accepted by Ingersol & Co. and endorsed by Trefoe, Meday Bolzeman, and H. L. Douglass; and that, in consequence of the failure of Ingersol & Co. no money had been received by Fulton on the bill. The report also stated, that there was due on the 24th February 1840, on the judgment of Pierce's administrator, the sum of 1753 dollars 53 cents, principal and interest.\*

After this report was made, namely, in March 1840, Matthews and Jackson paid the administrator *de bonis non* of Pierce, 1757 dollars and 8 cents, in full of the judgment against them, principal and interest.

In April 1840, the court decreed, that as Fulton had not collected, or been able to collect any thing upon the bill of exchange, and as the claim of Matthews and Jackson was prior and preferable to that of Kent,

\*The following was the state of the account—

"Principal of judgment,	1325 00
Interest on same, from November 13, 1833 to February 24, 1840,	499 29
Costs,	11 17
	1835 46
Deduct amount paid July 11, 1837,	25 20
amount paid September 6, 1837,	44 53
amount paid May 18, 1838,	12 30
	81 93
Due,	\$1753 53"

It is plain, that of the balance of 1753 dollars 53 cents, only 1325 was principal, and that the residue was interest and costs.

there should be paid, out of the money, 581 proceeds of the sale \*of the land which Kent had paid into court, to Matthews and Jackson, the sum of 1753 dollars 53 cents with interest thereon from the 24th February 1840.

From this decree the defendant Kent, by petition to this court, prayed an appeal; which was allowed.

Preston and Johnston, for the appellant, argued, 1. That this was not a proper case for subrogation; for the sureties, when they exhibited the bill, had not paid the debt due on the judgment of Pierce's administrator; and he could not be required to cede to the sureties his rights and remedies against the principal debtor, until they paid the debt. *Enders v. Brune*, 4 Rand. 438. It might be true, that the sureties paid the debt pending the suit; but they did not allege in their bill, that they had, but, on the contrary, they stated that they had not paid it. But there was no proof of the payment, unless Boyd's receipt for it, without proof of its execution, was sufficient to establish the fact; and, indeed, as the fact was not in issue, there could not regularly be any such proof. 2. They said, the lien of the judgment was a legal lien on English's land, depending on the right of the creditor to sue out an *elegit*, and that would have entitled him to extend a moiety of the land. The *elegit* would have given the creditor all that he was entitled to: there was no circumstance in the case, which could furnish a ground for the interference of equity; and if the circumstances did furnish ground for equitable relief, the relief could not be extended beyond a moiety of the proceeds of sale of the land. *Stuart v. Hamilton's ex'ors*, 8 Leigh 503. The decree gave the sureties full payment of the debt, which exceeded a moiety of the proceeds of the sale. 3. The bill of exchange for 2000 dollars, was taken for part of the proceeds of the trust subject sold under the deed of July 1835, and was delivered to Fulton; and that sum would have sufficed to discharge the debt for

582 which Matthews \*and Jackson were bound. They had an undoubted lien on that fund; and Pierce's administrator had a lien on English's land by the judgment; but Kent had only a lien on the land by the deed of November 1836. Now, where one creditor had two securities, and another had only one of those securities, the first must exhaust the security which the other has not, before he could be allowed to resort to the security which the other has in common with him. They cited *Wright v. Nutt*, 3 Bro. C. C. 326; *Wright v. Simpson*, 6 Vess. 714; *Hayes v. Ward*, 4 Johns. Ch. Rep. 123. It could not be pretended, that the fund mortgaged by the deed of July 1835, for the indemnification of Matthews and Jackson, was exhausted, until the 2000 dollars due by the bill of exchange should be applied, or proved unavailing. If Kent were to pay off this judgment, he would be entitled, by subrogation, to the bill of exchange. It is supposed to be worthless; be it so; yet Fulton received it as part of the proceeds of the trust subject; and if he, or his *cestuis que trust*, had impaired or lost their security, either he or they must abide

the loss. Jackson, one of the plaintiffs, was the agent of Fulton for the sale of the trust slaves: it was he who received the bill of exchange instead of money, or purchased it with part of the trust fund; though it was delivered by English to Fulton. 4. They said, there was 1000 dollars paid by Fulton to English, or retained by English with Fulton's consent, and with the knowledge, and of course acquiescence, of the plaintiffs; and this sum of 1000 dollars ought, at all events, in favour of Kent, to be credited against the judgment of (Pierce's administrator against the plaintiffs. If that 1000 dollars was part of the proceeds of the three slaves, which English carried to the southwest, and sold, along with the trust subject, it ought to have been deducted out of the 2000 dollars due by the bill of exchange, which English brought back and delivered to Fulton, instead of being deducted, as it was, out

583 \*of the cash received for the trust subject. 5. The trust fund that came into Fulton's hands, ought, by the terms, of his trust, to have been divided, rateably, among the creditors secured by the mortgage; but, with the consent of Matthews and Jackson, the whole of it was paid to the other creditors; no dividend was paid to them; and, as between them and Kent, their just dividend ought to be credited upon the judgment of Pierce's administrator. They voluntarily gave up so much which they were entitled to receive, and could have no right to claim the same amount out of the proceeds of the sale of land mortgaged to Kent. Lastly, they said, the decree was plainly wrong in its details: it gave interest upon interest.

M'Comas, for the appellees, said, 1. That a surety had an undoubted right to resort to equity against the principal debtor and the creditor, to compel the creditor to collect the debt of the principal, and the principal to pay the debt, out of the lands he held subject to it, or out of any other means he had. *Ranelagh v. Hayes*, 1 Vern. 189; *Nisbet v. Smith*, 2 Bro. C. C. 579; *Story's Eq.* 327, 730. The very case of *Hayes v. Ward*, cited for the appellant, proved the proposition. Now this, he said, was the precise object of the bill in this case. The money had not been then paid, and therefore the plaintiffs asked that it might be paid out of the proceeds of the land; but they foresaw that they might be compelled to pay it before the termination of the suit; and, in that case, under their prayer for general relief, they were entitled to subrogation. 2. Equity had jurisdiction to give relief, and to decree the payment of the whole amount of the judgment recovered against Matthews and Jackson out of the proceeds of sale of the land bound by the judgment; for which he cited *Mut. Ass. Society v. Stanard*, 5 Munf. 539; *Blow v. Maynard*, 2 Leigh 29, and *Haleys v. Williams*, 1 Leigh 140.

584 Then, 3. as to the bill of exchange, neither Matthews and Jackson, nor Fulton the trustee, were in any default in failing to collect the bill of exchange, or to get it cashed; every effort to get it cashed had been made by Fulton; and then by English; and English afterwards under-

took to transfer the bill of exchange to other parties. Certainly, if this fund was available, it ought to be applied, in the first instance, to the discharge of the judgment of Pierce's administrator; but it had not yet been collected, and probably never might be; and the judgment creditor was not bound to wait till its fate could be ascertained, before he resorted to the lien of the judgment on English's land for satisfaction; for which he referred to *Wright v. Simpson*, cited for the appellant. 4. As to the 1000 dollars which Fulton allowed English to retain; that, he argued, was part of the proceeds of the three slaves which English carried out along with the trust subject, and sold. 5. The trust fund that came into Fulton's hands was applied to the payment of other creditors, and no dividend was paid to Pierce's administrator; but it was paid to creditors who had acquired a lien on English's land by judgments of the same date with that of Pierce's administrator, and who, if they had not been paid, would have had the same right to have recourse against English's land, which Matthews and Jackson now had, and they therefore stood in the shoes of those other creditors. If the money had been distributed pro rata, the other creditors would have been party plaintiffs here; and it was immaterial, whether the whole of the judgment of Pierce's administrator remained to be satisfied, or whether the other creditors were entitled to satisfaction to the same amount. And he prayed the court to consider, as to the objections founded on the bill of exchange, the 1000 dollars which English was allowed to retain, and the payment of the whole trust money to other creditors than Matthews and Jackson—that

585 all these transactions occurred months before Kent got \*his lien; and if they had released the whole trust subject in Fulton's hands, they would still have retained their lien on the land, and Kent's lien must have been subordinate to it. He acknowledged that the decree was erroneous in the details; that it ought to have been for 1753 dollars 53 cents, with interest on 1325 dollars part thereof, being the principal debt, from the 24th February 1840; but this was a mere inadvertence, which no-wise affected the principles in controversy between the parties, and might be corrected without disturbing the principles of the decree.

STANARD, J. The right of a surety to the aid of a court of equity, to compel the principal to pay the debt, and thereby exonerate him, is sustained by numerous decisions (some of which were cited at the bar) and rests on the soundest principles of natural justice. This is so free from doubt, that Lord Thurlow, in the case of *Nisbet v. Smith*, said it had never been disputed. And the surety is entitled to resort for his indemnity to all the securities which the creditor holds. These rights combined, manifestly sustain the claim of the surety, seeking the aid of equity for his exoneration by compelling payment from the principal, to make the existing liens and securities of the creditor subservient to that end. Such is the nature of the claim set up by the bill in this case.

It is true, the right of subrogation is asserted in the body of the bill, but the prayer is, in effect, that the lien of the creditor shall be upheld and dedicated to the protection and exoneration of the sureties, and for general relief. I do not doubt that the bill presents a fit case for relief in equity.

The title to this relief is encountered by various objections, founded on the facts developed by the pleadings and proofs, which have been urged by the appellant's counsel with earnestness and ability.

586 \*It is objected, that an amount sufficient for the indemnification of the sureties, part of the subject mortgaged for that purpose by the deed of trust of July 1835, remains unadministered, and that that subject should be exhausted, before the lien of the judgment on the land should be enforced, to the disappointment of the appellant, who is the subsequent incumbrancer of the land: in effect, that as the appellees, who claim under the elder incumbrance, have two funds for their indemnity, and the appellant is the junior incumbrancer on one of them, the appellees should not have that one charged with their claim, till the other shall be applied and exhausted. If both funds were equally accessible and available, or could be made so by the court, the equity to apply the fund not directly charged by the junior incumbrancer, would be plain and incontestable. But that is not the case here. The productiveness of the unadministered subject of the trust of July 1835, is, in all probability, precarious as to the amount, and the time when it may be realized is indefinite. If the objection were sustained, it would leave the claimant under the junior and subordinate title, predominant over the elder and superior: it would give the junior and subordinate incumbrancer possession of a certain and adequate fund, while the elder and superior would be put upon the tedious and perhaps fruitless pursuit of satisfaction from a doubtful and discredited security. This is forbidden by the general principles of equity: the general rule entitles the elder and superior claim to satisfaction out of the fund most certainly productive and most accessible, whenever the junior can, by subrogation or otherwise, have the benefit of the fund liberated by such satisfaction. Here, if any thing shall in future be realized from the remaining subject of the trust of July 1835, Kent, the junior incumbrancer, having the subject embraced by his incumbrance withdrawn from him to satisfy the elder and superior claim of Matthews and Jackson, will be entitled to indemnification from it.

587 \*It is further objected, that the sales of the trust slaves mortgaged by the deed of July 1835, produced enough for the full indemnification of the appellees, and that, as between the parties to this controversy, the claim of the appellees rests on the ground they would have occupied, if the whole amount produced had been duly applied; because, it is said, by their consent or acquiescence, 1000 dollars, part of the proceeds of sale, was retained by English, and by the improvidence of one of them, acting as agent to make the sale of

the slaves, and the subsequent assent or acquiescence of them both, the bill of exchange was received, instead of money, as part of the proceeds of sale. To the first member of the objection, a ready and effectual answer is furnished by adverting to the position of the parties at the time when the proceeds of the sale of the slaves were accounted for, and the rights and obligations of the parties to that transaction. The settlement between Fulton the trustee, Jackson the agent of sale, and English who accompanied the agent and co-operated with him in making the sale, was made in March 1836. At that time, judgments had been rendered for the debt for which Matthews and Jackson were sureties, and for the other debts secured by the same deed of trust; and the security furnished by the deed of trust was reinforced by the liens of those judgments on English's land. And at that time, Kent had no lien on the land; the deed of trust under which he claims was not executed till November following. Kent, consequently, had no rights to be affected by any arrangement between English and the creditors claiming under the mortgage of the slaves, whereby a part of the proceeds of the trust slaves was permitted to be applied to the use or to other responsibilities of English. The utmost effect of the permission, was a surrender of the lien of the creditors on so much of the fund thus diverted from the purposes of the trust, and

588 nowise impaired the lien of the creditors on the residue of the \*trust subject, or on English's land. Nay, a total release of the security of the deed of trust of the slaves, would not, in any degree, have impaired the lien of the judgments, in favour of Kent, who had then no lien with which that of the judgments interfered. These remarks supply an answer to the other part of the objection, founded on the receipt of the bill of exchange. That was a transaction of English, or, at least, one in which he participated, and of which he could not complain: the receipt of the trustee for it was given to English. At the time it was received, the creditors might have consented to substitute the bill of exchange in place of money for their security, and to permit English to apply the money to other uses or responsibilities, even though it had distinctly appeared that the whole proceeds of sales of the slaves had been received in money, without impairing the liens of their judgments, so far as the appellant, who had then no lien, was concerned.

Another objection is, that the lien of the judgment, in its utmost extent, covered only a moiety of English's land, and that the utmost that ought to have been decreed by the court to the exoneration or indemnity of Matthews and Jackson, was a moiety of the net proceeds of sale. My impression is that the appellant's counsel were right in the principle on which they founded this objection; but though this be so, it is my distinct opinion, that this case does not present a fit occasion for the application of the principle. If the judgment under which the appellees claim, had been the only one of the claims secured by the mortgage of

the slaves for which there was a lien on the land, the case would be one for the application of the principle, or for a judicial ascertainment of its soundness. But, in this case, all the other claims secured by the mortgage of the slaves, were liens on the land, and many, if not all, the judgments for them which gave those  
589 liens, were \*rendered at the same court (September 1835) at which the judgment was recovered against Matthews and Jackson; and by those liens the whole land was chargeable and liable to extent. Those claims charged the entirety of the proceeds of sales of the mortgaged slaves. The application of the proceeds of either subject to satisfy one or more of the claims, with or without the consent of the creditors holding the other claims, left the unsatisfied claimants incumbrancers on the residue of both the subjects, and clothed with all the rights of the satisfied claimants, necessary to secure the application of that residue to the other claims. The moment that a part of the proceeds of the slaves, which might have been applied to the partial indemnity of the appellees, was applied to the satisfaction of other claims which equally bound and might have been satisfied out of the land, a title vested in the appellees, sustained by plain equity, to have the unapplied lien on the land appropriated to supply the deficiency caused by withdrawing from their indemnity the proceeds of the slaves. And the lien, which the appellant subsequently acquired by the deed of November 1836, cannot control or impair this elder and superior equity.

The balance due on the judgment of Pierce's administrator was 1753 dollars 53 cents, with interest on 1325 dollars, principal, from the 24th February 1840, and such is the balance shewn by the commissioner's report. That was the measure of the lien on the land, whether the proceeds of the land were applied by the decree to the exoneration of the sureties Matthews and Jackson by decreeing payment to the creditor, or to their indemnity by decreeing payment to them in reimbursement of the money they paid in satisfaction of the judgment. The court, however, by mistake, assumed that the report shewed that 1753 dollars 53 cents, with interest on the whole sum from the 24th February 1840, was due on the judgment, and charged  
590 the proceeds of the land \*accordingly.

This mistake, I doubt not, might and would have been corrected by application to the court below; and if the appellees had caused such correction to be made, they would, under the statute 1 Rev. Code, ch. 128, § 108, p. 512, have been entitled to an affirmance of the decree. My impression is, that as that has not been done, this court should correct the error, by reversing the decree pro tanto, giving costs to the appellant, or at least, not giving them to the appellees. But my brethren thinking that the decree should be affirmed, with the correction, and with costs to the appellees as the parties substantially prevailing, such must be the decree.

Decree corrected, and affirmed, with costs to the appellees as the parties substantially prevailing.

591

\*Thompson v. Pendell.

August, 1841, Lewisburg.

(Absent CABELL and BROOKE, J.)

**Lease—Covenant to Keep Premises in Repair—Destruction by Fire—Rent.**—In the lease of a mill, lessee covenants to keep up the repairs of the mill, except heavy repairs, such as if the dam or forebay should be injured by high water, or if the main shaft or wheel should give way so as to require a new one, in this case, it is to be repaired by the lessor in a reasonable time, and the lessor is not to lose the rent if he should go on to do the work according to contract: the mill is wholly destroyed by accidental fire during the term; and the lessor falls and refuses to rebuild the same: *Held*, the rent is suspended from the time of such destruction of the demised premises: *dissentiente* TUCKER, P.

Debt by Thompson against Pendell and five others (his sureties), in the circuit superior court of Rockbridge, on a single bill for 450 dollars, payable the 1st May 1838, "being for one year's rent of the Boat Yard mills."

The defendants tendered a special plea in bar, founded on the statute Supp. to Rev. Code, ch. 109, § 62, wherein they alleged, that by agreement between the plaintiff Thompson and the defendant Pendell, dated the 6th April 1837, Thompson leased to Pendell, the Boat Yard mills, and the store house and garden appurtenant to the same, for a term of five years from the 1st May 1837, at the annual rent of 450 dollars, payable at the end of each year of the term; and by the agreement, Thompson was to keep up and make, during the term, the heavy repairs of the mills, whether rendered necessary by wear and tear or by accident, within a reasonable time after such necessity should occur; and in case of Thompson's failure so to do, he was not to be entitled to rent during such his failure. And for securing the annual rents to Thompson, Pendell, and the other defendants his sureties, executed their bonds,  
592 and among the \*rest the bond in the declaration mentioned, which was for the first year's rent. And the defendants averred, that during the first year of the term, on the 5th December 1837, the mills and the store house were accidentally destroyed by fire, Pendell having then enjoyed the premises for seven months and four days: Yet Thompson, though often requested, wholly failed and refused to make the heavy repairs rendered necessary by the destruction of the mills and store house by fire; whereby Pendell had been from the time of the fire wholly deprived of the use of the mills. And Thompson, after the destruction of the same by fire, took possession of the garden, to wit, on day of April 1838, and by himself, his tenants and agents, had ever since held and enjoyed the same. By reason whereof the defendants had sustained damages to the value of 200 dollars. And the defendants, after the fire and before the commencement of this suit, tendered to Thompson the sum of 281

\*See foot-note to Ross v. Overton, 3 Call 300, and monographic note on "Covenants" appended to Todd v. Summers, 2 Gratt. 167.

The principal case is cited in Scott v. Scott, 18 Gratt. 166; 2 Min. Inst. (4th Ed.) 60, 634, 723.

dollars 66 cents, for and on account of the first year's rent, being the rateable proportion thereof for the space of time during which Pendell enjoyed the premises; which sum so tendered Thompson refused to receive, and the defendants had been and yet were always ready and willing to pay, and now brought into court. And the 200 dollars damages sustained by Pendell, and the 281 dollars 66 cents so tendered to Thompson, exceeded the sum demanded in the declaration. All which the defendants were ready to verify &c.

The facts of the plea were verified by affidavit of three of the defendants; and they paid the 281 dollars 66 cents into court.

Thompson objected to the reception of the plea, on the ground that it was not in itself a good bar to the action, and because no profit was therein made of the agreement for the lease of the mills of the 6th April 1837; but the court admitted it, and Thompson excepted. And then he put in a general replication, on which an issue was made up.

593 \*At the trial, the defendants offered in evidence a deed between Pendell and Thompson, dated the 6th April 1837; by which it appeared, that Thompson let the Boat Yard mills &c. to Pendell for the term of five years from the 1st May 1837, at an annual rent of 450 dollars—and there were the following covenants in it: "The said Samuel Pendell is to keep up the repairs of the mill, except heavy repairs, such as if the dam or forebay should be injured by high water, or if the main shaft or wheel should give way so as to require a new one, in this case it is to be repaired by the said Thompson in a reasonable time after such breach, and he Thompson is not to lose the rent if he should go on to do the work according to contract."—"And the said Pendell for himself &c. doth covenant and agree to and with the said Thompson, his heirs &c. that the said Pendell, his executors &c. shall well and truly pay or cause to be paid unto the said Thompson, his heirs &c. the said yearly rent of 450 dollars."—"And that the said Pendell, his heirs &c. agree, at their own proper costs and charges, to keep up the repairs of the mill and appurtenances thereof, except such as are herein before named and reserved, during the present lease, accidents by fire and the act of God excepted, and to return the mills to the said Thompson, his heirs &c. at the expiration of the said term of years, in as good a condition as he received them, the natural wear and tear excepted." Then followed the usual covenant for the enjoyment of the premises by the tenant during the term. Whereupon Thompson prayed the court to instruct the jury, 1st, that upon the legal construction of the agreement, the lessee was bound to pay the rent thereby agreed to be paid, though it should be proved that the mills and store house were wholly consumed by fire during the first year of the term, without the tenant's default and against his will, and though the jury should believe, that the landlord, under a sound construction

594 of the contract, \*was bound to rebuild in the event of a casualty by fire, and though the fire had rendered the demised

property of no value to the tenant. 2ndly, That if the jury should believe, that the bills &c. demised were burnt by the culpable negligence of the tenant or his agents during the term, then the tenant was bound to pay the rent, though the property had been consumed by fire, even if the landlord was bound to rebuild in case of accidental fire, and even if there was an express covenant to rebuild in case of such casualty. 3rdly, That if the jury should believe from the evidence that the tenant, within a day or two after the mills were burnt, removed from the premises, with his family and property, to the lands of one Weaver, and a few months afterwards engaged in milling business for Weaver, where he continued to reside ever since, exercising no act of ownership over the property demised to him by Thompson, then the entry of Thompson on a portion of the demised premises and erecting a hogpen thereon, and his subsequent entry and leasing to one Northern, for one year, a portion of the garden he had demised to Pendell, were not such acts or disturbances of the lessee's right, he having vacated the demised premises, as will by law discharge the tenant from the payment of the rent reserved by the lease." The court gave the last two instructions, but refused to give the first, and, on the contrary, told the jury, "that upon a fair construction of the lease, the tenant was not liable to pay the rent reserved, in case of an accidental destruction of the mills &c. by fire or any other means (except the rent accrued up to the time of such destruction) without any default or negligence on the part of the defendant, unless the landlord repaired or rebuilt within a reasonable time, as specified or provided in the contract; and that a refusal to rebuild from the time of the burning to this date, and a disclaimer by the landlord of any intention or obligation to

595 rebuild, was sufficient evidence to the jury, to establish a failure to repair or rebuild in a reasonable time; within the meaning of the contract." To which opinion Thompson excepted.

The defendants also introduced one Moore as a witness, who testified, that about three weeks after the burning of the mill, he heard Thompson make an estimate of his loss: that he estimated the same at 8000 dollars, which included the mills, the grain and other contents, and the rent Pendell was to pay. Thompson's counsel objected to this evidence as illegal, on the ground that his admission as to the loss of the rent was only the expression of his opinion on a point of law, which was erroneous, and ought not to bind him, and therefore ought not to be given in evidence against him. The court held that the evidence was admissible; saying, "that how far it should avail, was a question for the jury, under the advice of the court, if such advice should be asked, to consider in connexion with the other testimony in the cause." Thompson excepted.

Verdict and judgment for defendants; to which this court, upon the petition of Thompson, allowed him a supersedeas.

Brockenbrough for plaintiff in error. I. The special plea ought to have been rejected by the court, because (if for no other



reason) it made no profit of the covenant therein set forth and relied on as the foundation of the defence. The plea was "in the nature of a plea of setoff," under the statute Supp. to Rev. Code, ch. 109, § 62, and the defendants were as much bound to make profit as Pendell would have been if he brought an action of covenant for a breach. The plea was bad too for duplicity; for it set up two distinct grounds of defence, each going to the whole action—

1. that Thompson was bound by his contract to rebuild within a reasonable time, and having failed to do so, the rent was suspended; and 2. that Thompson, after the destruction \*of the mills by fire, resumed possession of part of the premises, and thenceforth occupied and enjoyed the same, and so the rent was suspended. These two grounds of defence were not only distinct and independent, but inconsistent: for if Thompson's covenant bound him to rebuild in case of destruction by fire, then Pendell was entitled to a suspension of the rent only from the time of his failure to rebuild within a reasonable time, and Thompson was entitled to the rent until such breach; but if it was true, that he entered upon and enjoyed part of the demised premises during the term, the whole rent was extinguished, as well that which accrued before the mills were burnt, as that which would, but for the alleged eviction, have afterwards accrued. *Briggs v. Hall*, 4 Leigh 484. And that part of the plea which claims the exemption of the defendants from rent by reason of Thompson's entry on the demised premises, is further defective in not stating that he entered against the will of the lessee Pendell. II. The court erred in refusing to give the first instruction asked by Thompson's counsel, and in the instruction it gave to the jury, that Pendell was not liable to pay the rent in the event which occurred of a total destruction of the mills by fire, unless Thompson rebuilt the same within a reasonable time. It erred in refusing to give the instruction asked, because a tenant is bound to pay the rent, notwithstanding the destruction of the premises by fire without his default or negligence, when there is nothing in the lease which exempts him; and because a breach of covenant on the part of the lessor does not excuse the lessee from paying the rent, but he is turned over to his action for the covenant broken. And the instruction which the court gave was erroneous. The covenant did not bind Thompson to rebuild in case of destruction of the premises by fire: it only bound him to make the "heavy repairs" therein specified, or at all events

only such repairs as were of the same kind \*with those specified. The enumeration of certain repairs in this covenant, limited the generality of the phrase "heavy repairs," to that description of repairs, which, in the usual course of events, were likely to become necessary during the term. If the contingency of a total destruction of the mills by fire, had been in the contemplation of the parties when the covenant was entered into, the rebuilding of them, being the heaviest of all repairs, would surely have been specified;

and the phrase "in this case," immediately following the implied covenant of Thompson to make the "heavy repairs" specified, is conclusive to shew what sort of repairs was in contemplation. Thompson's covenant to make the "heavy repairs," implied that something should remain to be repaired, not that he should rebuild in case of total destruction. There being no covenant to rebuild, Thompson's failure to rebuild was no ground for a suspension of the rent. The total destruction of the premises by fire, was a contingency not provided for by the contract between the parties; and the case is left subject to the operation of the well established rule of law, that the tenant shall pay rent notwithstanding such destruction. *Monk v. Cooper*, 2 Ld. Raym. 1477; *Paradine v. Jane*, Aleyn 26; 18 Vin. Abr. Rent I. a. pl. 10, p. 515; *Belfour v. Weston*, 1 T. R. 310; *Weigall v. Waters*, 6 Id. 488; *Hallett v. Wylie*, 3 Johns. Rep. 43; *Fowler v. Bott*, 6 Mass. Rep. 63. There was a class of cases in which under peculiar circumstances (the lessor having insured the premises) the tenant was relieved in equity, *Brown v. Quilter*, Amb. 619, but the distinction has been exploded, and the cases overruled; *Hare v. Groves*, 3 Anstr. 687; *Holtzaffel v. Baker*, 18 Ves. 115; *Leeds v. Cheetham*, 1 Sim. 146; 2 Cond. Eng. Ch. Rep. 74. III. The testimony of the witness Moore was improperly admitted. If it was offered to explain the meaning of the lease, or to shew Thompson's sense of its meaning, it was certainly improper; *Stark. Ev. part* 598 4, \*p. 1001. There is nothing to shew the application of the evidence to the question whether the destruction by fire was owing to the default or negligence of the lessee.

*Baldwin*, for defendants in error. I. The court did not err in receiving the defendants' plea. Thompson's objection to it was a general demurrer *ore tenus*, under which formal defects could not be relied on, but only such as shewed that there was not sufficient matter in the plea to bar the action. The plea was not objectionable for want of profit of the covenant therein alleged; for it did not appear, on the face of the plea, that the agreement was by deed; and if it had so appeared, and the plea could be regarded as faulty for want of a profit, the defect could only have been taken advantage of by special demurrer. Neither is the plea liable to the objection of duplicity. It does not set up two distinct grounds of defence; it states the destruction of the mills by fire, the refusal of Thompson to make the necessary repairs incumbent on him, and his subsequent enjoyment of part of the demised premises; all going to shew the failure of the consideration of the bond on which the action was brought, which is the very defence authorized by the statute. The averment of Thompson's subsequent occupation of part of the premises was not distinct from, but was connected and not inconsistent with, the other matter of the plea; and it was either material, in which case the whole defence would have failed without proof of that additional fact; or it was immaterial, and so mere surplusage. And



whether it rendered the plea double or not, the objection could only be taken, if at all, by special demurrer; and in point of fact it was not taken, in the court below, in any form or shape whatever. II. The court rightly refused the instruction asked by Thompson's counsel, and was right too in the instruction which it gave to the jury. If the buildings on demised premises be

destroyed by fire or other accident, 599 without default of the tenant, "and

he is deprived of the enjoyment thereof; and it is the duty of the landlord to rebuild within a reasonable time, either by the express terms of the lease or by fair implication, and the landlord fails or refuses to rebuild; the tenant is entitled to be relieved from the rent during the period of such refusal, to the extent of his loss occasioned by such refusal. In this case, it was the duty of the landlord to make "heavy repairs," without exception of accidents by fire; and here being a case of total destruction, "such heavy repairs" could only be made by rebuilding. The examples of "heavy repairs," in the covenant, are put by way of illustration of what was so to be regarded: the duty of the landlord is not to be confined to those specific repairs; he was bound to make all "heavy repairs" which were essential to the tenant's enjoyment of the demised premises. Whatever may be the extent of the "heavy repairs" which the landlord was bound to make, he did not make them, and he is not excused from making them because they involved the necessity of rebuilding. Nor is the duty of the landlord to rebuild, affected by the obligation of the tenant to make the minor repairs; he could not make them, until the landlord had rebuilt. The tenant was by the contract to keep up the minor repairs; the landlord was to keep up the "heavy repairs." The duty of the landlord to rebuild is plainly inferrible from his contract to keep up the "heavy repairs." *Bullock v. Dommit*, 6 T. R. 650; *Brecknock Navigation Co. v. Pritchard*, Id. 750; *Pym v. Blackburn*, 3 Ves. 34, 38; *Chesterfield v. Bolton*, Com. Rep. 627. The obligation of the landlord in this case to make the "heavy repairs," was not an independent covenant; for, by the fair interpretation of the covenant, the rent was to cease during his failure. And it is immaterial whether it was independent or not, since the statute, under which the defence was made, allows, by way of setoff, any right of the defendants to relief or redress, which could be obtained in

600 any forum \*by any form of action or suit. III. Moore's testimony was properly admitted. If it was not proper to shew Thompson's own interpretation of his contract, yet it was proper for other purposes; for example, it was proper upon the question which was made at the trial, whether the burning of the mills was imputable to the tenant's own default or negligence. The court confined itself to a response to Thompson's motion, as he made it, which was to reject the evidence altogether; and if he had wished to restrain the evidence to any particular point, he should have asked an instruction (as it

was intimated to him that he might) for the purpose.

ALLEN, J. Several objections have been taken to the proceedings and judgment. The first grows out of the pleadings. The defendants tendered a plea under the statute of 1831, to the filing of which the plaintiff objected, on two grounds; 1. because no profert was made of the lease described in the plea, and 2. because it set up two distinct and independent matters of defence. An objection to the filing of a plea brings to the notice of the court such matters only as could be taken advantage of on general demurrer. The lease was not averred to be under seal; and if it had been, the failure to make profert was cause of special demurrer. So in regard to the alleged duplicity of the plea,—if both matters relied on constituted a full defence to the action, a general demurrer admitting them to be true, could not have been sustained; and if, upon the replication, one of the grounds relied on in the plea did not constitute a bar to the action, the court on motion would have instructed the jury to disregard it. And such in fact was the case in the present instance. The third instruction asked for and given, applied to so much of the plea as set out the re-entry of the landlord. The objections, both, go to the form, rather than to the substance of the plea, and were properly overruled.

601 \*The important question is, whether, under the circumstances of this case, the tenant was absolved from the payment of the rent accruing after the destruction of the demised premises by fire. The principle of law, that where a tenant covenants generally to pay the rent, he is not absolved, though the premises be destroyed by fire, has been long established, and may now be considered as settled. The hardship is more apparent than real, and the rule may be vindicated upon considerations both of justice and good policy. But, in all such cases, the rights and liabilities of the parties are to be ascertained from the terms of their contract. If there is nothing to take the case out of the operation of the general rule, it must govern, notwithstanding its supposed rigour in particular instances. But the intention of the parties, as deduced from their contract, where it contravenes no settled rule of law, must govern. And as the contract, in the case before us, is somewhat peculiar in its terms, the reported cases can furnish us but little aid, in arriving at the true meaning and intention of the parties. The clause under which the controversy arises, provided, "That the tenant was to keep up the repairs of the mills, except heavy repairs, such as if the dam or forebay should be injured by high water, or if the main shaft or wheel should give way, so as to require a new one, in this case it was to be repaired by the landlord in a reasonable time after such breach, and he was not to lose the rent if he should go on to do the work according to contract."

The title of the landlord to rent is founded on the presumption that the tenant enjoys the thing rented during the term. *Gilbert on Rents*, Law Library, vol. 20, p. 59.

This is the universal understanding of the country. In the present case, mills, with a storehouse and garden, were leased. Both parties looked to the profits to be made from the use of the mills alone, as furnishing the tenant with a support and 602 the means of "paying the rent. Their contract may be somewhat obscure, but this obscurity is increased, as it seems to me, in attempting to elucidate it by adjudged cases on the effect of covenants to repair and rebuild. Keeping in view the fundamental principle, in the contemplation of these parties when they contracted, that the title to rent is founded on the presumption of enjoying the thing rented, their meaning is clear. The light repairs, of almost daily necessity in machinery of this kind, could be made frequently in a few minutes, and without materially or at all impairing the use and enjoyment of the premises. These the tenant was to make. The "heavy repairs," of the character designated, might not be required during the term: the substantial parts of the machinery would rarely require them. But property of this kind being liable to injuries from floods and other casualties, provision was made for those repairs should they be necessary: and though the tenant, during the time necessary to make them, agree to pay the rent provided the landlord proceeded to do the work in a reasonable time, he did so upon the assurance that his loss of the use would be but temporary, and that he would be compensated by future enjoyment. The burthen, during a temporary suspension, would be borne by each; the tenant losing the rent and the landlord the cost of repairs. But if the landlord refuse to make the "heavy repairs," he was to lose the rent. This is a necessary implication from the words used; for it would have been idle to say he was not to lose the rent if he went on with the repairs, if the parties did not understand that his failure to make them should deprive him of the rent. And this conforms with the spirit and intention of the parties. As long as the tenant actually enjoyed or had the prospect of enjoying the thing, he was to pay rent; when the enjoyment ceased through the default of the landlord, the rent ceased. If this was the leading motive of the parties, would it not defeat the great 603 object they "had in view, to hold, that though rent should cease from the failure of the landlord to make "heavy repairs," because the tenant thereby was deprived of the temporary enjoyment of the thing; yet, when the property was destroyed, wholly depriving him of the use of the demised premises, and the landlord declined to repair, he should still pay rent? This would indeed be to make a part greater than the whole. By a partial injury from fire, the burning of the main shaft for instance, the rent would be suspended, unless the landlord repaired; but if main shaft, building, dwelling house and all were consumed, the landlord was to be relieved from all charge, and the tenant be compelled to pay the whole rent. Such a construction, it strikes me, violates the whole scope and spirit of the contract. It looked to the enjoyment of the property

by the tenant, and imposed upon the landlord the burden of making all such repairs as would be essential to such enjoyment. The classes enumerated are merely intended to discriminate the kind of repairs each was to make. And whenever it became necessary to make "heavy repairs," or, in the case which has occurred, to rebuild, so as to enable the tenant to use the thing rented, the landlord was bound to secure such enjoyment to the tenant, under the penalty of losing the rent.

Some weight has been attached to the use of the word repair, in this contract. It has been argued that the word implies the continued existence of the thing to be repaired, and that, therefore, the parties could not have looked to rebuilding, to the erection of a new mill, in the case of total destruction. I doubt whether the parties to this inartificial contract, weighed with much nicety the true import of the words by which they have attempted to express their meaning. If we desired proof of this, the clause of their contract under consideration, furnishes it. It is provided, that "if the main shaft or wheel should give way, so as to require a new one, in this 604 case it is to be repaired by the landlord:" here, they use the word in a sense different from its literal meaning; not to amend what exists, but to make something entirely new. Even if we were tied down to the strict meaning of the word, it would not vary the aspect of the case. The dam, as well as mills, were leased; all were parts of one whole; and though the house containing the machinery was consumed, the dam, foundation &c. remained, and the superstructure to be erected and attached to the remnants of what continued, may be included in the meaning of the word "repair." But looking at the spirit and intention of the contract, we are not driven to any such technical considerations.

In this view of the case, it becomes unnecessary to consider whether the contract bound the landlord to rebuild. At first, I felt inclined to the opinion that the stipulations of the agreement did amount to a covenant on his part to rebuild. But subsequent reflection has led me to doubt the correctness of this impression. Each party, by the contract, held his remedy in his own hands. The landlord was at liberty to repair or rebuild as he thought proper. By failing to do the work, he lost the rent; by going on, he maintained his right to it. And as the obligation of the tenant to pay the rent resulted from his ability to enjoin the thing, if, in the case contemplated, he could not, through the failure of the landlord, enjoy it, he was authorized to withhold the rent. In this view too, the court did not err in instructing the jury that the obligation to pay ceased from the time the mills were destroyed, the landlord having avowed his determination not to rebuild. For from that time the actual use of the thing by the tenant, and all prospect of future enjoyment, terminated.

As to the objection to Moore's testimony—the court below held, that it was legal evidence, and admitted it, but said it was a question for the jury, under the advice of the court if asked, how far it

605 ought to avail. If the \*testimony was offered to affect the construction of the written agreement, it would have been clearly inadmissible. But it does not appear that such was the object. The defendants had pleaded that the mills were burnt without default of the tenant; and from one of the instructions, asked for by the plaintiff, and given, it would seem that the point arose before the jury whether the mills were not burnt through the culpable negligence of the tenant. The jury was instructed that if the mills were burnt through his culpable negligence, then the tenant was bound to pay the rent. Upon this point, the evidence was admissible, as tending to shew that the plaintiff, at one time, did not impute any negligence to the tenant. The motion went to reject the evidence altogether. The court was bound to overrule such an objection; and it does not appear that any motion was made to instruct the jury as to the effect of the evidence, although the court, in admitting it, intimated a willingness to instruct the jury as to its effect, if its opinion was asked.

Upon the whole, I think the judgment is right and should be affirmed.

STANARD, J., concurred.

TUCKER, P. In this case I have the misfortune to differ from my brethren upon the construction of the contract between the parties, though it is probable we may not differ materially as to the general principles of law which apply to cases of this description. I shall take it, therefore, as the general rule, both in equity and at law, that a tenant is not absolved from the payment of his rent by the accidental destruction of the premises by fire; nor shall I think it necessary to establish the principle by authority, as the question in this case is supposed to turn, not so much on the general principle, as on the construction of the covenant in the lease. To this I shall therefore particularly address myself.

606 \*And first, let me observe, that the stipulation in the contract (on the part of the landlord) to repair, can, by no fair interpretation, be construed to mean a covenant to rebuild. To rebuild is to re-erect what has been destroyed: to repair is to mend or make good that which by wear and tear, or otherwise, has been impaired, or only partially destroyed, but which still has existence. To repair, and to rebuild, are not therefore convertible terms. It is an abuse of language so to consider them. We do not repair what is destroyed; we rebuild it. We do not rebuild what is partially injured or impaired; we repair it: for to repair is to amend or restore to a good state after injury, decay or partial destruction. It implies the continued subsistence of the thing to be repaired. And as long as language shall give us distinct words for different ideas, it is wise to use them, and understand them, in their different senses. By confounding them, we shall confound also the meaning of contracts, and violate the intention of parties.

Cases, however, have been cited, where a party has been held to rebuild, though that term is not to be found in the contract.

But in those cases, equivalent terms are found. As in the case of the bridge, (6 T. R. 750,) the workman covenanted to build it across a river, and to uphold and keep it in repair for seven years; and he was held bound to rebuild it when washed away. But there, not only did the nature of the engagement shew the intention of the parties that he should rebuild it, but the term uphold distinctly bound him to it. For the lexicographers tell us that to uphold is to maintain, to keep up, to continue in being, to support in any state; so that the covenant was in effect to keep up the bridge, and to continue it in the state in which it was, for seven years. So in *Bullock v. Dommitt*, the covenant was to repair, uphold, support, maintain &c. In *Dyer 33*, the covenant was to repair and sustain; and the word "*sustain*" is italicised. In *Com. Rep. 626*, *Chesterfield v.*

607 \**Bolton*, the covenant was to leave in repair; and in *Brook's Abr. Cov. pl. 4*, the case supposed is of a covenant to leave in the same plight. Now, all these imply, or mean expressly, that the tenant so covenanting shall rebuild. And the same may be said of *Walton v. Waterhouse*, 2 Saund. 420, where the words are "repair, uphold, support, maintain and keep in repair as often as occasion shall require." There is then no case in which to repair, standing alone, has been construed to mean rebuild.

The language of the covenant in this case is altogether different from the cases cited. *Pendell* engaged to keep up the repairs of the mill, except "heavy repairs," which are to be made by *Thompson*; and if I am not mistaken in the interpretation given to the term "repairs," there is nothing in the contract which binds him to rebuild, or deprives him of his rent on his failure to rebuild in a reasonable time.

It is said, that as the contract provides, that the rent shall not be suspended where "heavy repairs" are required, if *Thompson* should go on to do the work according to contract, it is implied, that it shall be suspended if he does not. This I do not deny: but I cannot admit another deduction built upon it; that if the rent is to be suspended where there is partial injury, it must a fortiori be suspended, or totally lost to the landlord, where there is entire destruction. The law having established that the tenant shall not be absolved from rent by the destruction of the premises, unless it is so expressly provided by the contract, I cannot think that we are justified in interpolating such an exception into the contract for his benefit. It would indeed be the more unreasonable, since he has actually provided for the suspension of the rent in a particular case; that is to say, while the landlord delayed the repairs he was bound to make. Nay more; with the very idea of "accidents by fire and the act of God"

608 in his mind, and \*while he provides that he shall not be liable for them, he does not provide that his landlord shall be. How can we tell that the landlord would have assented to such a provision? How can we say, that he was willing to relinquish the benefit of that legal principle, which secured to him his rent, even

though the mill should be burned down? How can we say, that he was willing to surrender this just and equitable principle which, in the absence of a contrary stipulation, distributes the loss upon the parties according to their respective interest,—the tenant losing his lease, the landlord his reversion? How can we say, that Thompson would have been willing to be the insurer of the property during the continuance of the lease, without requiring additional rent to cover the hazard? Above all, how can we infer his willingness to assent to a provision, which, in the event that the lease proved a losing bargain to Pendell, would be a premium for its destruction? Shall we infer it by an argument *a fortiori* from the provision that the rent should be suspended in the event of Thompson delaying to do the "heavy repairs" when required? That provision was no premium for injury or negligence. If the shaft should give way and Thompson should immediately proceed to repair, the rent would be going on, while the profits, only, would be suspended; and thus the tenant would have every motive to prevent those injuries, which would be more detrimental to him than to the landlord himself. But if the rent is to be suspended until the landlord shall enter upon the arduous and expensive duty of rebuilding, which it might not be his interest or within his power to undertake, the tenant might be absolved forever from an onerous contract, through his own negligence or perfidy. Such a construction I am not disposed to give to this contract. If the tenant desired to protect himself against the rent in case of fire, until the landlord should rebuild, he ought so to have provided. The provision is too momentous to be \*taken by loose inference from less important stipulations. The less may often be inferred indeed from the greater; but it is I think against every principle of interpretation, to infer the greater from the less. *Expressio unius exclusio alterius*, can never apply more strongly, than against such a construction. For it not only does not exclude what is not expressed, but it includes by inference, the greater in the less, contrary to the fair presumption, that if the greater had been intended it would have been mentioned rather than the less.

Judgment affirmed.

610 \*Caruthers's Adm'rs v. The Trustees of Lexington.

August, 1841, Lewisburg.

(Absent TUCKER, P., and CABELL, J.)

Equity Jurisdiction—Bill for Account—Laches—Case at Bar.—A lottery is authorized in 1802, for relief

\*Equity Jurisdiction—Laches.—Nothing can call forth a court of equity into activity, but conscience, good faith, and reasonable diligence? Where these are wanting the court is passive and does nothing. Laches and neglect are always discountenanced. See the principal case cited in *Doggett v. Helm*, 17 Gratt. 97; *Tebbs v. Duval*, 17 Gratt. 349; *Green v. Thompson*, 84 Va. 306, 5 S. E. Rep. 507; *Perkins v. Lane*, 82 Va. 62.

Same—Same—Death of Parties—Loss of Papers.—For the proposition that equity does not lend its aid

of sufferers by fire in Lexington, but commissioners, with consent of greater part of the sufferers, determine to apply the proceeds of the lottery to the construction of roads through the town; about 2000 dollars are obtained by the lottery, which is drawn in 1805; by application of funds derived from lottery and of private subscriptions and of a donation from the legislature, the roads are completed in 1808-9; J. C. was the treasurer, and W. C. secretary, of the lottery, but W. C. was the chief manager, and actually received and disbursed the greater part of the funds; W. C. died in 1817; in 1837, by act of assembly, the balance in hands of the treasurer of the lottery, is vested in the trustees of Lexington, the treasurer or his representative is required to settle with them, and to pay them the balance, and in case of failure, they are authorized to recover it by action of debt; and in 1830, trustees bring bill in chancery against the adm'rs of W. C. for an account of the lottery fund: HELD, equity will not entertain a bill for an account of such stale transactions, when all parties to the transactions, who could explain them, are dead; and bill dismissed.

The general assembly passed an act in 1796, authorizing certain commissioners therein named to raise by lottery, 25000 dollars, to be applied towards the expense of rebuilding houses consumed by fire, shortly before the passing of the act, in the town of Lexington. The commissioners took no steps to carry the act into execution, and the sufferers by the fire rebuilt their houses with their own means.

Some four years afterwards, it occurred to some of the citizens of the town, that the benefits intended for individuals by the act, might be in part realized to them, and to the community at large, by appropriating the money to be raised by the lottery, to the construction of a road across the north 611 and south mountains, passing \*through Lexington, and that a lottery for such a purpose would be more popular, and therefore more likely to succeed, than if the proceeds were to be applied to the indemnification of individuals for private losses; and the sufferers by the fire, or the greater part of them, assented to such an application of the money to be raised by the lottery.

to enforce stale demands, when, by reason of the death of parties or witnesses, the loss of papers, or other circumstances, there is danger of doing injustice, and there can no longer be a safe determination of the controversy, see the principal case cited with approval in *Bargamin v. Clarke*, 20 Gratt. 553; *Morrison v. Householder*, 79 Va. 631.

Same—Same—Same—Same.—If, from delay to demand settlement, no correct account of administration can be rendered, and any conclusion arrived at, must at best be conjectural, and the transactions are so obscured by time, loss of evidence, and death of parties, as to make justice difficult, the courts will not relieve the plaintiff. As authority for this proposition, the principal case is cited and expressly approved in *Turner v. Dillard*, 82 Va. 540; *Stamper v. Garnett*, 31 Gratt. 504. The principal case is cited with approval in *Poster v. Rison*, 17 Gratt. 341. See *Carr v. Chapman*, 5 Leigh 164; *Nelson v. Kownslar*, 79 Va. 468; *Perkins v. Lane*, 83 Va. 59. See foot-notes to *Doggett v. Helm*, 17 Gratt. 96; *Atkinson v. Robinson*, 9 Leigh 383; *Bargamin v. Clarke*, 20 Gratt. 544; *Carter v. McArtor*, 28 Gratt. 356, and monographic note on "Laches" appended to *Peers v. Barnett*, 12 Gratt. 410.

In 1802, the general assembly passed another act, reciting, that by reason of the failure of the commissioners to proceed under the act of 1796, that act had not been carried into execution, and therefore appointing other commissioners; but without saying any thing as to the new application intended to be made of the money to be raised by the lottery. The commissioners named in this last act, met in 1803, and took measures for carrying the act of 1796 into execution. A committee of three managers was named, John Caruthers was appointed the treasurer, and William Caruthers the secretary; and it was made the duty of the secretary to distribute tickets for sale, to contract for printing, and to communicate with persons at a distance respecting the sale of tickets.

The managers determined to make an experiment with one class of the lottery, by which they hoped to raise 5000 dollars. Tickets were accordingly distributed by the secretary, but the whole of them could not be sold. The lottery was drawn in August 1805.

The managers proceeded to make contracts for opening the roads, and applied the money raised by the lottery to defray the expense thereof. The community, interested in the improvements, aided it by private subscriptions. And in 1808, the general assembly likewise gave its aid to the work: by an act passed in that year, reciting that the sufferers by the fire had transferred their rights to the money raised by the lottery, to the managers thereof, for the purpose of opening the roads before mentioned, and that the managers had opened a road over the south mountain, but had not sufficient funds to complete the \*road over the north mountain, 1000 dollars was appropriated, to be expended by commissioners named for the purpose.

The roads were completed in 1808 or 1809.

The last meeting of the managers of the lottery was held in November 1808; at which a committee was appointed to settle the accounts of William Caruthers; but whether any settlement was made, or attempted, no wise appeared.

In 1810 or 1811, Abraham Smith and Juliet his wife, and Margaret Lyle, sufferers by the fire, brought a suit, in the superior court of chancery of Staunton, against the commissioners for drawing the lottery named in the act of 1802, insisting that the money raised by the lottery should be applied to their relief, according to the intent of the acts by which the lottery was authorized, and praying an account of the funds which had been thereby raised. But neither the bill, nor any other part of the record in that suit, was exhibited in this suit, except only the answer of the commissioner; wherein they insisted the claim of the plaintiffs to fix a personal liability on them for the misapplication of the money raised by the lottery, and stated, that not quite half the tickets of the first class of the lottery were sold, that the actual proceeds of it were only 2000 dollars, that this sum had been appropriated to the opening of the roads, and that the outstanding claims against the agents for selling the tickets had not then been fully settled up. This case of Smith and Lyle against the commissioners, was finally de-

cided in favour of the commissioners, but not till after the death of William Caruthers, which occurred in 1817.

Ten years after, namely, in 1827, an act of assembly was passed for extending the limits of the town of Lexington; whereby, among other things, the surplus money raised by lottery under the former acts, 613 and then \*remaining in the hands of the treasurer of the lottery, or of his representatives, was vested in the trustees of the town, and the treasurer or his representatives were required to settle the accounts with the trustees, and to pay over to them the balance in hand, deducting legal charges; and in case of their failure to do so, the trustees were authorized to sue for the sum due by action of debt.

In 1830, the trustees of Lexington exhibited their bill, in the superior court of chancery of Staunton, against the administrators of William Caruthers, alleging that he was the treasurer of the lottery, that large funds came into his hands, and that he died in 1817, without having settled his accounts; that it appeared by the accounts and books of Caruthers and by a memorandum in his own handwriting, that he was a debtor to the lottery in a large balance; and that the reason why the accounts were not settled during his life, was; that Smith and Lyle had brought a suit in chancery to have the funds raised by the lottery applied to indemnify them against losses sustained by the fire. Therefore, the bill prayed, that the administrators of Caruthers should render an account of his transactions as treasurer of the lottery, and a decree for the balance which should be found due thereon.

The administrators of Caruthers answered, that they had no knowledge whatever of the lottery transactions, but they exhibited all the documents relating to them they could find. They said, that their intestate was not the treasurer of the lottery, but the secretary; that John Caruthers was the treasurer; that their intestate could not be held liable for any balance in the treasury, if there was any balance; and that from all the information they could procure, they believed that nothing was due to the lottery from their intestate, or from any body else. They exhibited the answer of the commission-

614 ers \*of the lottery to the bill of Smith and Lyle, to shew that only 2000 dollars was raised by the lottery, and shewed many receipts for moneys expended on the roads. They suggested, that the impression that a balance was due from their intestate, had grown out of an account on the books of Isaac Caruthers & Co. of which their intestate William was a partner; which account they exhibited, and denied that it afforded any evidence of the indebtedness of their intestate to the lottery. And they objected, that they could not justly, and ought not to be called to account at this late day, when all the persons acquainted with the transactions were dead, and it was therefore impossible to render a just account.

The account exhibited with the answer, between The Lottery and Isaac Caruthers & Co. shewed a balance due the lottery, in October 1813, of £411. 15. 2. and it was stated, in the handwriting of William

Caruthers, that this was "a balance due the lottery to be paid by William Caruthers on a settlement with him:" but it was manifest, that there was an individual account between William Caruthers and The Lottery, which was to be settled, and by which the true balance was to be ascertained.

The cause having been transferred to the circuit superior court of Rockbridge, that court referred the accounts to a commissioner.

The commissioner reported, that the want of a general account, which William Caruthers ought to have kept with the lottery, and which without doubt he must have kept, but which his administrators could not produce, left the subject in much darkness, upon which that account alone could throw light: that he had, with great labour, examined the books of Isaac Caruthers & Co. and the books kept by William Caruthers, and all the other documents laid down before him. And he reported a balance due from William Caruthers, of 1128 dollars.

615 \*The defendants filed eighteen exceptions to the details of the account reported by the commissioner.

The court overruled the exceptions; and holding that, under all the circumstances, the lapse of time was not an obstacle to the relief; that though William Caruthers was not the treasurer of the lottery, he acted as such, and received and disbursed all the moneys raised from the lottery; and that, acting as treasurer, it was his duty to have kept regular accounts shewing the true state of the lottery fund, which he had failed to do, and if there was any difficulty in ascertaining the just balance due from him, it was owing to his own fault; therefore, the court decreed, that the administrators of William Caruthers should pay the trustees of Lexington, out of the estate of their intestate, the sum of 1128 dollars, with interest from the 27th February 1827, the date of the act of assembly vesting the balance of the lottery fund in the trustees.

From this decree, the administrators of Caruthers, by petition to this court, prayed an appeal; which was allowed.

The cause was argued here, by G. N. Johnson and the attorney general for the appellants, and by Cooke for the appellees.

I. The counsel for the appellants insisted, that the act of assembly of 1827, was founded upon the supposition, that the accounts of the treasurer of the lottery had been settled, and that the balance due upon them had been ascertained and was acknowledged; therefore, the act vested the property in that balance in the trustees of Lexington, and gave them an action of debt to recover it: but it gave them no right to a bill in chancery to bring about a settlement of these old accounts after all the persons, who had any knowledge of the transactions, and who were able to explain them, were dead. The act too gave

616 the action of debt against the \*treasurer of the lottery, or his representatives; but John Caruthers was the treasurer, and William only the secretary: the suit therefore should have been brought against John; or if William acted as treasurer,

John or his representatives should at least have been made a party.

The counsel for the appellees answered, that it appeared, clearly, that William acted as the treasurer, nor was there any reason to believe that John ever interfered at all. The statute vested the whole balance due, in the trustees of Lexington, and required that the treasurer should settle his accounts with them, and then gave them an action of debt for the balance: but it was necessary to settle the account before the action of debt could be brought. The title to the balance was vested in the trustees; and the court of chancery was the proper tribunal to settle the accounts, and ascertain the balance. The form of the remedy was immaterial: the right was given to the trustees, and they resorted to the most convenient and proper remedy, a bill in chancery, to have the accounts adjusted.

II. The counsel for the appellants maintained, that this was a stale transaction and equity ought not to entertain the bill. If the statute intended, that the trustees might resort to equity to have an account settled, it surely never intended to authorize a bill for the settlement of such an account; a bill, which, on its general principles, equity could not entertain. The lottery was drawn in 1805; the money actually received from it, must have been disbursed as early as 1808 or 1809, when the roads across the south and the north mountains were completed; something, it seemed, remained due, not from the treasurer, but from agents for selling the lottery tickets; William Caruthers died in 1817, and this bill was filed thirteen years afterwards, when no person was living who had any part in the transactions, or could give any explanation of them. To authorize such an account were to authorize a palpable injustice.

617 \*The counsel for the appellees answered, that it was plain the account had never been settled; and the reason was, that Smith and Lyle set up a claim to the money raised by the lottery. The commissioners, in their answer to that bill, said, that the accounts remained to be adjusted; that was in 1811. The suit of Smith and Lyle was not decided until after the death of Caruthers in 1817. Caruthers then died without settling the accounts. The question is, whether, at the time the act of assembly vesting the balance in the trustees was passed, namely, in February 1827, these accounts were so stale, that a court of equity ought not to entertain a bill for the settlement of them? The legislature did not think so; for it required the debtor to settle the accounts. Nor is a lapse of ten or thirteen years enough to bar the settlement asked by the trustees.

III. The remaining questions discussed at the bar, arose upon the exceptions to the commissioner's report; but these turned upon matters of fact.

ALLEN, J. It was objected, in the first place, that the act of assembly of 1827 did not authorize a proceeding in chancery; and that if, under a liberal construction of the act, such a proceeding could have been maintained, the act authorized a proceeding against the treasurer or his representatives, and as it appears, that John and not Wil-

liam Caruthers was the treasurer, the plaintiffs had no authority to proceed against the representatives of William. In the view this court takes of the case, it is unnecessary to decide these questions. Grant that the trustees of Lexington had a right to proceed by bill in equity, and that William Caruthers, though not regularly appointed treasurer of the lottery, acted as treasurer, have the trustees made out such a case as entitles them to relief in equity?

It seems to me, that, after the great lapse of time which has occurred, the death of all the parties who \*could throw light on the transactions, and the impossibility, with the scanty materials before us, to settle the account correctly, the court below, upon the coming in of the commissioner's report, ought to have dismissed the bill. The lottery was drawn in 1805. The roads, to the construction of which the money was applied, appear to have been completed in 1808 or 1809. From that period till 1817, when Caruthers died, the commissioners of the lottery seem to have concerned themselves no further with the matter, except to file an answer in 1811 to a bill of Smith and Lyle. In 1808, the last meeting of the commissioners of which we have any evidence, took place; and then a committee was appointed to settle Caruthers's accounts with the lottery. And twenty-two years afterwards, and thirteen years after the death of Caruthers, this suit is brought.

In *Pickering v. Ld. Stamford*, 2 Ves. Jr. 583, the master of the rolls said, "that parties shall not, by neglecting to bring forward their demands, put others to a state of inconvenience subjecting them to insuperable difficulties. Against such a bill undoubtedly the court ought to set its face."—"If, from the plaintiffs lying by, it is impossible for the defendants to render the accounts he calls for, or it will subject them to great inconvenience, the plaintiff must suffer, or the court will oppose, what I think the best ground, public convenience." The English cases refusing relief after a great lapse of time, were reviewed and approved by this court in the case of *Carr's adm'r v. Chapman's legatees*, 5 Leigh 164, 178, where it is said, that "the principles deduced from the English cases are fully supported, if not advanced a step, by the spirit of our own decisions and of our legislation also." The same principles are affirmed in *Hayes v. Goode*, 7 Leigh 452. And in *Atkinson v. Robinson*, 9 Leigh 393, 396, the court held, "that even if it were clearly proved, that the decedent Beverley Robinson had, in the last hours of his life, acknowledged that the \*debt to Smart, which the complainant claimed, had not been fully discharged, yet the amount remaining due was uncertain, and could only be ascertained by a settlement of accounts in reference to transactions more than twenty-seven years old at the commencement of this suit, and now of more than thirty-seven years standing. Such an account ought not to be decreed; for every claimant who asks relief of a court of equity ought to exhibit his claim within a reasonable time, so that, in giving him a decree, the court may

not do injustice to the defendant." No particular period is fixed by the cases as limiting the demand for an account. If, from the delay which has taken place, it is manifest that no correct account can be rendered, that any conclusion to which the court can arrive must be, at best, but conjectural, and that the original transactions have become so obscured by time and the loss of evidence and the death of parties, as to render it difficult to do justice, the court will not relieve. It is the duty of the plaintiff in equity, as well as at law, to establish his title to the relief sought for, by satisfactory proof; it will not answer to shew a probable title to something. He must satisfy the court, that it can extend relief without the hazard of doing injustice to the defendant.

To apply these principles to the present case: William Caruthers was the secretary, not the treasurer, of the lottery. As secretary, it was his duty to keep the accounts with the agents to whom tickets were entrusted for sale. That account seems to have been kept by him, and furnishes the basis of the account reported by the commissioner. But this account does not prove, that he acted as treasurer in fact: it was kept by him as secretary, in discharge of his duties as secretary. The evidence shews that he was the active and efficient manager of the business, and, taken altogether, raises a strong presumption, that most of the receipts and disbursements passed through his hands. Still, no account \*kept by him as treasurer, or by any other person, is produced, though in all probability such an account was kept, by some person, somewhere. The evidence does not shew, that he received all the proceeds arising from the sale of the tickets, or made all the disbursements. There was a treasurer, who may have transacted part of the business. Yet the first step in the account, is to charge him, as treasurer in fact, with the price of all the tickets disposed of. The evidence shews a great anxiety, on the part of the managers, and of the community, for the completion of the roads. A private subscription was raised in aid of the lottery fund: can we suppose, that this would have been done, if a large fund remained in the hands of Caruthers? In 1808, the legislature contributed 1000 dollars, reciting in the act, that the funds raised by the lottery were insufficient. These circumstances, taken in connexion with the silence of all parties afterwards, render it extremely improbable, that such a fund could have been lying in the hands of the secretary unappropriated.

It was contended, that the lottery fund was arrested in the hands of Caruthers, by the suit of Smith and Lyle, and that this explains why the accounts were not settled, and the balance was not exacted. The record of that suit is not exhibited in this. To sustain their proposition, the plaintiffs are themselves obliged to rely on the answer of the commissioners in that suit; and that answer, when looked to, repels the idea that there could have been any balance. The commissioners set out the difficulties they had to encounter, and their



inability to dispose of half of the lottery tickets: they aver, that they realized not more than 2000 dollars, and that the money (together with the private subscriptions and the donation of 1000 dollars from the legislature) was appropriated to the road. And they, throughout, resist the claim of those plaintiffs, as an attempt to fix a personal liability on them for a mis-  
621 application of the fund, \*that is, of the whole fund. They say, indeed, that the outstanding claims on agents had not then been fully settled up: were they ever fully settled up, and by whom? by the secretary, or by the treasurer? All this is left, by the evidence in this cause, absolutely uncertain.

The principal ground on which the plaintiffs rely, is the account between The Lottery and Isaac Caruthers & Co. exhibited with the defendants' answer. [Here, the judge entered into an examination of that document, and shewed that it furnished no evidence of William Caruthers's indebtedness to the lottery; and then into an examination of the exceptions to the commissioner's report, and detected many errors in it.]

These considerations shew the great injustice likely to be inflicted, by an attempt to go into an account of such stale transactions, after the death of all the parties who could give satisfactory explanations. The act of 1827, authorizing the suit, does not obviate the objections to an account of such transactions. That act was passed under an impression, that an ascertained balance remained in the hands of the treasurer, because there was no person authorized to demand it. The balance was vested in the trustees of Lexington, and they were authorized to bring an action of debt for it; which plainly shews, that the legislature, if it intended a proceeding by bill in chancery at all, did not mean to sanction a bill for the settlement of stale accounts. Whatever may have been the motives of the legislature, there is nothing in its act to impair the rights of the parties. There is nothing in the actual case, to relieve the plaintiffs from the necessity of establishing their claim by satisfactory evidence. This they have failed to do: on the contrary, the case, as it now stands, leaves the impression, that the proceeds of the lottery have long since been appropriated; and it is evident, that, at this period, with the materials that have been collected, no  
622 \*account likely to do justice between the parties can be taken.

I am of opinion, that the decree should be reversed, and the bill dismissed.

The other judges concurred. Decree reversed, and bill dismissed.

#### Wallace for the Benefit of Bradley v. Shaffer.

August, 1841, Lewisburg.

(Absent TUCKER, P., and CABELL, J.)

Title Bond—Condition to Convey Good Title—Plea "Conditions Performed"—Case at Bar.—Title bond executed by S. to W. with condition, that S. should

convey good title to W., not to him and his assigns, in 200 acres of land; this bond is assigned by W. to M. and by M. to B. and while the bond is held by M. the first assignee, S. and his wife make a conveyance of the title to M. who refuses to accept the same: in action by W. for benefit of B. the last assignee, and upon pleas of conditions performed, and of conveyance to M.—HELD, that the condition of the bond requires that the title shall be made to W. and, if there was proof of a conveyance of title to M. that would not sustain the plea of conditions performed, and the second plea of a conveyance to M. is nought.

This was an action of debt brought by Wallace, for the benefit of Bradley, against Shaffer, in the circuit superior court of Washington, for 400 dollars, the penalty of a bond conditioned for the conveyance of title to a parcel of 200 acres of land.

The declaration set out and made profert of the bond, and set out the condition, that Shaffer should make or cause to be made to Wallace, a good and complete title to a 200 acre tract of land, lying in Morgan  
623 county, \*Tennessee, on the Clear Fork of Cumberland, being the same 200 acre tract purchased of Lawrence Scott; and assigned the breach of the condition, that Shaffer had not made or caused to be made, to Wallace, or any other person having a right to demand the same under the obligation a good and lawful title to the said parcel of land.

Shaffer took over of the bond and of the condition; and the condition was, that Shaffer should make or cause to be made to Wallace a good and lawful title to a 200 acre tract of land lying and being in the county of Morgan on the Clear Fork of Cumberland, being the same 200 acre tract purchased from Lawrence Scott. And it appeared by endorsements on the bond, that it had been assigned by Wallace to Jacob Miller, and by Miller to Abraham Bradley, for whose benefit the suit was brought. And then he pleaded, 1. Conditions performed; and 2. That after the bond had been assigned to Miller, and before it was assigned by Miller to Bradley, the defendant and his wife executed a deed conveying the land to Miller, and acknowledged the same before two justices of the peace of the county of Washington, Virginia, and tendered the deed so executed and acknowledged to Miller, who was then and there the proper person to receive it, he then holding the bond, and that Miller refused to receive the deed; and the plea averred, that the land conveyed by the deed was the same land mentioned in the condition of the bond. General replications were put in to the pleas, and issues were made up.

At the trial of the issues, Shaffer offered in evidence to support his first plea, a deed with the certificates annexed of the acknowledgment thereof, to the introduction of which the plaintiff objected, and the court refused to admit it, on the ground that the defendant was bound to shew that the deed, with the certificates thereto annexed, was sufficient to convey the land, accord-  
624 ing \*to the laws of Tennessee, and as those laws were not laid before the court, it could not judicially know that the deed was sufficient. The defendant excepted. The jury having, upon all the evi-

\*See monographic note on "Bonds" appended to Ward v. Churn, 18 Gratt. 801.



dence. found a verdict for the defendant, the plaintiff moved the court for a new trial, which motion the court overruled; and the plaintiff filed a bill of exceptions, stating the facts proved at the trial—That the plaintiff, having given in evidence the title bond, which was assigned by Wallace to Miller, and by Miller to Bradley, further proved on his part, that neither Lawrence Scott nor the defendant owned, or ever had owned, any land in Morgan county, Tennessee, on the Clear Fork of Cumberland; that the tract of land described in a grant from the state of Tennessee to the defendant, and in the deed offered by the defendant in support of his pleas, (the same mentioned in the first bill of exceptions,) was situated at the forks of Cook's and Crabtree's creeks, streams flowing into Emery's river, a branch of Clinch's river; and that the consideration paid by Wallace, on his contract with the defendant, was 200 dollars, part of the price of a slave. And the defendant, on his part, introduced a grant from the state of Tennessee to him, in pursuance of an entry made in the entry-taker's office in Morgan county by Charles Atkins, of 200 acres, lying in the said county, on the waters of Clear Creek, describing the same by metes and bounds; and he proved, by one witness, that the land granted to him was equal or superior in quality to lands on the waters of the Clear Fork of Cumberland, and that it lay within about four miles of the waters of that stream; and he then proved, in mitigation of damages, that he and his wife acknowledged the deed mentioned in the first bill of exceptions, and excluded, before two justices of the peace of Washington, Virginia, conveying the land granted to him to Miller, and that Miller, who

625 then held the title \*bond, was satisfied with and agreed to accept the deed, and to surrender the title bond, saying he had before doubted Shaffer's ability to make him a good title, but he now perceived he could do so: that the deed, however, was not delivered to Miller, but was left with one of the justices before whom it was acknowledged, and was never applied for by Miller, who refused to accept it, or to surrender the title bond, and soon after assigned the bond to Bradley: that the land covered by the grant to Shaffer, and which was described and intended to be conveyed by the deed of Shaffer and wife to Miller, was the same land which was sold by Lawrence Scott to Shaffer, and which was included in Shaffer's grant; and that the consideration of Bradley's purchase of the title bond from Miller, was 1060 acres of hilly land of little value, being not worth more than six and a quarter cents per acre. It was then proved by seven witnesses for the plaintiff, that the land described in the defendant's grant was not nearer than eight or ten miles to the Clear Fork of Cumberland, and that it was inferior in value to lands on that stream, the whole tract not being worth more than 50 dollars. Whereupon, the court said, that the grant issued by the state of Tennessee to Shaffer, assignee of Atkins, for 200 acres of land, described the tract as lying on the waters of Clear Creek, which, in the absence of all

testimony on the subject, the court took to be the same as the Clear Fork of Cumberland river; that the waters of that creek probably interlocked with those of Cook's and Crabtree's creeks, on which many of the witnesses said the land lay; but, however that might be, there was no allegation or proof that any of the parties had ever seen the land sold, or the county in which it lay: that, from a knowledge of the country, lands on the Clear Fork of Cumberland were more desirable, or more valuable, than lands on Cook's and Crabtree's creeks,

626 and the \*purchase was made in reference to the locality of the lands on the first mentioned of the streams; yet it was manifest to the court, that it was a mistake in the description, that the land lay on the Clear Fork of Cumberland; that if the truth had been known, it would not have affected the contract, which was a loose one, mainly dependant, for its description, on the fact that the land sold was the 200 acres purchased of Lawrence Scott; that it was manifest from the testimony, that the land attempted to be conveyed by Shaffer's deed to Miller, was the only land ever purchased of Scott, and was the land sold to Wallace, and whether it lay on the Clear Fork or not, did not, under the circumstances, seem to be material, since it was evident, that neither Wallace nor his assignee was influenced in his purchase by the locality of the land, and it appeared doubtful which was the most valuable, land lying on the Clear Fork, or land on Cook's and Crabtree's creeks: that the goodness of the title was the main object in the purchase. That it appeared, that Miller, while the contract was his, accepted the deed executed to him by Shaffer and wife; and if that had appeared when the court decided against the admission of the deed in evidence, a different decision would probably have been made on the ground of the acceptance; but the deed was offered and rejected before any proof of Miller's acceptance of it was given. Upon the whole case, the court, thinking that substantial justice had been done by the verdict, refused to set it aside, and overruled the plaintiff's motion for a new trial.

The court then gave judgment for the defendant according to the verdict; to which this court allowed the plaintiff a supersedeas.

Johnston for plaintiff in error.

Fulton for defendant.

627 \*PER CURIAM. The circuit superior court erred in overruling the plaintiff's motion for a new trial. The verdict of the jury was not sustained by the evidence, the plea of conditions performed being altogether unsupported. No evidence appears to have been introduced even tending to prove the making of a deed to Wallace, to whom, by the condition of the title bond, it was to have been made. The imperfect proof of the execution of a deed to Miller, was not evidence under the plea of conditions performed; nor would the deed have been evidence under that plea, if the proof had been complete. As to the second plea of the defendant, it was manifestly bad, since Miller, though the owner of the

title bond, was not the person to whom the title was to have been conveyed; and, therefore, he had a right to refuse to accept it, as he is alleged in the plea to have done.

Judgment reversed, and cause remanded for a new trial.

### Craigen's Ex'x v. Lobb.

August, 1841, Lewisburg.

(Absent TUCKER, P., and CABELL, J.)

**Clerk's Fees—Right to Set Off—Case at Bar.**—Though no action lies for clerks' fees, till they shall be put into an officer's hands for collection, and he has returned that they cannot be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due.

**Same—Limitation of Claim for.**—And if the clerk's fees were never put into an officer's hands for collection, there was not, till the statute of 1839, any limitation to the clerk's claim for them.

Debt, in the circuit superior court of Hardy, by Craigen's executrix against Lobb, on a bond for 100 dollars.

628 \*The defendant pleaded, 1. Payment, on which issue was joined; 2. setoff of sums due from the plaintiff's testator to him for work and labour and money had and received to defendant's use: replication, that the debts set off did not accrue within five years next before the action brought: rejoinder, that they did accrue within the five years: and issue made up.

At the trial the defendant, to support his plea of setoff, shewed an account of moneys due to him by the plaintiff's testator for money had and received to his use, and for clerk's fees due him by the testator, all subsequent to the date of the bond declared on: whereupon the plaintiff objected to the admission of proof of the clerk's fees, on the ground that the fee bills or tickets had never been placed in the hands of the sheriff or other officer for collection, and it had never been returned by any such officer that the person owing such fees had not sufficient within his bailiwick whereon to make distress; it appearing, that the fee books had not been lost or any way destroyed. But the court overruled the objection, and admitted proof of the clerk's fees. The defendant excepted.

The plaintiff then moved the court to instruct the jury, that if they should find that the moneys, in the account of setoffs mentioned, had accrued and fallen due and payable more than five years before this action was brought, then the statute of limitations was a bar to the setoffs; which

instruction the court refused to give, and instructed the jury, that if they should find that the moneys in the account had accrued and fallen due and payable more than five years before the action brought, they ought not to allow so much of the account as was for other sums than clerk's fees, but that as to the clerk's fees the statute of limitations was not a bar to the setoff thereof. The defendant again excepted.

Verdict for the plaintiff for seven dollars with interest &c. and that the residue 629 of the debt had been discharged \*by setoff. Judgment for the plaintiff accordingly. To which judgment, this court, on the petition of the plaintiff, allowed a supersedeas.

Samuels, for the plaintiff in error. 1. The court ought not to have admitted proof of the clerk's fees relied on as a setoff. The statute 1 Rev. Code, ch. 85, § 23, p. 320, expressly provides, that "no action shall be had or maintained for clerk's or surveyor's fees, unless the sheriff or sergeant shall return, that the person owing or chargeable with such fees had not sufficient within his bailiwick, except where the clerk or other officer as aforesaid shall have lost his fee book by fire or other misfortune, so that he be hindered from putting his fees into the sheriff's hands to collect; and in that case, any suit may be had and maintained for the recovery thereof." If the fees could not be recovered by action, they cannot be setoff. 2. At all events, the court ought to have instructed the jury, that the statute of limitations began to run against the clerk's fees, from the time they became due, instead of instructing them, that the statute was not a bar at all to such a claim.

Peyton, for defendant. 1. The purpose of the statute was to protect those who owed clerk's or surveyor's fees from being harrassed by actions, when the fees might be collected by the sheriff by distress, and from costs which might be equal to the fees; and it never was intended to prevent the clerk from using his fees as a setoff or discount against his own debt to the party who owed them. This case is not within the letter or the spirit of the statute. But these clerk's fees were, in truth, admissible upon the plea of payment. They all accrued after the date of the bond on which the action is founded, and should be viewed as a discount, not as a setoff. The statute of setoff refers only to unconnected debts; for at common law, where the nature of the dealings necessarily constitutes

630 an account consisting of \*payments, debits and credits, the balance only is considered as the debt which the plaintiff is entitled to recover, and therefore it is not necessary in such cases either to plead or give notice of setoff. Green v. Farmer, 4 Burr. 2221; Dale v. Sollet, Id. 2133; Roper v. Bumford, 3 Taunt. 76; Ord v. Ruspini, 2 Esp. Rep. 569. Then, 2. as to the statute of limitations, it surely was not a bar to the discount or offset of the clerk's fees. They accrued after the bond sued on was executed. The statute prohibited any action for them till they should be put into the sheriff's hands and he should return that they could not be levied by distress; which has not even yet been done, so that no action

\***Clerk's Fees—Action for.**—It was held in Johnson v. McCoy, 22 W. Va. 552, 9 S. E. Rep. 888, citing and distinguishing the principal case, that a clerk of a circuit court may maintain an action for his fees without first having placed them in an officer's hands and had them returned, "No property found." The court said: "That decision," meaning the decision in the principal case, "was based on a statute in the Code of 1819, expressly providing that no action shall be had or maintained for clerk's fees unless the sheriff should return that the person owing such fees had not sufficient property within his bailiwick. That statute has long since been repealed. No provision prohibiting action for clerk's fees until a return by an officer is now in our statute law." See Va. Code 1887, ch. 172, § 3520.

had accrued at the time this action was brought; but that does not prevent the setoff of them against the plaintiff's demand.

ALLEN, J. It is insisted for the plaintiff in error, that a setoff is a cross action; and that as, by the statute, no action could be maintained to recover the amount of the clerk's fee bills till the sheriff had returned that they could not be levied by distress, these fee bills could not be used by way of setoff. The fees were due to the officer from the time of the service rendered: the debt existed, and though the statute, for the benefit of the debtor, and to prevent him from being subjected to additional costs, prohibits a suit until an effort has been made to collect it by distress, this only regarded the remedy. The English statute permitted mutual debts to be setoff; ours authorizes the defendant to make all discount he can against the debt: and though a plea of setoff is in the nature of a cross action, still the debt being a subsisting one, and a proper discount, it is embraced by the words of the statute, though another law affecting the remedy may have required some other step to be taken before an action could be maintained for it. The point has been settled by the English courts, upon a statute somewhat analogous. The statute of 2 George 2, 631 \*ch. 23, provided, that no attorney or solicitor shall commence or maintain any action or suit for the recovery of any fees, at law or in equity, until the expiration of one month after he shall have delivered to the party a bill of such fees. In *Martin v. Windsor*, Dougl. 198-9, in *notis*, a motion was made by the defendant, an attorney, to stay proceedings till one month after the delivery of his bill should expire, that he might be enabled to set it off: and the court held, that though an attorney cannot bring an action on his bill, till it has been delivered one month, that circumstance is not necessary to enable him to set it off. In *Bulman v. Birkett*, 1 Esp. Rep. 449, the question was decided in the same way. In each case, the court held that the claim could be set off, though at the time no action could have been maintained. The cases are in point, and decisive as to this objection.

The court having permitted the introduction of the evidence, the plaintiff moved for an instruction, that if the jury believed the account had accrued and fallen due more than five years before the institution of the suit, the statute of limitations was a bar: the court gave the instruction so far as it applied to items in the account other than clerk's fees, but as to them, instructed the jury, that the statute of limitations was not a bar. It was argued for the defendant, that these fee bills were admissible evidence under the plea of payment; that accounts arising after the execution of the bond should be viewed as discounts applicable to and connected with the bond, and not in the light of a setoff. I do not think so. If this position were correct, the statute of limitations would never avail against setoffs accruing after the date of the bond. Yet the inconvenience and injustice growing out of the attempt to set off old and stale claims, after the loss of evidence and

the death of parties, is as great where they are used by way of setoff as where they are asserted in an independent action. The statutes of setoff apply to uncon-

632 nected debts. At common law, where the dealings constituted an account of receipts and payments, the balance is considered the debt, and therefore it is not necessary to plea or give notice of setoff. And this was the decision of the court in the case of *Dale v. Sollet*, cited at the bar. The defendant, as agent of the plaintiff, deducted £40. out of a sum recovered by him for the plaintiff, for his labour and service therein; and the court held, that this was not in the nature of a cross demand or mutual debt; it was a charge which made the sum of money received for the plaintiff's use so much the less. In this, and in other cases of a similar character, the transactions were connected; the claim grew out of the dealings of the parties, and reduced the demand. But in the present case, the setoff had no connection with the bond. It was an independent debt due the defendant; a demand which he might have enforced by distress or action: and he was not bound to avail himself of it by way of setoff. But under the plea of setoff, he had a right to set it up. And I do not think the court erred in the instruction given. The argument proceeds upon the ground, that a setoff is a cross action; that it cannot avail where a cross action could not be maintained, and if a cross action could have been maintained for these fee bills, to such an action the statute would have been a good defence, and therefore must be a good defence against them when used as setoffs. The authorities cited shew, that the setoffs may be relied on, if an existing debt, although no action at law could be maintained at the time. And the only enquiry is, when did the statute begin to run against these fee bills? By the law, as it formerly stood, no period was prescribed, within which fee bills were to be placed in the officer's hands for collection. The inconvenience resulting from this has been remedied by the statute of March 1839, which prohibits the collection by distress or suit after the expiration of five years: but the proviso to that statute shews, that previous to its

633 \*passage there was no limitation to the period within which they could be collected by distress, for it allows one year to put into the hands of the officer all fees due at the passage of the statute. Until the claims were placed in the officer's hands and returned, no cause of action existed. The statute of limitations relates to the time the cause of action accrued; and it not appearing here, that the clerk's tickets had ever been returned, the defendant could not have maintained his action upon them. When tickets are returned, the cause of action accrues and the statute commences running, but not until then. The court therefore was correct in the instruction given that the statute did not prevent the allowance of the fee bills, for the limitation had not commenced running at the time of the trial.

The other judges concurred. Judgment affirmed.

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2. Priority between attachments in chancery and at law. See Attachments No. 2, and S. C., 406

3. What decree for plaintiff in foreign attachment is erroneous. See Foreign attachment No. 2, and Briens v. Pittman & Co., 379

4. In a suit in chancery against absent defendants, the only proof of publication of order calling absentees before the court, was the certificate of the printer not verified by oath; but no exception was taken for want of proof of publication, and court declaring that plaintiff had proceeded regularly against the absent defendants, gave him a decree: upon appeal from the decree, neither party can object, in the appellate court, to the want of proof of the publication; and especially the plaintiff, to whose fault the irregularity was imputable, cannot ask the reversal of his own decree on such ground. Cunningham ex'or &c. v. Smithson. 33

## ACCEPTANCE.

What acceptance of bill of exchange binds individual partner but not the partnership. See Partnership No. 1, and

Cunningham ex'or &c. v. Smithson. 33

## ACCOUNT.

### I. In indebitatus assumpsit.

1. What account filed with declaration in indebitatus assumpsit is sufficient. See Assumpsit No. 3, and Robinson & Meem v. Burks. 378

### II. Bill for account.

2. Equity has jurisdiction of a bill by the principal against auctioneers for an account, if the account be yet open; or to surcharge and falsify the account, if it has been stated. Townes v. Birchett. 173

3. What bill for account of stale transactions will be dismissed. See Lapse of time, and Caruthers's adm'r's v. trustees of Lexington. 610

### III. When account current rendered shall be deemed a stated account.

4. The rule of the courts of equity, that an account current rendered by one party to another, received and held without complaint or objection, shall be deemed a stated account, considered. Townes v. Birchett. 173

5. It seems the rule is not confined to accounts rendered by merchant to merchant, of mutual dealings between them as merchants, much less to accounts rendered by merchants abroad to merchants at home: that objections to such accounts rendered, which will prevent them from being deemed stated accounts, must be made within a reasonable time; and that it lies upon the party contesting the accounts so rendered, to prove that he made objection within a reasonable time: the rule is founded on the acquiescence of the party. Dissentiente ALLEN, J. S. C., 173

6. B. whom the court regarded as a merchant of P. employed T. and W. auctioneers and merchants of the same town, to sell goods at auction for him: T. & W. five years after the sales made, render B. an account sales, and an account current, wherein they charge him inter alia with commissions, with moneys paid to and for him, and with amount of debts lost by failure of buyers; and B. holds these accounts for two years after he receives them, without objection proved to have been made by him: HELD, these shall be deemed stated accounts, which shall be taken as prima facie just; and though B. may surcharge and falsify, the onus probandi of surcharge and falsification lies on him. Dissentiente ALLEN, J. S. C., 173

### IV. Accounts of administrator and guardian.

7. Weight and effect of administration and guard-

ianship accounts settled ex parte and recorded. See Ex'ors and adm'r's No. 2, and Newton v. Poole. 112, 113

## ACQUIESCENCE.

See Account No. 4, 5, 6, Lapse of time, and Townes v. Birchett. 173  
Caruthers's adm'r's v. trustees of Lexington. 610

## ACTION.

Who has right of action on contract with parent to pay money to child. See Contract No. 7, 8, and Ross v. Milne & ux., 204

## ADEMPTION.

Of legacy and devise by advancement on marriage.

Testator, by his will, devises 2000 acres of land, and bequeaths twenty-eight slaves, and sundry bonds amount not mentioned, and one fourth of proceeds of sales of land not specifically devised, to his granddaughter Maria and five other children of his son John deceased, to be divided among them; and that one fifth part of the general residuum of his estate shall be equally divided among the same persons; and by codicil provides, that Maria's part shall be settled to her separate use for life, remainder to her children if any, and if none, to the use of the other children of her father: after which, on the marriage of Maria, testator, by marriage contract, gives her 400 acres not parcel of the 2000 acres of land, nine slaves parcel of the 28 slaves named in the will, and 1500 dollars in money, all to be settled on her for her use and the heirs of her body, but in case of her death without issue, or in event of such issue as she may have not arriving to 21 years of age or marrying, then to the heirs of her father: HELD, 1. All the legacies of personal property to Maria, were adeemed or satisfied by the gift to her in the marriage contract. 2. The devise of land to her is also adeemed or satisfied by the landed portion given her by the contract; dissentiente TUCKER, P.  
Hansbrough's ex'ors v. Hooe & wife. 316

## ADMINISTRATION.

See Ex'ors and adm'r's and Legatees and distributees.

## ADMISSION.

1. Effect of permitting bill for correction of alleged mistake in conveyance to be taken for confessed. See Mistake, and Pullen v. Mullen & wife. 484

2. After what time account current rendered and held without objection shall be deemed a stated account. See Account No. 4, 5, 6, and Townes v. Birchett. 173

## AD QUOD DAMNUM.

See Mills No. 1, and Hunter v. Matthews. 223

## ADVANCEMENT.

1. What evidence is insufficient to prove gift of slave by parent to child. See Gift No. 1, and Slaughter's adm'r v. Tutt. 147

2. Construction of will directing advancements to children to be deducted from their shares of estate. See Will No. 5, and Moore v. Hilton and others. 2

3. An advancement to a child, made subsequent to a will, is to be taken as a satisfaction of a legacy to that child, pro toto or pro tanto, according to its amount. S. C., 2

4. Ademption of legacy and devise by advancement on marriage. See Ademption, and Hansbrough's ex'ors v. Hooe and wife. 316

## ADVERSARY POSSESSION.

What suit in equity for recovery of slaves is barred by statute of limitations. See Fraud No. 3, and Owen v. Sharp & wife &c., 427

## AGREEMENT.

See Contract.

## APPELLATE JURISDICTION.

1. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and by Google  
Hicks and others v. Goode. 479

2. What interference of court with jury is no ground to reverse judgment on the verdict. See New trial No. 1, and  
Brooks v. Calloway. 466
3. What defect in proof of publication against absent defendants in chancery will not avail in appellate court. See Absent defendants No. 4, and Cunningham ex'or &c. v. Smithson. 33
4. Decree corrected and affirmed, with costs to appellee as the party substantially prevailing.  
Kent v. Matthews & al.. 590
5. Concerning grant of new trial by appellate court for contrariety of verdict to evidence, see New trial No. 3, 4, and  
Slaughter's adm'r v. Tutt. 147
6. When circuit court, after reversing judgment of county court in a mill case, should remand the cause. See Mills No. 2, and  
Hunter v. Matthews. 228
7. Reversal of decree against partnership for defect of proof, and dismission except as to one partner. See Partnership No. 5, 6, and  
Cunningham ex'or &c. v. Smithson. 33
8. Reversal of decree against partnership will not be set aside for death of one of the partners before the hearing. See Partnership No. 4, and S. C., 33

## ARBITRATION.

- I. What award sufficiently refers to and pursues the submission.

1. S. brings detinue against J. for one slave, and J. detinue against S. for three slaves, and J. brings also an action of debt against S. and the parties agree to refer all matters in difference in the three suits to two arbitrators and their umpire, whose awards, or the awards of their umpire, to be made the judgments of the court; which submission is made a rule of court; the arbitrators proceed to arbitrate the two actions of detinue, and make an award therein, without arbitrating the action of debt; in their award, the date of the submission is not recited, and the submission is recited as referring to arbitration the two actions of detinue only; and the award in J.'s action of detinue against S. give J. the three slaves demanded in his declaration, and two other slaves. Increase of a female slave demanded, born after the action brought: HELD, neither the omission to state the date of the submission in the award, nor the recital of the submission as referring the two actions of detinue only, nor the failure to proceed to arbitration of the action of debt, is a good ground of objection to the award under the terms of this submission.

Martin v. Martin, 495

- II. What misrecital of submission does not invalidate award.

2. Award misrecites the date of the submission to be the 18th July, instead of the 14th September 1821: HELD, this misrecital does not invalidate the award made in other respects pursuant to the submission.  
Byars v. Thompson. 550

## III. Finality of award.

3. B. and T. by arbitration bond, dated September 14, 1821, submit all matters in difference between them to three arbitrators; the arbitrators make an award on the 21st November 1821, which was on that day signed and sealed by them, and read, but not delivered, to the parties; and B. objecting to the award, because interest to which he was entitled was not credited to him, the arbitrators reconsider the award, and on the 22nd November, allow the interest and reduce the amount before awarded against B. and awarded the reduced amount against him, and sign, seal and deliver the corrected award: HELD, the award of the 22nd November is the true award.

Byars v. Thompson. 550

4. Arbitrators, in their award, reserve to themselves a right to reconsider a claim which they allow the party against whom they award; and then complete the award without reconsidering this claim: HELD, the reservation is void, and the award good for the sum awarded. S. C., 550

5. It is not necessary to the validity of an award that it should be delivered, unless it is expressly provided by the submission that delivery shall be necessary to its validity. S. C., 550

## IV. Rejection of excess in award.

6. It seems, that where an award settles matters of difference that are, and other matters that are not, within the submission, the court may reject the excess, and render judgment on so much of the award as is within the submission.  
Martin v. Martin. 495

V. Award in detinue for a female slave.

7. Whether arbitrators in detinue for a female

slave can award issue born pending the action? See Detinue, and

Martin v. Martin. 495

## VI. Declaration on award.

8. In an action of debt for the penalty of an arbitration bond, the declaration sets out the submission, and so much of the award as entitles the plaintiff to his action: HELD, it is not necessary, in such case, that the declaration should set out the whole award.  
Byars v. Thompson. 550

## ASSETS.

What are assets of decedent's estate. See Ex'ors and adm'rs No. 1, and  
Newton v. Poole. 118

## ASSIGNMENT.

What decree at plaintiff's instance in favour of his assignee is regular. See Decree No. 2, and  
Townes v. Birchett. 174

## ASSUMPSIT.

1. Who has right of action on contract with parent to pay money to child. See Contract No. 8, and  
Ross v. Milne & ux., 204

2. What parol contract of indemnity is valid, and what declaration in assumpsit thereupon is sufficient. See Indemnity No. 2, and  
Chapman v. Ross. 565

3. Under the statute, 1 Rev. Code, ch. 128, § 86, an account filed with declaration in assumpsit for goods sold, charging goods sold "per account rendered," with proof that the account was rendered, is sufficient.  
Robinson & Meem v. Burks. 378

## ATTACHMENTS.

## I. Service of attachment.

1. What is an effectual attachment in chancery of absent debtor's effects in hands of garnishee. See Foreign attachment No. 1, and  
Erskine &c. v. Staley &c., 406, 7

## II. Priority between attachments in chancery and at law.

2. Creditors of an absent debtor sue out a foreign attachment in chancery against him and a home defendant having in his possession specific goods of the absent debtor, as well as bonds, notes &c. to collect for him as his agent, and this process is served on the garnishee; other creditors of the same debtor, having brought an action at law against him, sue out an attachment against his estate to force his appearance, and this attachment, after the foreign attachment had been served on the garnishee, is levied on the same specific goods which were in the garnishee's hands at the time the foreign attachment was served on him; judgment being recovered in the action at law, pending the foreign attachment in chancery, the court of law orders a sale of the specific goods on which the attachment at law was levied; and the creditors in the action at law being about to have a sale, under the order of the court of law, of the goods on which their attachment was levied, the creditors in the foreign attachment in chancery obtain an injunction to inhibit that sale, claiming a prior lien on the goods by virtue of their attachment previously served on the garnishee: HELD, upon the construction of the statute, 1 Rev. Code, ch. 123—1. That the creditors in the foreign attachment, by the service thereof on the garnishee and from the date of such service, acquired a lien on the effects of the absent debtor in the garnishee's hands; and of this lien, neither the absent debtor, nor the garnishee, by any act of theirs, nor any third person by any attachment or other process of law, subsequently levied, could deprive them. 2. Therefore, the creditors in the foreign attachment, if they shall get a decree, will be entitled to priority, for satisfaction thereof out of the attached effects, over the creditors claiming under the attachment at law subsequently levied. 3. And the remedy by way of bill of injunction, to which the creditors in the foreign attachment had recourse, was the proper remedy to protect their rights.  
Erskine &c. v. Staley &c., 406

## III. Decree in foreign attachment.

3. What decree in foreign attachment, for sale of absent debtor's land, is erroneous. See Foreign attachment No. 2, and  
Briens v. Pittman & Co., 379

## AUCTIONEER.

## I. When principal must bear loss by insolvency of buyers.

1. Auctioneers employed to sell goods, with discretion to sell on credit, take notes from certain buyers to themselves, payable at a future day, and

the makers of these notes fall before they come to maturity: **Held**, the principal, and not the auctioneers, shall bear the loss, unless it appear that the auctioneers appropriated the notes to their own purposes; and though the auctioneers procure such notes to be discounted for their accommodation, yet, if at the time they were in advance to their principal to an equal or greater amount, this will not be such an appropriation to their own use, as will make them liable to bear the loss.

Townes v. Birchett, 172

## II. Bill by principal against auctioneer.

2. Equity has jurisdiction of a bill by the principal against auctioneers for an account, if the account be yet open; or to surcharge and falsify the account, if it has been stated.

Townes v. Birchett, 173

3. And where auctioneers are stakeholders and trustees of proceeds of sales by them made, bound to pay them to one or the other of two parties, upon conditions agreed upon, equity has jurisdiction to relieve, on a bill by one of the claimants against the auctioneers and the other claimant.

S. C., 173

## AVERAGE.

1. In case of jettison of a deck load, to avoid dangers of the seas, the owner of the goods is not entitled to the benefit of general average.

Doane & c. v. Keating, 391

2. One ships goods from New York to Norfolk, to be stowed on deck; but the bill of lading is in the usual form, not mentioning that the shipment is of a deck load; in an action by the shipper against the ship owner for average, parol evidence that the goods were to be stowed on deck is admissible.

S. C., 391

## AWARD.

See Arbitration, and

Martin v. Martin, 495

Byars v. Thompson, 550

## BANKS.

Concerning suit against a branch bank, see Branch banks, and

Mason v. Farmers bank at Petersburg, 84

## BILL OF EXCEPTIONS.

1. Where the evidence on the trial of an issue is conflicting, and the court is satisfied with the verdict, and a new trial is asked and refused, the court is right not to certify the facts proved.

Brooks v. Calloway, 466

2. Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception: the demurrer does not waive the exception.

Dishazer v. Maitland, 524

3. Concerning grant of new trial by appellate court for contrariety of verdict to evidence, see New trial No. 3, 4, and

Slaughter's adm'r v. Tutt, 147

## BILL OF EXCHANGE.

What bill binds individual partner but not the partnership. See Partnership No. 1, and

Cunningham ex'or & c. v. Smithson, 32

## BILL OF LADING.

Admissibility, in action for average, of parol evidence that goods were to be stowed on deck. See Average No. 2, and

Doane & c. v. Keating, 391

## BOND.

1. To what deeds the rule is applicable that a deed cannot be delivered as an escrow to a party to whom it is made. See Escrow No. 1, and

Hicks and others v. Goode, 479

2. What plea that bond was delivered as an escrow is a good bar. See Escrow No. 2, and S. C., 479

3. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and S. C., 479

4. Competency of one of several obligees plaintiffs as a witness for obligor defendant on plea of non est factum. See Witness, and S. C., 479

5. What evidence does not sustain plea of conditions performed to action on bond for conveyance of land. See Covenant No. 2, and

Wallace v. Shaffer, 622

6. What indemnifying bond is sufficient to maintain action by sheriff against the obligors. See Indemnity No. 1, and

Dabney v. Catlett, 383, 634

## BRANCH BANKS.

Suit against a branch bank.

1. Upon the construction of the statute of March 19, 1832, "authorizing suits against branches of banks

in this commonwealth;" **Held**, a suit cannot be maintained against the president and directors of the branch: the suit must still be brought against the principal bank by its corporate name.

Mason v. Farmers bank at Petersburg, 84

2. And where a suit is brought against the president and directors of a branch bank, this is not a mere misnomer, which must be pleaded in abatement, but is a bar to any recovery; and though a verdict be found upon the general issue pleaded, the error is not cured by the statute of Jeofails.

S. C., 84

3. In such a case, however, the defendants cannot have judgment for costs; for they can no more have judgment against the plaintiff, than he can have judgment against them.

S. C., 84

## CANAL.

See James river and Kanawha company and James river and Kanawha Co. v. Anderson & c., 278

## CARRIERS.

What action by shipper for average cannot be sustained. See Average, and

Doane & c. v. Keating, 391

## CHANCERY.

See Equitable jurisdiction, and Practice in suits in equity.

## CLERK'S FEES.

I. Right to set off.

1. Though no action lies for clerk's fees, till they shall be put into an officer's hands for collection, and he has returned that they cannot be levied by distress, yet the clerk may set them off against an action on his bond to the party from whom they are due.

Craig's ex'x v. Lobb, 627

II. Limitation of claim.

2. And if the clerk's fees were never put into an officer's hands for collection, there was not, till the statute of 1839, any limitation to the clerk's claim for them.

Craig's ex'x v. Lobb, 627

## COMMISSION MERCHANT.

See Auctioneer, and

Townes v. Birchett, 173

## CONDITIONS PERFORMED.

What evidence does not sustain plea of conditions performed to action on bond for conveyance of land. See Covenant No. 2, and

Wallace v. Shaffer, 622

## CONFESSION OF BILL.

Effect of permitting bill for correction of alleged mistake in conveyance to be taken for confessed. See Mistake, and

Pullen v. Mullen & wife, 434

## CONFUSION OF GOODS.

What is no confusion of decedent's goods with those of executor. See Ex'ors and adm'rs No. 1, and

Newton v. Poole, 113

## CONTINUANCE.

A party having had two, if not three, continuances, and leave to take his depositions to be read in chief, is neither entitled to another continuance, nor to have the trial of the cause put off for another day during the same term.

Brooks v. Calloway, 466

## CONTRACT.

I. Bill of exchange.

1. What bill of exchange binds individual partner but not the partnership. See Partnership No. 1, and

Cunningham ex'or & c. v. Smithson, 32

II. Lease.

2. When accidental destruction of demised premises entitles lessee to suspension of rent. See Lease, and

Thompson v. Pendell, 591

## III. Indemnity.

3. Construction of contract of indemnity. See Indemnity No. 2, and

Chapman v. Koss, 565

4. Validity of parol contract of indemnity. See Indemnity No. 2, and S. C., 565

5. What indemnifying bond is sufficient to maintain action by sheriff against obligors. See Indemnity No. 1, and

Dabney v. Catlett, 383, 634

## IV. Covenant to convey land.

6. What is no performance of covenant to convey land. See Covenant No. 2, and Wallace v. Shaffer, 622

## V. Contract with parent to pay money to child.

7. Upon an indenture between S. and R. wherein R. covenants to pay money to M. a daughter of S. within two months after S.'s death, the representative of S. only can maintain an action against R. for breach of the covenant, and M. cannot maintain either covenant for the breach or debt for the money. 204

Ross v. Milne and wife, 204

8. So, upon a parol contract between S. and R. whereby R. upon a consideration moving entirely from S. promises to pay S.'s daughter M. a sum of money after S.'s death, M. cannot maintain either debt or assumpsit for the money; the representative of S. only can maintain an action at law. S. C., 204

9. A parol contract is made between S. and R. whereby R. for a consideration proceeding entirely from S. promises to pay S.'s daughter M. a sum of money after S.'s death; and the daughter gives S. the mother no valuable consideration for such provision for her: HELD, this is a mere executory gift of a chose in action on the part of the mother, who may at any time countermand the payment, and such gift vests no right to the money in the daughter. S. C., 204

## VI. Usury.

10. What contract is usurious. See Usury, and Reynolds & al. v. Carter adm'r &c., 166

## VII. Specific execution.

11. What agreement will not be specifically enforced in equity. See Specific execution No. 1, 2, and Pigg v. Corder, 60

## CONVERSION.

What land held by partners is not social but individual property, subject to dower rights of their wives. See Partnership No. 2, and Wheatley's heirs v. Calhoun, 264

## CONVEYANCE.

1. A deed more than thirty years old, but not accompanied by possession, is not to be admitted in evidence without proof of execution. 524

Dishazer v. Maitland, 524

2. Effect of permitting bill for correction of alleged mistake in conveyance to be taken for confessed. See Mistake, and Pullen v. Mullen and wife, 434

3. What mistake in conveyance will be corrected in equity. See Mistake, and S. C., 434

4. Construction of conveyance to A. and her offsprings forever. See Mistake, and S. C., 434

5. What is no performance of covenant to convey land. See Covenant No. 2, and Wallace v. Shaffer, 622

## CORPORATION.

1. Concerning suit against a branch bank, see Branch banks, and

Mason v. Farmers bank at Petersburg, 84

2. See James river and Kanawha company, and James river and Kanawha co. v. Anderson &c., 278

## COSTS.

1. What defendants, on judgment for them, cannot recover costs. See Branch banks No. 3, and Mason v. Farmers bank at Petersburg, 84

2. Decree corrected and affirmed, with costs to appellee as the party substantially prevailing. Kent v. Matthews & al., 500

## COUNTY AND CORPORATION COURTS.

What is no part of record of county court. See Nul tiel record, and Greenesville justices v. Williamson &c., 93, 4

## COVENANT.

## I. Right of action.

1. Who has the right of action on indenture covenanting with parent to pay money to child. See Contract No. 7, and

Ross v. Milne and wife, 204

## II. What is no performance.

2. Title bond executed by S. to W. with condition, that S. should convey good title to W., not to him and his assigns, in 200 acres of land: this bond is assigned by W. to M. and by M. to B., and while the bond is held by M. the first assignee, S. and his wife make a conveyance of the title to W. who refuses to accept the same: in action by W. for benefit of B. the last assignee, and upon pleas of conditions performed, and of conveyance to M.—HELD, that the

condition of the bond requires that the title shall be made to W. and, if there was proof of a conveyance of title to M. that would not sustain the plea of conditions performed, and the second plea of a conveyance to M. is naught. Wallace v. Shaffer, 622

## COVERTURE.

See Feme covert.

## DEBT.

Who has right of action on contract with parent to pay money to child. See Contract No. 7, 8, and Ross v. Milne & ux., 204

## DECK LOAD.

In case of jettison of a deck load, to avoid dangers of the seas, the owner of the goods is not entitled to the benefit of general average. Doane &c. v. Keating, 301

## DECLARATION.

1. What declaration on award is sufficient. See Arbitration No. 8, and

Byars v. Thompson, 550

2. What declaration in assumpsit on contract of indemnity is sufficient. See Indemnity No. 2, and Chapman v. Ross, 565

3. What account filed with declaration in indebitatus assumpsit is sufficient. See Assumpsit No. 3, and

Robinson & Meem v. Burks, 378

4. What defect in declaration is not aided after verdict by statute of jeofails. See Branch banks No. 2, and

Mason v. Farmers bank at Petersburg, 84

5. Upon a declaration which shows that the plaintiffs have no right of action, and on the contrary that the right of action is in another, verdict is found for plaintiffs: HELD, the statute of jeofails of Virginia, 1 Rev. Code, ch. 128, § 103, does not apply to the case, and cures no such defect. Ross v. Milne & wife, 204

## DECREE.

1. Concerning right to introduce new evidence after interlocutory decree, see Interlocutory decree, and

Moore v. Hilton and others, 1

2. One makes an assignment of a claim for money due him, among other property, to a trustee for benefit of his creditors, and then files a bill in equity, in his own name, to recover the money, and by amended bill makes the trustee a party, and prays that the money due may be decreed to the trustees: HELD regular to decree the money to the trustee. Townes v. Birchett, 174

## DEED.

1. A deed more than thirty years old, but not accompanied by possession, is not to be admitted in evidence without proof of execution. 534

Dishazer v. Maitland, 534

2. To what deeds the rule is applicable that a deed cannot be delivered as an escrow to a party to whom it is made. See Escrow No. 1, and

Hicks & al. v. Goode, 479

3. What plea that bond was delivered as an escrow is a good bar. See Escrow No. 2, and S. C., 479

4. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and S. C., 479

5. Competency of one of several obligees plaintiffs as a witness for obligor defendant on non est factum. See Witness, and S. C., 479

6. Who has right of action on indenture covenanting with parent to pay money to child. See Contract No. 7, and

Ross v. Milne and wife, 204

7. Construction of conveyance to A. and her offsprings forever. See Mistake, and Pullen v. Mullen & wife, 434

8. Correction of mistake in conveyance. See Mistake, and S. C., 434

## DEMURRER.

Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception: the demurrer does not waive the exception. Dishazer v. Maitland, 524

## DETINUE.

Quere. Whether, in detinue for a female slave, her increase born pending the action can be recovered? Whether, in the trial of such action by jury, verdict can properly be rendered, and judgment given, for such after-born increase? Whether there is any difference, in this respect, between a trial by jury and an arbitration, so that if a jury cannot properly render a verdict for such after-born in-



crease, the arbitrators may award the same? Two judges of this court hold the affirmative, and two the negative.

Martin v. Martin, 495

#### DEVISE.

1. See Legatees and distributees, and Will.
2. Satisfaction of devise by advancement on marriage. See Ademption, and Hansbrough's ex'ors v. Hooe & wife, 816

#### DISTRIBUTEES AND DISTRIBUTION.

See Legatees and distributees.

#### DOWER.

I. What remainder is not subject to dower.

1. Husband dies entitled to a remainder in fee of real estate, expectant on an estate of freehold therein; his widow is not entitled to dower of the land when the remainder falls in. 248

II. What rescission of contract for sale of land precludes dower of vendee's widow.

2. By articles between C. and W. they agree to make a joint purchase of land, and to divide the same between them by a designated line. W. to pay the whole purchase money of the whole land to the vendor thereof, and C. to pay W. the purchase money for his part, at a certain appointed time; within the time, C. pays W. the greater part, but not the whole, of the purchase money for his part of the land; and then, also within the time, the contract between C. and W. is rescinded, W. agreeing to take back C.'s part of the land, upon condition that C. shall have credit on another account, for the money he has paid; and C. dies, never having been let into possession of the land so by him agreed to be purchased and paid for: HELD, (upon the construction of the statute, 1 Rev. Code, ch. 99 § 31,) that as the contract between C. and W. was wholly executory, and was rescinded before C. had completed payment of the purchase money, and he had never had legal or equitable possession, he had no such equitable estate as that his widow was dowerable thereof. 265

#### III. Mortgage paramount to dower right.

3. What mortgage is paramount to dower right of mortgagor's widow. See Mortgages and trusts No. 1, and

Wheatley's heirs v. Calhoun, 264

#### IV. Subrogation to such mortgage.

4. Subrogation of one joint mortgagor, as against widow of the other, to rights of mortgagee. See Mortgages and trusts No. 2, and

Wheatley's heirs v. Calhoun, 264

#### V. Dower in land held by partners.

5. What land held by partners is not social but individual property, subject to the dower rights of their wives. See Partnership No. 3, and

Wheatley's heirs v. Calhoun, 264

#### DRAWER AND ENDORSERS.

When creditor and subsequent endorsers have no right of subrogation to security given to first endorser. See Subrogation No. 3, and

Bank of Virginia and May v. Boisseau &c., 387

#### DUELLING LAW.

To an action for insulting words under the statute to suppress duelling, no plea of justification can be received.

Brooks v. Calloway, 466

#### ELEGIT.

Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and

Kent v. Matthews & al., 573, 4

#### ENDORSERS.

When subsequent endorser has no right of subrogation to security given to first endorser. See Subrogation No. 3, and

Bank of Virginia and May v. Boisseau &c., 387

#### ENTAIL.

1. Testator devises lands to his son E. W. to him and his heirs forever; and if his son E. W. should die without lawful issue of a son, then to his son H. W.—HELD, E. W. took by the will an estate tail: dissentiente, TUCKER, P. 370

2. Construction of conveyance to A. and her offsprings forever. See Mistake, and Pullen v. Mullen & wife, 434

#### EQUITABLE JURISDICTION.

1. To correct mistake in conveyance. See Mistake, and Pullen v. Mullen & wife, 434
2. Of bill by principal against auctioneers. See Auctioneer No. 2, 3, and Townes v. Birchett, 173
3. When surety may resort to equity against creditor and principal debtor. See Principal and surety No. 1, and Kent v. Matthews & al., 574
4. Propriety of injunction at suit of creditor in foreign attachment, to restrain sale under junior attachment at law. See Attachments No. 2, and Erskine &c. v. Staley &c., 406
5. When injunction cannot be awarded to restrain proceedings of James river and Kanawha company. See James river and Kanawha company, and James river and Kanawha co. v. Anderson &c., 278
6. What decree against absent debtor in favour of attaching creditor is erroneous. See Foreign attachment No. 2, and Briens v. Pittman & co., 379

#### EQUITY OF REDEMPTION.

What sale by sheriff of insolvent's equity of redemption in slaves is no ground of action by insolvent. See Insolvent, and Governor for Cockrell v. Williams, 508

#### ESCROW.

I. What deed is not absolute though delivered to a grantee.

1. The rule of law, that a deed cannot be delivered to a party to whom it is made as an escrow, to be the deed of the obligor only on condition, and that in such case the delivery is absolute and the condition nugatory, is applicable only to the case of deeds which are upon their face complete contracts requiring nothing but delivery to make them perfect according to the intention of the parties: not to deeds which upon their face import that something more is to be done besides delivery to make them complete and perfect contracts according to the intention of the parties. 479

Hicks & al. v. Goode, 479

II. What plea of delivery as an escrow is a good bar.

2. A bond prepared, intended and purporting on its face, to be the joint bond of G. and J. to four commissioners under decree in chancery for sale of land, is signed and sealed by G. and by him delivered to one of the obligees, upon condition that J. also shall execute it, otherwise it shall not be binding on G. but be null and void; J. never executes it; in debt on the bond against G. he pleads, that the bond was delivered to the obligee as an escrow, to be his deed only upon the condition that J. also should execute it, which J. never did, et sic non est factum: HELD, the plea is a good bar. Dissentiente ALLEN, J. 479

Hicks & al. v. Goode, 479

#### ESTATE TAIL.

See titles Entail and Mistake, and

Wright v. Cohoon, 370

Pullen v. Mullen & wife, 434

#### EVIDENCE.

##### I. Competency.

1. Competency of one of several obligees plaintiffs as a witness for obligor defendant on non est factum. See Witness, and Hicks & al. v. Goode, 479
2. A deed more than thirty years old, but not accompanied by possession, is not to be admitted in evidence without proof of execution. Dishazer v. Maitland, 534
3. Admissibility, in action for average, of parol evidence that goods were to be stowed on deck. See Average No. 2, and Doane &c. v. Keating, 391
4. Concerning introduction of new evidence after interlocutory decree. See Interlocutory decree, and Moore v. Hilton and others, 1

##### II. Variance.

5. What is a material variance between record pleaded and that shewn. See Null tiel record, and Greenesville justices v. Williamson &c., 93, 4
6. Specific execution cannot be decreed of a contract different from that alleged in the bill. See Specific execution No. 3, and Pigg v. Corder, 69

##### III. Weight and sufficiency.

7. What proof is insufficient to establish gift of slave by parent to child. See Gift No. 1, and Slaughter's adm'r v. Tutt, 147



8. What evidence does not sustain plea of conditions performed to action on bond for conveyance of land. See Covenant No. 2, and Wallace v. Shaffer, 622

9. What is sufficient proof of guardian's charges against ward for repairs. See Guardian and ward No. 2, and Newton v. Poole, 113

10. Weight and effect of administration account settled ex parte and recorded. See Executors and administrators No. 2, and S. C., 112

11. Weight and effect of guardianship account settled ex parte and recorded. S. C., 113

12. Weight and effect of account current rendered, which has been received and held without objection. See Account No. 4, 5, 6, and Townes v. Birchett, 177

13. Effect of permitting bill for correction of alleged mistake in conveyance to be taken for confessed. See Mistake, and Pullen v. Mullen & wife, 434

#### IV. Exception to competency of evidence, and demurrer.

14. Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception: the demurrer does not waive the exception. Dishazer v. Maitland, 524

#### V. Refusal of court to certify facts.

15. When court refusing new trial may properly refuse to certify facts proved. See Bill of exceptions No. 1, and Brooks v. Calloway, 466

### EXECUTORS AND ADMINISTRATORS.

#### I. What are assets of decedent's estate.

1. A brickmaker, having a parcel of bricks on hand, goes abroad, having constituted his wife his agent, and specially directed her to resume and prosecute his brick-making business; she commences it accordingly, during his life, but he dies abroad before the bricks she had begun are finished, and she completes them after his death; she qualifies as executrix of her husband's will; and, without returning any inventory of his estate, sells the bricks he left on hand, and those she made, without discrimination: HELD, this was not a confusion of the testator's goods with the goods of the executrix; for the bricks begun by her before and completed after her husband's death, as well as those he left ready made on hand, were all properly assets of his estate, and to be accounted for as such; and all the expenses he incurred in the brick-making business, whether incurred during his life or after his death, were proper charges against his estate. Newton v. Poole, 113

#### II. Weight and effect of adm'n account settled ex parte and recorded.

2. The rule, that administration accounts, audited ex parte by commissioners appointed by the proper court, returned to the court, and recorded, are to be taken as prima facie correct, liable to be surcharged and falsified, upon proof adduced, by any party interested, rests not on the ground that such audited accounts stand on the same foot as stated accounts between parties, but, mainly, on the long established practice of the country, and on the supposed integrity of the tribunal provided by law for the adjustment thereof: therefore, HELD, 1. That such audited accounts are only to be corrected in the particulars in which they are proved to be erroneous, unless corruption in the tribunal itself be established; and, 2. Though great and numerous errors appear, or even though the executor or administrator appear to have taken an unfair advantage, and though he never returned to the court, and did not exhibit to the auditors, any inventory and appraisement of the estate, the audited accounts are yet to be taken as prima facie evidence, and to be corrected only so far as they are surcharged and falsified by proof. Newton v. Poole, 112

#### III. Impeachment of purchase by ex'or.

3. Invalidity of purchase by executor at his own sale of land under the will, and what relief the cestui que trust are entitled to. See Trusts and trustees No. 3, 4, and Moore v. Hilton &c., 2

### FEME COVERT.

#### I. What certificate of privy examination is defective.

1. Certificate of justices of privy examination of the wife to a deed of husband and wife, states, that the wife appeared before the justices, and separately and apart from her husband, acknowledged that she had willingly executed the deed on her part, and wished not to retract it; the deed was

signed and sealed by both husband and wife in 1798, and the privy examination was had in 1816: HELD, upon construction of the statute of 1814 (incorporated in the statute of conveyances, 1 Rev. Code, ch. 99, § 15,) that the certificate is defective in not showing that the deed was explained to the wife, or that she was in any way apprised of its contents and purpose, and therefore the rights of the wife did not pass by the deed. Halrston v. Randolphs, 445

#### II. What action survives to the wife.

2. See Husband and wife No. 2, and May v. Boisseau, 512

### FOREIGN ATTACHMENT.

#### I. Service on garnishee.

1. In the proceeding by way of foreign attachment in chancery, a subpoena against the absent debtor and the garnishee, with a restraining order endorsed by the clerk, served on the garnishee, is, according to the settled practice, as effectual to attach the effects of the absent debtor in the garnishee's hands, as a formal order of the court to the same purpose would be. Erskine &c. v. Staley &c., 406, 7

#### II. What decree for plaintiff is erroneous.

2. In proceeding by foreign attachment in chancery, HELD, error to decree for plaintiff without affidavit of defendant's non-residence: Error, to decree sale of lands, without requiring bond with surety from plaintiff, in double the reported value of the lands, with condition for performing future orders or decrees: Error, to decree a sale of lands for cash: Error, to direct payment of money to creditor and conveyance of land to the purchaser, before the sale is reported and confirmed. Briens v. Pittman & Co., 379

### FRAUD.

What trust for children of fraudulent grantor will not be enforced against grantee.

1. One makes a fraudulent bill of sale of a female slave, absolute on its face, in order to protect the property from his creditors, but there is a secret trust that the grantee shall hold the property for the benefit of grantor's daughters: HELD, the daughters cannot establish the secret trust in equity, and have a decree for the slave, her increase and profits. Owen v. Sharp & wife &c., 427

2. A fraudulent bill of sale is made of a female slave, absolute on its face, with a secret trust for the grantor's daughters, of whom the grantee becomes guardian in 1827, and in 1839 he settles his guardianship accounts, both wards having then attained to full age: they then set up a claim to the property, which the grantee denies to be just; and in 1837, they file a bill to establish the secret trust: HELD, the statute of limitations would alone be a bar to the bill. S. C., 427

### GARNISHEE.

What constitutes an effectual attachment in chancery of effects in garnishee's hands. See Foreign attachment No. 1, and Erskine &c. v. Staley &c., 406, 7

### GENERAL AVERAGE.

#### See Average, and

Doane &c. v. Keating, 391

### GIFT.

#### I. What proof does not establish gift.

1. In trover against adm'r of plaintiff's father, plaintiff claims title to slaves under a parol gift from his father, and possession under the alleged gift: there is no direct proof of the gift, but only proof of such a temporary possession held by the plaintiff, as may as well be referred to a loan as to a gift from the father, and, under the circumstances, more probably referrible to a loan than to a gift: HELD, this proof is insufficient to maintain the title. Slaughter's adm'r v. Tutt, 147

#### II. Executory gift.

2. What is a mere executory gift by parent to child of a chose in action. See Contract No. 9, and Ross v. Milne & wife, 204

#### III. Advancement.

3. Satisfaction of legacy by advancement. See Advancement No. 3, Ademption, and Moore v. Hilton and others, 2  
Hansbrough's ex'ors v. Hooe & wife, 316

### GUARDIAN AND WARD.

#### I. Ex parte settlement.

1. Weight and effect of guardianship account settled ex parte and recorded. Newton v. Poole, 113

## II. Proof of guardian's charges for repairs.

2. A guardian claims credit in his account for the price of materials purchased by him for repairs of houses of his ward; he proves his purchase of the materials, and that they were necessary and proper for such repairs; and then being examined on oath, he states, that the materials were in fact applied to the repairs of the ward's houses, but is unable to designate the particular houses to the repairs of which they were applied: HELD, this is sufficient proof to entitle him to credit for the price of the materials.

Newton v. Poole.

113

## HEARING OF CAUSE.

Application for rehearing upon new evidence after interlocutory decree. See Interlocutory decree No. 1, and

Moore v. Hilton & others.

1

## HUSBAND AND WIFE.

1. What certificate of privity examination and acknowledgment of the wife to a deed of husband and wife is defective. See Feme covert No. 1, and

Hairston v. Randolphs.

445

2. M. gives his acknowledgment in these words—"Borrowed of Mrs. E. H. B. 750 dollars Nov. 5, 1829," said Mrs. E. H. B. being then a feme covert; her husband dies: HELD, the action survives to her to recover the money; and no debt due from the husband can be set off against the claim of the wife.

May v. Boisseau.

512

3. See titles Dower and Widow.

## IMPROVEMENT COMPANIES.

See

James river and Kanawha co. v. Anderson &c.,

278

## INCREASE.

Whether, in detinue for a female slave, her increase born pending the action can be recovered by verdict or award. See Detinue, and

Martin v. Martin.

495

## INCUMBRANCERS.

Under what circumstances incumbrancer of two funds will be restricted to one at instance of subsequent incumbrancer of the other. See Principal and surety No. 1, and

Kent v. Matthews & al.,

573

## INDEBITATUS ASSUMPSIT.

What account filed with declaration is sufficient. See Assumpsit No. 3, and

Robinson &c. v. Burks.

578

## INDEMNITY.

I. What indemnifying bond taken by sheriff is sufficient to maintain his action against the obligors.

1. Sheriff on seizure of chattels under a f. fa., takes indemnifying bond under statute 1 Rev. Code, ch. 134, § 25, with condition to save sheriff harmless, and to pay and satisfy any person claiming title to the property, all damages he may sustain by the seizure and sale; omitting to provide also, as required by the statute of 1828, Supp. to Rev. Code, ch. 215, § 1, that the obligors shall warrant the title of the property sold under the execution to the purchaser thereof at the sheriff's sale: HELD, the bond is defective and not good as a statutory bond; but it is good at common law, and the sheriff may maintain an action on it for indemnity against damages recovered against him by the owner of the property seized and sold.

Dabney v. Catlett,

583

And see remarks of ALLEN, J., upon the above abstract.

634

II. Construction and validity of parol contract of indemnity.

2. One Alexander devised land and mill seat to Ross, on condition that he should pay Chapman 250 dollars; Ross, apprehending the mill seat would be overflowed by a dam 11 feet 6 inches high which Summers claimed right to build on the stream below, refused to accept the land and mill seat devised to him and to pay the 250 dollars, unless Chapman would indemnify him against injury to mills he proposed to build, from the erection by Summers of such a dam below; and this being communicated to Chapman, he said, Summers had no right to erect such a dam, and if Ross would accept the devise and pay the 250 dollars, he would indemnify Ross against all injury he should sustain from the erection of such a dam by Summers; whereupon Ross accepts the devise, pays the 250 dollars, and builds mills at the mill seat to him devised, and then Summers builds his dam, and the waters overflow Ross's mill seat, whereby his works are of no value.

In assumpsit by Ross against Chapman, on the contract of indemnity, HELD, 1. That the declaration setting out such a contract, shews sufficient consideration to support the promise to indemnify. 2. That the contract is not within the statute of frauds, and, though merely verbal, is valid and binding. 3. That it is not necessary to allege in the declaration, notice to defendant of injury resulting from Summers's dam. 4. That to entitle Ross to recover, it is essential he should prove that Summers had lawful right to erect his dam.

Chapman v. Ross,

505

## INDENTURE.

Who has right of action on indenture covenanting with parent to pay money to child. See Contract No. 7, and

Ross v. Milne & wife,

204

## INJUNCTION.

1. Propriety of injunction at suit of creditor in foreign attachment, to restrain sale under junior attachment at law. See Attachments No. 2, and

Erskine &c. v. Staley &c.,

406

2. When injunction cannot be awarded to restrain proceedings of James river and Kanawha company. See

James river and Kanawha co. v. Anderson

278

## INQUISITION.

Who are unfit jurors of inquest on application for leave to erect mill and dam. See Mills No. 1, and

Hunter v. Matthews.

328

## INSOLVENT.

Sale by sheriff under schedule.

A ca. sa. being served on C. he surrenders, in his schedule, his equity of redemption in certain slaves then under mortgage; and the sheriff, without redeeming the mortgage, or exposing the slaves to the view of the bidders, sells the equity of redemption: HELD, if the sheriff had no right to make the sale, nothing passes by it; if he had a right to make it, he committed no breach of the duties of his office in making it; and so, either way, no action lies for C. against him.

Governor for Cockrell v. Williams,

506

## INSULTING WORDS.

To an action for insulting words under the statute to suppress duelling, no plea of justification can be received.

Brooks v. Calloway.

466

## INTERLOCUTORY DECREE.

Right to introduce new evidence after such decree.

1. Upon the construction of the statute of March 1826, Supp. to Rev. Code, ch. 103, § 9, HELD, that after an interlocutory decree upon a hearing, deciding the questions of fact in issue between the parties, neither party has an absolute right to introduce new evidence touching the questions so decided; the introduction of such evidence depends on the sound discretion of the court and its judgment on the sufficiency of the excuse offered for the failure to have it before the court when the cause was heard and the interlocutory decree pronounced; and such excuse may be offered, either on motion upon notice, or upon a petition, for a rehearing of the cause.

Moore v. Hilton and others.

1

2. But new evidence may be introduced before a commissioner touching any matter of account directed by the interlocutory decree, or before the court touching any matter of account which the court ought by the decree to have referred to a commissioner.

S. C. 1

## INTERNAL IMPROVEMENTS.

See

James River and Kanawha co. v. Anderson &c.,

278

## ISSUE.

1. What is a devise of an estate tail. See Entail No. 1, and

Wright v. Cohoon.

370

2. Construction of conveyance to A. and her offsprings forever. See Mistake, and

Pullen v. Mullen & wife.

434

3. Whether, in detinue for a female slave, her issue born pending the action can be recovered by verdict or award. See Detinue, and

Martin v. Martin.

495

## ISSUE OUT OF CHANCERY.

When a reference to commissioner, rather than an issue out of chancery, is proper. See Trusts and trustees No. 4, and

Moore v. Hilton &c.,

2

**JAMES RIVER AND KANAWHA COMPANY.**

Right to occupy streets: and when injunction to proceedings of company cannot be awarded.

1. Upon the construction of the charter of the J. R. and K. company, passed March 1832, Supp. to R.C. ch. 377, § 29, 34, 35. **Held**, 1. That the company has a right to enter upon and occupy the public streets of a town, as well and in like manner as the lands of individuals, when it shall deem the same necessary for its canal or other works, liable to make compensation in damages to any party injured. 2. That the company may lawfully enter and occupy such streets for its works, and proceed with its works, before instituting proceedings to ascertain the damages that may result to others. 3. That it is not competent to a court of chancery to award an injunction to stay the proceedings of the company in the prosecution of its works of any kind, unless it be manifest, both that it is transcending the authority given by its charter, and that the interposition of the court is necessary to prevent injury that cannot be adequately compensated in damages. The two circumstances must concur, to warrant a court in awarding such process.

James river and Kanawha co. v. Anderson &c., 578

2. It seems, that the company would have the same right to occupy the streets of the city of Richmond for its basin, as it has to occupy such streets for its canal, liable to compensate any party injured in damages, but not liable to be restrained by injunction.

3. And that the city authorities have a right to sanction such use of the streets by the company. S. C., 578

**JEOFAILS.**

1. Upon a declaration which shews that plaintiffs have no right of action, and on the contrary that the right of action is in another, verdict is found for plaintiffs: **Held**, the statute of jefails of Virginia, 1 Rev. Code, ch. 128, § 103, does not apply to the case and cures no such defect.

Ross v. Milne & wife, 204

2. See, on same subject, title Branch banks No. 2, and

Mason v. Farmers bank at Petersburg, 84

**JETTISON.**

In case of jettison of a deck load, to avoid dangers of the seas, the owner of the goods is not entitled to the benefit of general average.

Doane &c. v. Keating, 391

**JUDGMENT.**

Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and

Kent v. Matthews & al., 578

**JURY.**

1. Who are unfit jurors of inquest on application for leave to erect mill and dam. See Mills No. 1, and

Hunter v. Matthews, 238

2. What interference of court with jury is no ground to reverse judgment on the verdict. See New trial No. 1, and

Brooks v. Calloway, 466

**JUSTIFICATION.**

To an action for insulting words under the statute to suppress duelling, no plea of justification can be received.

Brooks v. Calloway, 466

**LACHES.**

What bill for account of stale transactions will be dismissed. See Lapse of time No. 1, and

Caruthers's adm'r's v. trustees of Lexington, 610

**LAND.**

What decree for sale of absent debtor's land is erroneous. See Foreign attachment No. 2, and

Briens v. Pittman & Co., 379

**LANDLORD AND TENANT.**

See Lease, and

Thompson v. Pendell, 591

**LAPSE OF TIME.**

1. A lottery is authorized in 1802, for relief of sufferers by fire in Lexington, but commissioners, with consent of greater part of the sufferers, determine to apply the proceeds of the lottery to the construction of roads through the town; about 2000 dollars are obtained by the lottery, which is drawn in 1805; by application of funds derived

from lottery and of private subscriptions and of a donation from the legislature, the roads are completed in 1808-9; J. C. was the treasurer, and W. C. secretary of the lottery, but W. C. was the chief manager, and actually received and disbursed the greater part of the funds; W. C. died in 1817; in 1827, by act of assembly, the balance in the hands of the treasurer of the lottery is vested in the trustees of Lexington, the treasurer or his representative is required to settle with them, and to pay them the balance, and in case of failure, they are authorized to recover it by action of debt; and in 1830, trustees bring bill in chancery against the adm'r's of W. C. for an account of the lottery fund: **Held**, equity will not entertain a bill for an account of such stale transactions, when all parties to the transactions, who could explain them, are dead; and bill dismissed.

Caruthers's adm'r's v. trustees of Lexington, 610

2. After what time account current rendered and held without objection shall be deemed a stated account. See Account No. 4, 5, 6, and

Townes v. Birchett, 178

**LEASE.**

Right to suspension of rent.

In the lease of a mill, lessee covenants to keep up the repairs of the mill, except heavy repairs, such as if the dam or forebay should be injured by high-water, or if the main shaft or wheel should give way so as to require a new one, in this case, it is to be repaired by the lessor in a reasonable time, and the lessor is not to lose the rent if he should go on to do the work according to contract; the mill is wholly destroyed by accidental fire during the term; and the lessor fails and refuses to rebuild the same: **Held**, the rent is suspended from the time of such destruction of the demised premises; dissentient TUCKER, P.

Thompson v. Pendell, 591

**LEGATEES AND DISTRIBUTEES.**

1. Who are entitled to take as legatees, and whether per stirpes or per capita. See Will No. 4, and

Hamletts & others v. Hamlett's ex'or &c., 350

2. An advancement to a child, made subsequent to a will, is to be taken as a satisfaction of a legacy to that child, pro toto or pro tanto, according to its amount.

Moore v. Hilton and others, 2

3. See, on the same subject, title Ademption, and Hansbrough's ex'ors v. Hooe & wife, 316

4. Necessity of widow's renouncing will of husband though it make no provision for her. See Widow No. 1, and

Cocke's ex'or &c. v. Phillips, 348

**LIEN.**

1. Vendor's lien for purchase money. See Vendor's lien, and

Redford v. Gibson, 332

2. Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and

Kent v. Matthews & al., 578

3. What is an effectual attachment in chancery of absent debtor's effects in garnishee's hands. See Foreign attachment No. 1, and

Erskine &c. v. Staley &c., 406, 7

4. What lien under attachment in chancery will be preferred to lien of attachment at law. See Attachments No. 2, and

S. C., 406

**LIMITATION OF SUITS.**

1. Limitation of claim for clerk's fees. See Clerks' fees No. 2, and

Craiglen's ex'x v. Lobb, 627

2. What suit in equity for recovery of slaves is barred by statute of limitations. See Fraud No. 2, and

Owen v. Sharp & wife &c., 427

3. See Lapse of time No. 1, Account No. 4, 5, 6, and

Caruthers's adm'r's v. trustees of Lexington, 610

Townes v. Birchett, 178

**LOAN.**

See Gift No. 1, and

Slaughter's adm'r v. Tutt, 147

**MARSHALLING.**

Under what circumstances incumbrancer of two funds will be restricted to one at instance of subsequent incumbrancer of the other. See Principal and surety No. 1, and

Kent v. Matthews & al., 578

## MERCHANTS' ACCOUNTS.

When account current rendered shall be deemed a stated account. See Account No. 4, 5, 6, and Townes v. Birchett, 173

## MILLS.

## I. Who are unfit jurors of inquest.

1. Petition for leave to build mill, and dam across water course; ad quod damnum awarded, and inquisition returned; motion, by a person appearing by the inquisition to be interested, and admitted defendant to oppose the application, to quash the inquisition, on the ground, that two of the jurors empaneled on the inquest, had been of the jury who had found an inquisition on a former ad quod damnum in the same case; though it appeared, that the points now in controversy could not have been presented for the consideration of the jury on the first inquest, yet HELD, that the inquisition ought for that cause to be quashed. Dissentiente CABELL and STANARD, J.  
Hunter v. Matthews, 228

## II. Remanding cause after reversal.

2. In a mill case, county court overrules motion to quash the inquisition, proceeds to hear the cause on the merits, and gives leave to build mill and dam; upon appeal to circuit superior court, judgment reversed, inquisition quashed, and judgment for defendant without prejudice to a future application for a new ad quod damnum: HELD, the circuit superior court ought to have remanded the cause to the county court for further proceedings to be there had.  
Hunter v. Matthews, 228

## MISNOMER.

What is not a mere misnomer of corporation, but matter barring recovery. See Branch banks No. 2, and

Mason v. Farmers bank at Petersburg, 84

## MISTAKE.

## Correction of mistake in conveyance.

A house and lot are conveyed to Mrs. M. and to her offspring: Mrs. M. and her husband convey the same to a trustee and his heirs, to secure a debt; the trustee advertises the land to be sold in pursuance of the deed, but thinking that Mrs. M. had only a life estate, he proclaims that only an estate for her life will be sold, and that interest is sold to P. but the trustee conveys the whole fee simple; eight years after, M. and wife file a bill against P. to correct the mistake; and this bill is taken pro confesso: HELD, 1. as the bill was taken for confessed, immaterial to enquire whether parol evidence is admissible to prove the mistake of the trustee in selling only an estate for Mrs. M.'s life, and then conveying the whole fee; and 2. the mistake is to be corrected, by decreeing that P. shall reconvey to Mrs. M. the remainder in fee expectant on her own life.  
Pullen v. Mullen & wife, 434

## MORTGAGES AND TRUSTS.

## I. What mortgage is paramount to dower right of mortgagor's wife.

1. Two persons purchase real estate jointly, and one of the terms of their purchase is, that, on receiving a conveyance from vendor, they shall, at the same time, execute a mortgage of the property to secure payment of the purchase money; vendor makes the conveyance to the purchasers; but their mortgage is not then executed, owing to a difference between vendor and them as to the provisions to be inserted therein; but the mortgage is executed ten months afterwards, in fulfilment of the original contract of sale and purchase: HELD, the rights of the mortgagee are paramount, in equity, to the dower rights of the purchasers' wives; and upon the death of one of them, his widow is dowerable of his equity of redemption of his moiety, but of that only.  
Wheatley's heirs v. Calhoun, 264

## II. Right of subrogation to mortgage.

2. C. and W. make a joint purchase of real estate, one of the terms of the purchase being that, on receiving a conveyance of the property from vendor, purchasers shall mortgage same property to secure payment of the purchase money; vendor executes conveyance to C. and W. and they execute a mortgage of the property according to the agreement; C. dies, leaving unpaid three fourths of the purchase money with interest thereon, all of which W. pays, except a trivial balance: HELD, W. is entitled to be subrogated, in equity, to the rights of the mortgagee, and to have satisfaction out of the mortgaged subject, for the excess of the debt paid by him above his just proportion, namely, a moiety

thereof; and, as the rights of the mortgagee were paramount to the right of C.'s widow to dower, so are the rights of W. by subrogation, likewise paramount to her right of dower.

Wheatley's heirs v. Calhoun, 264

3. When creditor and subsequent endorsers have no right of subrogation to mortgage given for indemnity of first endorser. See Subrogation No. 3, and

Bank of Virginia and May v. Boisseau & others, 887

## III. Subrogation to judgment lien as against mortgagee.

4. Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and  
Kent v. Matthews & al., 577

## NEW TRIAL.

## I. What is no ground for new trial.

1. The court, on the trial of an issue, makes a remark calculated to prejudice the minds of the jury against the defendant, but at the same time tells the jury, that that remark has nothing to do with the cause, and ought not to influence their verdict; and a verdict is rendered for the plaintiff: HELD, such remark is no ground for reversing the judgment on the verdict.  
Brooks v. Calloway, 466

2. When court refusing new trial may properly refuse to certify facts proved. See Bill of exceptions No. 1, and S. C., 466

## II. Grant of new trial by appellate court.

3. In a bill of exceptions to a judgment of a court overruling a motion for a new trial, the facts proved at the trial are stated, and certified by the court; upon appeal from the judgment, it appears that the verdict is an erroneous inference from the facts stated; therefore, judgment reversed, and a new trial awarded.  
Slaughter's adm'r v. Tutt, 147

4. And where the facts proved at the trial, are stated and certified by the court that tried the cause, and the question is whether the verdict conforms with the facts stated, and there is no question as to the weight or credit of evidence, the appellate court should judge of the correctness of the verdict upon the facts stated, uninfluenced by the opinion of the jury, or of the court that sanctioned the verdict; TUCKER, P. paulo dissentiente.— S. C., 147

## NON EST FACTUM.

## I. Want of affidavit to plea.

1. In debt on a bond, defendant pleads that bond was delivered as escrow upon conditions which were not performed, et sic non est factum; the plea is not verified by affidavit of the party according to statute 1 Rev. Code, ch. 128, § 83, but plaintiff makes no objection for want of such affidavit, and the plea is received by the court, issue joined upon it, trial, verdict and judgment for defendant: the want of the affidavit to the plea is not a good objection to the judgment in an appellate court.  
Hicks & others v. Goode, 479

## II. Witness for defendant.

2. Competency of one of several obligees plaintiffs as a witness for obligor defendant on plea of non est factum. See Witness, and  
Hicks & others v. Goode, 479

## NO SUCH RECORD.

See Nul tiel record.

## NOTICE.

When declaration on contract of indemnity need not aver notice to defendant of injury sustained. See Indemnity No. 2, and  
Chapman v. Ross, 565

## NUL TIEL RECORD.

What is a material variance between record pleaded and that shewn.

In debt on an administration bond against the adm'r and his sureties, defendants plead in bar (upon the statute 1 Rev. Code, ch. 104, § 38, 39.) that upon petition of G. one of the sureties to the county court, setting forth that he was bound as one of the sureties of the adm'r and conceived himself in danger of suffering thereby, and praying the court for relief, the adm'r was required by order of court to give a new bond, and did so accordingly with another person as his surety, which new bond was executed in open court on the same day of the order requiring such bond, was in a penalty equal to that of the first bond, was made payable to the justices then sitting, and was duly executed and

conditioned as the law directs; whereby, and by force of the statute, all the sureties in former bond were discharged. Plaintiffs reply nul tiel record. And defendants shew an entry on minute book of the county court, stating, that on motion of G. against the adm'r, for counter security, the defendant appeared in court, acknowledged summons, and tendered J. M. as security, whereupon it was ordered that said G. be dismissed from further securityship; and shew also a new bond, executed by the adm'r and J. M. his surety, bearing even date with the entry on minute book, made payable to justices then sitting, in proper penalty and with proper condition required by the statute in a new bond in such case, with an endorsement thereon made by the clerk, that it was acknowledged on the day of its date: **HELD**, 1. that the entries on the minute book of the county court, and such papers only as are therein distinctly referred to, can alone be inspected to ascertain the record; and therefore, in this case, the new bond, not being mentioned in the minute to have been required, executed or accepted, cannot be regarded as part of the record; and so the minute itself is the true and the only record of the proceeding; and 2. that the record appearing by the minute, being variant, in several substantial particulars, from the record pleaded by the defendants, the plaintiffs were entitled to judgment, that there was no such record. **Dissentiente, ALLEN, J.**

Greensville justices v. Williamson &c., 93, 4

#### OFFSPRING.

1. What is a devise of an estate tail. See Entail No. 1, and  
Wright v. Cohoon, 370
2. Construction of conveyance to A. and her offsprings forever. See Mistake, and  
Pullen v. Mullen & wife, 434
3. Whether, in detinue for a female slave, her issue born pending the action can be recovered by verdict or award. See Detinue, and  
Martin v. Martin, 495

#### ONUS PROBANDI.

- Of surcharge and falsification. See Account No. 5, 6, Ex'ors and adm'rs No. 2, and  
Townes v. Birchett, 173  
Newton v. Poole, 112, 113

#### PARENT AND CHILD.

1. Effect of contract with parent to pay money to child, and who has right of action thereon. See Contract No. 7, 8, 9, and  
Ross v. Milne & wife, 204
2. What proof is insufficient to establish gift of slave by father to child. See Gift No. 1, and  
Slaughter's adm'r v. Tutt, 147
3. Concerning advancement, and the satisfaction of legacy or devise thereby, see Will No. 5, Advancement No. 8, Ademption, and  
Moore v. Hilton and others, 2  
Hansbrough's ex'ors v. Hooe & wife, 316
4. When grandchildren legatees shall be construed to take per stirpes and not per capita. See Will No. 4, and  
Hamletts & others v. Hamlett's ex'or &c., 350

#### PAROL CONTRACT.

- What contract of indemnity is valid though not in writing. See Indemnity No. 2, and  
Chapman v. Ross, 565

#### PARTICULARS.

- What account filed with declaration in indebitatus assumpsit is sufficient. See Assumpsit No. 3, and  
Robinson &c. v. Burks, 378

#### PARTIES TO SUITS.

- When revival on death of a party in equity is unnecessary. See Partnership No. 3, 4, and  
Townes v. Birchett, 174  
Cunningham ex'or &c. v. Smithson, 33

#### PARTNERSHIP.

- I. What bill binds individual partner but not the partnership.

1. N. and J. Dick, A. Moore and W. Davidson are partners in house of Dicks, Moore & co. carrying on business under that firm in Virginia, where three first named partners reside, the other W. D. residing at London, but partnership has no house established at London under any name: S. draws a bill on W. D. alone, but expressed in body of the bill to be "on account of D. M. & co." W. D. writes a general acceptance on this bill, in his own name, not in that of firm of D. M. & co. and the bill is afterwards dishonoured, and returned to drawer:

**HELD**, 1. This was W. D.'s individual acceptance: D. M. & co. are not parties to the bill, and not liable to S. by force of the bill itself. 2. And though, if S. had proved that the money for which the bill was drawn was due on a contract with D. M. & co. they might be held liable upon such original contract, yet, failing to prove such original contract, he has no claim against them on any ground.

Cunningham ex'or &c. v. Smithson, 32

#### II. What land held by partners is not social property.

2. By articles between C. and W. they agree to join in purchase of mills and 200 acres of land adjoining, and that in case the purchase shall be effected, C. shall keep the mills at a salary to be paid out of the joint concern, and that "the improvements, privileges, expenses and profits, shall in all respects be equal to both parties and their legal representatives;" they make the purchase accordingly, the mills &c. are conveyed to them jointly, they give their joint bonds for the purchase money, payable in four annual instalments, and a joint mortgage of the property to secure payment of the same, and then commence and carry on the business of millers in partnership for several years: the first instalment is paid out of the social funds, and the residue of the purchase money out of money borrowed on the credit of the partnership, but repaid to the lenders, by W. alone, after C.'s death: **HELD**, though C. and W. were partners in the milling business carried on by them at the mills so purchased, yet the mills &c. were not social property or stock, but real estate purchased by C. and W. individually, of which each was tenant in common with the other of an undivided moiety; and therefore, C.'s widow is dower of his moiety.  
Wheatley's heirs v. Calhoun, 264

#### III. Death of one of several partners parties in equity.

3. Bill in equity against two persons, who have been auctioneers and partners: one dies pending the suit; it is not necessary to revive the suit against the representative of the decedent: the plaintiff may proceed against the survivor alone.

Townes v. Birchett, 174

4. Decree against surviving partners and executor of deceased partner of mercantile house, from which defendants appeal, and pending appeal one of the surviving partners dies: the death is not suggested, and court proceeds to hear cause, reverses the decree, and dismisses plaintiff's bill as to the surviving partner: proof is afterwards offered of the death of one of them before the hearing, and appellee moves to set aside decree of reversal, for that cause: motion overruled, because there was still a surviving partner before the court, who represented the whole interest, and because appellee cannot complain of a decree in favour of the deceased party.

Cunningham ex'or &c. v. Smithson, 33

#### IV. Reversal of decree against partnership for defect of proof, and dismissal except as to one partner.

5. Plaintiff in equity sets up claim against a mercantile house, and only question put in issue is, whether the house is liable or only an individual member of it: plaintiff obtains a decree against the house; and on appeal, decree reversed, because, in opinion of appellate court, there is no proof of the liability of the house, but only of the individual partner: the appellate court will not remand the cause as to all the parties, in order to give plaintiff opportunity to adduce further proof of liability of the house, but will dismiss the bill as to the partners held not liable, and remand the cause for proceedings against the partner only who is liable.

Cunningham ex'or &c. v. Smithson, 33

6. Nor will the court retain the partners, so held not liable in the actual state of the case, still in court, for the purpose of having a settlement of the partnership accounts, and having any balance found due thereon to the partner who is liable, he being an absent defendant, applied to satisfaction of plaintiff's demand: the bill not having been framed with that view, and not having asked such settlement of the partnership accounts. S. C., 33

#### PAWN.

Where property is pawned generally for debt, if the pawn be lost or destroyed, without fault of the pawnee, he may recover the debt of the pawner; aliter, if there be a special contract, that the pawnee shall take the pawn as the only security for the debt.

Raynolds & al. v. Carter adm'r &c., 166

#### PERFORMANCE.

1. What is no performance of the condition of

bond for conveyance of land. See Covenant No. 2, and

- Wallace v. Shaffer, 622  
2. See title Specific execution, and  
Pigg v. Corder, 60

#### PER STIRPES.

When grandchildren legatees shall be construed to take per stirpes and not per capita. See Will No. 4, and

- Hamletts and others v. Hamlett's ex'or &c., 350

#### PLEADING.

##### I. Declaration.

1. What declaration on award is sufficient. See Arbitration No. 8, and  
Byars v. Thompson, 550  
2. What declaration in assumpsit on contract of indemnity is sufficient. See Indemnity No. 2, and  
Chapman v. Ross, 566  
3. What defect in declaration is not aided after verdict by statute of Jeoffails. See Branch banks No. 2, Declaration No. 5, and  
Mason v. Farmers bank at Petersburg, 84  
Ross v. Milne & wife, 204

##### II. Plea.

4. What plea that bond was delivered as an escrow is a good bar. See Escrow No. 2, and  
Hicks & others v. Goode, 479  
5. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and S. C., 479  
6. What is not a mere misnomer of corporation, but matter barring recovery. See Branch banks No. 2, and  
Mason v. Farmers bank at Petersburg, 84  
7. What plea to action on bond for conveyance of land is naught. See Covenant No. 2, and  
Wallace v. Shaffer, 622  
8. To an action for insulting words under the statute to suppress dueling, no plea of justification can be received.  
Brooks v. Calloway, 466

##### III. Variance between pleading and proof.

9. What is a material variance, on nul tiel record, between record pleaded and that shewn. See Nul tiel record, and  
Greensville justices v. Williamson & others, 98, 4  
10. Specific execution cannot be decreed of a contract different from that alleged in the bill. See Specific execution No. 3, and  
Pigg v. Corder, 60

#### PLEDGE.

- See Pawn, and  
Raynolds & al. v. Carter adm'r &c., 106

#### POSSESSION.

1. What suit in equity for recovery of slaves is barred by adversary possession. See Fraud No. 2, and  
Owen v. Sharp & wife &c., 427  
2. A deed more than thirty years old, but not accompanied by possession, is not to be admitted in evidence without proof of execution.  
Dishazer v. Maitland, 524

#### PRACTICE IN SUITS AT LAW.

1. When continuance is properly refused. See Continuance, and  
Brooks v. Calloway, 466  
2. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and  
Hicks & others v. Goode, 479  
3. What account filed with declaration in indelbitatus assumpsit is sufficient. See Assumpsit No. 3, and  
Robinson &c. v. Burks, 378  
4. Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception: the demurrer does not waive the exception.  
Dishazer v. Maitland, 524  
5. What interference of court with jury is no ground to reverse judgment on the verdict. See New trial No. 1, and  
Brooks v. Calloway, 466  
6. When court refusing new trial may properly refuse to certify facts proved. See Bill of exceptions No. 1, and S. C., 466  
7. Concerning grant of new trial by appellate court for contrariety of verdict to evidence, see New trial No. 3, 4, and  
Slaughter's adm'r v. Tutt, 147  
8. When circuit court, after reversing judgment of county court in a mill case, should remand the cause. See Mills No. 2, and  
Hunter v. Matthews, 228

9. What defendants, on judgment for them, cannot recover costs. See Branch banks No. 3, and  
Mason v. Farmers bank at Petersburg, 84

#### PRACTICE IN SUITS IN EQUITY.

1. Concerning the practice in chancery suit to attach property of absent debtor, see Foreign attachment, and  
Briens v. Pittman & co., 379  
Ersline &c. v. Staley &c., 406  
2. Effect of permitting bill for correction of alleged mistake in conveyance to be taken for confessed. See Mistake, and  
Pullen v. Mullen & wife, 434  
3. When reference to commissioner, rather than an issue, is proper. See Trusts and trustees No. 4, and  
Moore v. Hilton & others, 2  
4. What defect in the proof of publication against absent defendants will not avail in appellate court. See Absent defendants No. 4, and  
Cunningham ex'or &c. v. Smithson, 33  
5. Concerning introduction of new evidence after interlocutory decree, see Interlocutory decree, and  
Moore v. Hilton & others, 1  
6. Reival unnecessary on death of one of several partners defendants. See Partnership No. 8, and  
Townes v. Birchett, 174  
7. What decree at plaintiff's instance in favour of his assignee is regular. See Decree No. 2, and S. C., 174  
8. Decree corrected and affirmed, with costs to appellee as the party substantially prevailing.  
Kent v. Matthews & al., 560  
9. Reversal of decree against partnership for defect of proof, and dismissal except as to one partner. See Partnership No. 5, 6, and  
Cunningham ex'or &c. v. Smithson, 33  
10. Reversal of decree against partnership will not be set aside for death of one of the partners before the hearing. See Partnership No. 4, and S. C., 33

#### PRINCIPAL AND AGENT.

1. When principal must bear loss by insolvency of buyers from agent. See Auctioneer No. 1, and  
Townes v. Birchett, 173  
2. Equitable jurisdiction of bill by principal against auctioneer. See Auctioneer No. 2, 3, and S. C., 173

#### PRINCIPAL AND SURETY.

- I. Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee.  
1. M. and J. are bound as sureties for E. who conveys slaves to a trustee to indemnify them, and to secure divers other debts; and judgment against E. the principal and M. and J. the sureties, and judgments against E. for all the other debts so secured, are recovered at the same time; after which the trustee appoints J. one of the cestuis que trust, his agent to carry the trust slaves to a southwestern market, and E. the mortgagor accompanies him, carrying out three other slaves; J. and E. cooperate in selling the trust slaves, and E. sells the other three slaves, for a gross sum of 12,325 dollars for both parcels of slaves, and bring back a bill of exchange for 2000 dollars, and 10,325 dollars in money; the trustee receives the bill of exchange from E. and makes efforts to get it cashed, but the acceptors having failed, without success, and sends it to an attorney for collection; of the 10,325 dollars, he, with the acquiescence of M. and J. permits E. to retain 1000 dollars, and receives 9325 dollars, out of which, with the acquiescence of M. and J. he pays no dividend to them or to the creditor to whom they are sureties, but applies the whole to the other debts secured by the mortgage; and after all these transactions, E. by deed of trust conveys his land to indemnify K. another surety for him, and the trustee sells the land under this deed, and K. becomes the purchaser: HELD. 1. That the judgment against E. and M. and J. his sureties, gave the judgment creditor a lien on E.'s land, prior to the lien which K. acquired by his subsequent mortgage, and M. and J. are entitled to the benefit of that prior lien; that the other judgments of the same date against E. gave those judgment creditors prior liens on E.'s land, and their judgments being satisfied out of a fund in which M. and J. had a right to participate, they are entitled by subrogation, to the benefit of these liens also; and as these liens together bound the whole of E.'s land, therefore, not a moiety only, but the whole of the proceeds of the land sold under the subsequent deed of trust to K. is liable to be applied to the satisfaction of M. and J.'s claim. 2. That M. and J. being entitled to indemnity under a mortgage of slaves and to a lien by judgment on E.'s land, and K. having

only a mortgage on the land, equity would compel the former to take satisfaction out of the mortgage of slaves, if that fund were equally certain and available, and leave the land for K.'s indemnification; but as it was uncertain when the bill of exchange for 2000 dollars would be collected, or whether it could be collected at all, the court will give M. and J. the benefit of their lien on the land, leaving K. to be subrogated to the benefit of the bill of exchange. 3. That, as to the 1000 dollars which was retained by E. out of the proceeds of sales of the trust slaves, and as to the application of the whole money received by the trustee, to the payment of other debts, without paying any dividend to M. and J. or to the creditor to whom they were sureties; as K. had no lien on E.'s land at that time, if the parties claiming under the mortgage of the slaves had wasted the whole fund, or released the mortgage, that would not have prevented them from resorting to the lien on the land for satisfaction. K. having then no lien with which their proceedings interfered. 4. That a surety, before the payment of the debt, has a right to resort to equity against the creditor and the principal debtor, to compel the creditor to collect, and the principal debtor to pay, the debt, out of any fund the debtor has subject to the debt; and when the surety pays it, he has a right to be subrogated to all the rights and securities of the creditor.

Kent v. Matthews & al., 573

## II. Subrogation of surety to rights of mortgagee.

3. Subrogation of one joint mortgagor, as against widow of the other, to rights of mortgagee. See Mortgages &c. No. 2, and

Wheatley's heirs v. Calhoun, 364

3. When subsequent endorser has no right of subrogation to mortgage given to first endorser. See Subrogation No. 3, and

Bank of Virginia and May v. Boisseau &c., 387

## PRIORITY.

1. Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and

Kent v. Matthews & al., 573

2. Concerning priority of lien between attachment in chancery and attachment at law, see Attachments No. 2, and

Erskine &c. v. Staley &c., 406

## PRIVY EXAMINATION.

What certificate of privy examination and acknowledgment of the wife to a deed of husband and wife is defective. See Feme covert No. 1, and

Hairston v. Randolphs, 445

## PUBLICATION.

What defect in proof of publication against absent defendants in chancery will not avail in appellate court. See Absent defendants No. 4, and

Cunningham ex'or &c. v. Smithson, 33

## PUBLIC IMPROVEMENTS.

See

James river and Kanawha co. v. Anderson &c., 378

## PURCHASE MONEY.

Vendor's lien for purchase money. See Vendor's lien, and

Redford v. Gibson, 332

## QUIA TIMET.

When surety may resort to equity against creditor and principal debtor. See Principal and surety No. 1, and

Kent v. Matthews & al., 574

## RECORD.

What is a material variance between record pleaded and that shewn. See Nul tiel record, and

Greeneville justices v. Williamson &c., 93, 4

## REHEARING.

Application for rehearing upon new evidence after interlocutory decree. See Interlocutory decree No. 1, and

Moore v. Hilton and others, 1

## REMAINDER.

What remainder is not subject to dower. See Dower No. 1, and

Cocke's ex'or &c. v. Phillips, 248

## RENT.

When accidental destruction of demised premises entitles lessee to suspension of rent. See Lease, and

Thompson v. Pendell, 501

## RESCISSION.

What rescission of contract for sale of land precludes dower right of vendee's widow. See Dower No. 2, and

Wheatley's heirs v. Calhoun, 265

## REVIVAL.

When unnecessary on death of one of several partners parties in equity. See Partnership No. 3, 4, and

Townes v. Birchett, 174

Cunningham ex'or &c. v. Smithson, 33

## REVOCATION.

### I. Ademption.

1. Concerning satisfaction of legacy and devise by advancement on marriage, see Ademption, Advancement No. 3, and

Hansbrough's ex'ors v. Hooe & wife, 316

Moore v. Hilton & others, 3

II. What writing is no revocation of written will of persons.

2. Testator in 1838 made a will, all written with his own hand, whereby he gave 30,000 dollars to his sister, 5000 dollars to S. S., and the residue of his estate to his father; in 1839, he signed another instrument, whereby, revoking all other wills before made, he gave T. Y. T. 5000 dollars, and the residue of his estate to his father, but this last paper was not written by him, and it was not duly attested according to the statute of 1834-5. HELD, the clause of revocation in the instrument of 1839 was not independent of the dispositions contained in it, so as to operate as a substantive declaration in writing revoking the will of 1838, but the revocation was made with a view to the new dispositions, and those being void for want of due attestation, the revocation is a nullity.

Barksdale v. Barksdale, 535

3. Quere, whether the statute of 1834-5 does not repeal the 9th section of the statute of wills touching revocations of wills of personality? Two judges held that it did, and the other two gave no opinion on the point.

S. C., 535

## RICHMOND CITY.

Concerning right of James river and Kanawha company to occupy streets of Richmond for the purposes of its works, and of the city authorities to sanction such use of the streets, see

James river and Kanawha co. v. Anderson &c., 378

## ROADS.

Right of James river and Kanawha company to occupy public streets for the purposes of its works. See

James river and Kanawha co. v. Anderson &c., 378

## SALE.

1. What sale by sheriff of insolvent's equity of redemption in slaves is no ground of action by insolvent against sheriff. See Insolvent, and

Governor for Cockrell v. Williams, 508

2. What sale by trustee is not a due performance of his trust. See Trusts &c. No. 3, and

Moore v. Hilton and others, 2

3. What decree for sale of absent debtor's land is erroneous. See Foreign attachment No. 2, and

Briens v. Pittman &c., 379

## SATISFACTION.

Of legacy and devise by advancement on marriage. See Ademption, Advancement No. 3, and

Hansbrough's ex'ors v. Hooe and wife, 316

Moore v. Hilton and others, 3

## SCHEDULE.

What sale by sheriff of insolvent's equity of redemption in slaves is no ground of action by insolvent against sheriff. See Insolvent, and

Governor for Cockrell v. Williams, 508

## SETOFF.

1. When debt due from deceased husband cannot be set off against claim of the wife. See Husband and wife No. 2, and

May v. Boisseau, 512

2. Concerning the right to set off clerk's fees, see Clerks' fees No. 1, and

Craiglen's ex' v. Lobb, 627

## SHERIFFS.

1. What indemnifying bond taken by sheriff is sufficient to maintain his action against the obligors. See Indemnity No. 1, and

Dabney v. Catlett, 383, 634

2. What sale by sheriff of insolvent's equity of redemption in slaves is no ground of action by insolvent against sheriff. See Insolvent, and

Governor for Cockrell v. Williams, 508



## SHIPPING.

What action by shipper of goods for average cannot be maintained. See *Average*, and *Doane &c. v. Keating*, 301

## SLANDER.

To an action for insulting words under the statute to suppress duelling, no plea of justification can be received.

*Brooks v. Calloway*, 466

## SLAVES.

1. What proof is insufficient to establish gift of slave by parent to child. See *Gift No. 1*, and *Slaughter's adm'r v. Tutt*, 147
2. Whether, in detinue for a female slave, her increase born pending the action can be recovered by verdict or award. See *Detinue*, and *Martin v. Martin*, 496
3. What suit in equity for recovery of slaves is barred by the statute of limitations. See *Fraud No. 2*, and *Owen v. Sharp & wife &c.*, 427

## SPECIALTY.

1. Who has right of action on indenture covenanting with parent to pay money to child. See *Contract No. 7*, and *Ross v. Milne & wife*, 204
2. See references under title *Bond*.

## SPECIFIC EXECUTION.

What agreement will not be specifically enforced in equity.

1. Upon a bill by a son in law for specific execution of an agreement or promise of a mother in law, brought against her executor, legatee and devisee, after her death: if the terms of the agreement are uncertain—or, if it appear probable, that the promise was made to or for the benefit of the daughter, and not the son in law—or, if the plaintiff have delayed for an unreasonable time to assert his claim to specific execution—or if such a change of circumstances has occurred, that the object of the mother in law in making the promise, cannot be accomplished by specific execution: any of these considerations would be a sufficient objection to a decree for specific execution, much more, all combined.

*Pigg v. Corder*, 60

2. And per *TUCKER, P.* if the promise of the mother in law do not appear to have been intended by her as a binding contract, or if it be unreasonable, or if it was founded on no valuable, or on very inadequate, consideration; equity ought not to decree specific execution, but should leave the party to his remedy at law. S. C., 60

3. Upon a bill for specific execution of an agreement, the agreement alleged in the bill must be proved by the evidence, and specific execution can only be decreed of the same agreement so alleged and proved: it is error to direct specific execution of a different contract—per *TUCKER, P.* S. C., 60

## STAKEHOLDER.

When equity may relieve on bill by one of the claimants against stakeholder and the other claimant. See *Auctioneer No. 3*, and *Townes v. Birchett*, 173

## STATUTES OF VIRGINIA CITED AND CONSTRUED.

## I. Practice of chancery courts.

1. Ch. 66, § 41, p. 204 of 1 R. C. giving discretion to chancery courts, where a sale of property is decreed, to direct the same to be made for cash or on credit, construed.

*Briens v. Pittman & co.*, 379

2. Same chapter, § 103, p. 216, providing that, by special order of court, new evidence in chancery suits might be introduced after the general commission for taking depositions was closed, cited.

*Moore v. Hilton & al.*, 15

3. Statute of March 1826, Acts of 1826-6, ch. 15, Suppl. to R. C. ch. 103, § 9, p. 182, providing that, from the filing of the bill until the final hearing, either party may obtain general commissions and take depositions, construed. S. C., 1 cited.

## II. Clerks' fees.

4. Ch. 85, § 23, p. 320 of 1 R. C. declaring in what case a suit may be maintained for the recovery of clerk's fees, construed.

*Craig's ex'x v. Lobb*, 627

5. Acts of 1839, ch. 63, § 1, p. 40, prohibiting the collection of clerks' fees by distress or suit after the expiration of five years from the time they become due, cited. S. C., 632

## III. Privy examination.

6. Acts of 1814-15, ch. 28, § 3, p. 76, 1 R. C. of 1819, ch. 99, § 15, p. 365, 6, prescribing the mode of taking and certifying the privy examination and acknowledgment of females covert to deeds of husband and wife, construed.

*Hairstown v. Randolphs*, 445  
cited in note. S. C., 448

7. Statutes of 1674, act 7, 2 Hen. stat. at large p. 317,—of 1706, ch. 21, 3 Id. p. 319,—of 1710, ch. 13, § 3, Id. p. 517,—of 1724, ch. 6, § 7, 4 Id. p. 400, and of 1748, ch. 1, § 5, 6, 5 Id. p. 410, on same subject, cited.

8. Statutes of 1785, ch. 62, Rev. Code of 1794, ch. 90, § 6; *Pleasants's* edl. p. 157, 8, on same subject, cited. S. C., 447

## IV. Dower in trust estates.

9. Ch. 99, § 31, p. 370 of 1 R. C. subjecting trust estates of husband to dower right of wife, construed.

*Wheatley's heirs v. Calhoun*, 265

## V. Statute of frauds.

10. Ch. 101, § 1, p. 372 of 1 R. C. providing that no action shall be brought upon certain agreements unless the same be in writing, construed.

*Chapman v. Ross*, 565  
cited. S. C., 571

## VI. Usury.

11. Ch. 103, § 1, p. 373, 4 of 1 R. C. defining usury and avoiding usurious contracts and securities, construed.

*Raynolds v. Carter &c.*, 166

## VII. Wills.

12. Ch. 104, § 3, p. 376 of 1 R. C. prescribing the modes of revoking a devise of lands, construed.

*Hansbrough's ex'ors v. Hooe & wife*, 316

13. Acts of October 1748, ch. 5, § 12, 5 Hen. stat. at large p. 457, concerning the revocation of wills of chattels, cited. S. C., 324

14. Ch. 104, § 9, p. 377 of 1 R. C. providing that no written will of chattels shall be revoked by a subsequent will, codicil or declaration unless the same be in writing, construed.

*Barksdale v. Barksdale*, 535  
cited. S. C., 538, 540

15. Acts of 1834-5, ch. 60, p. 43, requiring wills of personal estate to be executed with the like solemnities required for wills of real estate, cited; and *quære* as to construction? S. C., 535

## VIII. Widow's share of husband's personality.

16. Ch. 104, § 26, p. 381 of 1 R. C. enacting that widow not renouncing her husband's will within one year from the time of his death shall have no more of his slaves and personal estate than is given her by the will, construed.

*Cocke's ex'or & others v. Philips*, 248  
cited in note. S. C., 251

17. Same chapter, § 29, p. 382, prescribing widow's distributive share of intestate's personality, cited. S. C., 248, 251, 2

18. Statutes of 1673, ch. 1, 2 Hen. stat. at large p. 303, prescribing widow's share of deceased husband's estate, cited. S. C., 254, 259, 300

19. Statutes of 1705, ch. 33, § 4, 3 Hen. stat. at large p. 373, on same subject, and providing remedy for the widow where less than the prescribed share was given her by husband's will, cited. S. C., 254, 259, 300

20. Same chapter, § 5, giving remedy to widow's representative in case of her death before distribution, cited. S. C., 255

21. Statutes of 1727, ch. 11, § 21, providing that the widow might renounce the provision made for her by husband's will, and prescribing her share of his slaves and personal estate in such case, cited. S. C., 256, 261

## IX. Ex'ors and adm'rs.

22. Ch. 104, § 35, 44, 45, p. 383, 386, 7 of 1 R. C. concerning inventory of decedent's estate, cited.

*Newton v. Poole*, 136

23. Same chapter, § 38, 39, authorizing counter-security or a new bond to be required from executor or administrator on petition of sureties for relief, and declaring effect of such new bond when given, cited.

*Greensville justices v. Williamson & al.*, 93, 95, 96

## X. Guardians.

24. Ch. 108, § 7, p. 407 of 1 R. C. directing the settlement of guardian's accounts and declaring the effect thereof, cited. 2

*Newton v. Poole*, 13

25. Same section, requiring guardian to return inventory of ward's estate, cited. S. C., 136



## XI. Slaves.

26. Ch. 111, § 51, p. 432 of 1 R. C. concerning parol gifts of slaves, cited.  
Slaughter's adm'r v. Tutt, 151

## XII. Absent defendants.

27. Ch. 123, § 1, p. 474 of 1 R. C. requiring, in proceeding by foreign attachment in chancery, affidavit to be made of defendant's nonresidence, construed.  
Briens v. Pittman & co., 379
28. Same section, authorizing attachment in chancery against absent debtor and home defendant garnishee, construed.  
Erskine & c. v. Staley & c., 406
29. Same chapter, § 2, p. 475 of 1 R. C. authorizing chancery court, as against absent defendants, to hear the cause upon such proof as the plaintiff may adduce, cited.  
Cunningham ex'or & c. v. Smithson, 51
30. Same chapter, § 3, p. 475, declaring under what circumstances a sale may be decreed of lands belonging to absent defendant, construed.  
Briens v. Pittman & co., 379

## XIII. Proceedings in suits at law.

31. Acts of 1830-31, ch. 37, § 8, Suppl. to R. C. ch. 228, p. 284, giving action for insulting words, construed.  
Brooks v. Calloway, 466
32. Ch. 128, § 33, p. 496 of 1 R. C. requiring pleas of non est factum to be verified by affidavit, construed.  
Hicks & others v. Goode, 479
33. Same chapter, § 61, p. 504.5 of 1 R. C. giving attachment against estate of defendant in action at law, to force his appearance, cited.  
Erskine & c. v. Staley & c., 409
34. Same chapter, § 86, p. 510, requiring account to be filed with declaration in indebitatus assumpsit, construed.  
Robinson & c. v. Burks, 378
35. Acts of 1830-31, ch. 11, Suppl. to R. C. ch. 109, § 62, p. 157, allowing defendant in action at law founded on contract to file special plea in bar in the nature of a plea of setoff, cited.  
Thompson v. Pendell, 591, 595

## XIV. Jeofails and amendments.

36. Ch. 128, § 103, p. 512 of 1 R. C. providing that certain defects in declaration shall be no ground after verdict for staying or reversing the judgment, construed.  
Mason v. Farmers bank at Petersburg, 84
- Ross v. Milne & wife, 204
37. Same chapter, § 104, p. 512, providing that where there are several counts, one of which is faulty, and entire damages are given, the verdict shall be good, cited.  
Ross v. Milne & wife, 207
38. Same chapter, § 108, authorizing decree in cause removed to court of appeals to be amended in court below, and requiring affirmance thereupon, cited.  
Kent v. Matthews & al., 590

## XV. Executions and indemnifying bonds.

39. Ch. 134, § 10, p. 523 of 1 R. C. providing that executions of ca. sa. shall bind the real estate of the defendant from the time of the levy, cited.  
Erskine & c. v. Staley & c., 419
40. Same chapter, § 25, p. 533.4, authorizing sheriff levying execution to require indemnifying bond, and prescribing condition thereof, cited.  
Dabney v. Catlett, 383
41. Acts of 1827-8, ch. 30, § 1, p. 23, Suppl. to R. C. ch. 215, p. 272, prescribing a further provision to be contained in the condition of indemnifying bond, cited.  
S. C., 383, 384

## XVI. Banks.

42. Acts of 1831-2, ch. 75, p. 68, Suppl. to R. C. ch. 311, p. 381, concerning suits growing out of transactions with branch banks, construed.  
Mason v. Farmers bank at Petersburg, 84

## XVII. Turnpike companies.

43. Ch. 234, § 7-13, p. 213-216 of 2 R. C. authorizing turnpike companies to enter upon and occupy lands, and prescribing the proceedings to be had for condemning the same, cited.  
James river and Kanawha co. v. Anderson & c., 284

## XVIII. James river and Kanawha company.

44. Charter of the James river company, Acts of October session 1784, ch. 19, § 1, 2, 11, 17, 11 Hen. stat. at large p. 450, 457, 461, cited.  
James river and Kanawha co. v. Anderson & c., 279
45. Acts of 1819-20, ch. 56, p. 39, Suppl. to R. C. ch. 348, p. 420, altering the charter of the James river company, cited.  
S. C., 283, 4, 301
46. Acts of 1822-3, ch. 45, Suppl. to R. C. ch. 351, p. 433, 441, 2, superseding the president and directors of the James river company, and transferring all their

rights, powers, duties and privileges to certain public officers of the commonwealth, cited.  
S. C., 284, 5, 301, 2, 309

47. Acts of 1831-2, ch. 82, Suppl. to R. C. ch. 377, § 29, 34, 35, p. 481, 483, empowering the James river and Kanawha company to enter upon and occupy lands for the purposes of its works, and declaring that the prosecution of such works shall not be restrained, except in certain specified cases, by order or injunction from any court, construed.  
S. C., 288, 289
- other provisions of the same statute cited.  
S. C., 286-9, 305, 315

48. Acts of 1835-6, ch. 110, amending the charter of the James river and Kanawha company, cited.  
S. C., 296, 7, 298

## XIX. Mills.

49. Ch. 235, § 1, 2, 4, p. 225.6 of 2 R. C. concerning writ of ad quod damnum and inquisition of jury on application for leave to erect mill and dam, cited.  
Hunter v. Matthews, 228
50. Same chapter, § 9, p. 228, declaring the effect of inquisition in a mill case, cited.  
S. C., 247

## STREETS.

- Right of James river and Kanawha company to occupy public streets for the purposes of its works. See  
James river and Kanawha co. v. Anderson & c., 278

## SUBMISSION.

- See Arbitration, and  
Martin v. Martin, 495  
Byars v. Thompson, 560

## SUBROGATION.

## I. To judgment lien.

1. Lien of several contemporaneous judgments on land of debtor, and subrogation of sureties thereto as against subsequent mortgagee. See Principal and surety No. 1, and  
Kent v. Matthews & al., 573

## II. To rights of mortgagee.

2. Subrogation of one joint mortgagor, as against widow of the other, to rights of mortgagee. See Mortgages & c. No. 2, and  
Wheatley's heirs v. Calhoun, 264

## III. Who has no right of subrogation.

3. A deed of trust is executed to indemnify a first endorser at bank from loss; but though the note is not paid, the first endorser is exempted from liability by the failure of the bank to give him due notice of dishonour: HELD, neither the bank nor any subsequent endorser, has any claim to rank as creditor on the trust fund under the deed of trust, by subrogation to the first endorser, who was thereby indemnified, but who never sustained any loss.  
Bank of Virginia and May v. Boisseau & c., 387

## SURCHARGE AND FALSIFICATION.

- Concerning the onus probandi on bill to surcharge and falsify account. See Account No. 5, & Ex'ors and adm'rs No. 2, and  
Townes v. Birchett, 173  
Newton v. Poole, 112, 113

## SURETIES.

- See Principal and surety.

## TITLE BOND.

- What is no performance of the condition of bond for conveyance of land. See Covenant No. 2, and  
Wallace v. Shaffer, 622

## TRUSTS AND TRUSTEES.

1. What is not a trust estate in the husband, of which the wife may be endowed. See Dower No. 2, and  
Wheatley's heirs v. Calhoun, 265
2. What trust for children of fraudulent grantor will not be enforced against grantee. See Fraud, and  
Owen v. Sharp & wife & c., 427

3. Testator directs, that his land shall be sold on such credit as his ex'ors shall think best for the interest of his children, to whom he bequeaths the proceeds: ex'or advertises land for sale at auction in 1825, without specifying the terms of sale; offers it for sale, and at the sale requires near one half of purchase money to be paid in cash, and residue in two equal annual instalments; and purchases at his own sale: HELD, the ex'or's sale and purchase was not a due performance of his trust; and he may, at election of cestui que trust, be rightly required to keep the land, and pay the purchase money for which he bought it, and as much more as the land would have sold for if it had been offered

for sale on the usual terms of one, two and three years credit.

Moore v. Hilton & al., 2  
4. But the difference between the price the land would have brought on a sale on such credit in 1825, and that which it brought on the terms on which it was then sold and purchased, should rather be referred to a commissioner to be by him ascertained, than to a jury upon an issue directed for the purpose. S. C., 2

5. What decree at plaintiff's instance in favour of his trustee is regular. See Decree No. 2. and Townes v. Birchett, 174

6. See title Mortgages and trusts.

#### USURY.

What contract and security are usurious.

J. advances \$200 to R. and R. puts a slave of the yearly value of \$50 into J.'s possession, upon an agreement that J. shall hold the slave and take the profits for interest on the money, till R. shall redeem the pawn by paying the principal sum of \$200—J. the pawnee holds the slave for two years, and dies; and then his adm'r takes a bond with sureties from R. the pawner, for the principal sum of \$200 advanced by his intestate, and restores the slave to the pawner: HELD, 1. That the contract between J. and R. was usurious and void. 2. That the adm'r of J. stands in the place of his intestate, and the usury of the original contract taints and avoids the bond taken by him for the debt.

Raynolds &c. v. Carter adm'r &c., 166

#### VARIANCE.

1. What is a material variance between record pleaded and that shewn. See Nutt v. record, and Greenesville Justices v. Williamson &c., 93, 4

2. What award is not variant from the submission, but sufficiently refers to and pursues the same. See Arbitration No. 1, and Martin v. Martin, 495

3. What misrecital of submission does not invalidate award. See Arbitration No. 2, and Byars v. Thompson, 550

#### VENDOR'S LIEN.

G. by S. his attorney sells and conveys land to W.: the conveyance expresses, on its face, that purchase money is all paid; but, in fact, 800 dollars thereof having been paid on the day of conveyance, S. on same day deposits the same in W.'s hands, to indemnify him against a suretyship in certain bonds taken upon ne exeats against S. as attorney in fact of G. which ne exeats are afterwards discharged; and 400 dollars are, by the contract, retained in W.'s hands to meet the possibility of dower of G.'s wife, and she is now dead; W. sells and conveys the land to R.—HELD, G. has no lien on the land for the 800 dollars, but has a lien for the 400 dollars with interest.

Redford v. Gibson, 382

#### WAIVER.

1. Exception taken to the admission of evidence, and then a demurrer to all the evidence including that mentioned in the exception; the demurrer does not waive the exception.

Dishazer v. Matland, 524

2. When want of affidavit to plea of non est factum is not an available objection in appellate court. See Non est factum No. 1, and

Hicks & others v. Goode, 479

3. What defect in the proof of publication against absent defendants in chancery will not avail in appellate court. See Absent defendants No. 4, and Cunningham ex'or &c. v. Smithson, 33

#### WARD.

See Guardian and ward, and Newton v. Poole, 113

#### WIDOW.

I. Renunciation of husband's will.

1. A married man dies possessed of personal estate, leaving a will wherein he bequeaths his whole estate to his nephews and nieces, and makes no provision for or mention of his wife: HELD, upon the construction of the statute 1 Rev. Code, ch. 104, § 26, 29, that, in order to entitle herself to a distributive share of her husband's personal estate, the widow must declare her dissatisfaction with the will and renounce all benefit under the same, within the time and in the manner prescribed by the statute; dissentiente BROOKE and STANARD, J.

Cocke's ex'or &c. v. Philips, 248

II. Right to dower.

2. See title Dower, and Cocke's ex'or &c. v. Philips, 248  
Wheatley's heirs v. Calhoun, 264, 5

#### WILL.

I. Ademption of legacy or devise.

1. Concerning the ademption or satisfaction of legacy and devise by subsequent advancement, see Advancement No. 3, Ademption, and

Moore v. Hilton and others, 2  
Hansbrough's ex'ors v. Hooe & wife, 316

II. Revocation of will.

2. What writing is not a revocation of a written will of personals. See Revocation No. 2, and Barksdale v. Barksdale, 535

3. Concerning effect of statute of 1835 on the mode of revoking wills of personalty, see Revocation No. 3, and S. C., 535

III. Who are entitled as legatees, and whether per stirpes or per capita.

4. Testator bequeaths residuum of his estate, after his wife's death or marriage, to be equally divided among James, Mary, Patsey, Nancy and Narcissa [who were testator's children], the children of his son George, the children of his daughter Elizabeth, the children of his son Bedford deceased, and the children of his daughter Obedience; his five children legatees were all married, and had, in all, 31 children living at his death; his son Bedford left three children, and his son George and daughters Elizabeth and Obedience were married, and these four had, in all, 18 children living at testator's death; and the three last had 5 children born after his death and during his widow's life: HELD, by circuit superior court, and affirmed by the court of appeals, 1. That the children of George, Elizabeth and Obedience, born after testator's death and during widow's life, as well as those in being at testator's death, are entitled to shares. 2. That such of the grandchildren as were in being at testator's death, took vested and transmissible interests, liable however to be diminished by the birth of other grandchildren, and the after-born grandchildren as soon as they came in being took likewise vested and transmissible interests. 3. That the grandchildren took per stirpes, and not per capita; so that each of the testator's children legatees took one ninth, and each family of his grandchildren legatees took one ninth to be subdivided among them respectively.

Hamletts & others v. Hamlett's ex'or &c., 350

IV. Construction of direction to deduct advancements made to children from their shares.

5. Testator having real and personal estate, by will, after mentioning advancements made to two of his children, directs that the same shall be deducted from their shares of his estate when a division thereof shall be made among all his children, and then directs his land to be sold, and after taking of the principal a fund for education of younger children, an equal division among all his children; and by codicil, desires that the proceeds of sale of his land shall be equally divided among all his (seven) children; and afterwards, states an account on his books, of an additional advancement made to a daughter before advanced, and subjoins a direction that the whole amount advanced to that child shall be deducted from her share of his estate: HELD, that the whole amount of advancements, as well those mentioned in the will as that made subsequent to the codicil, should be deducted from the shares of the children advanced, of the whole estate real and personal without discrimination.

Moore v. Hilton & al., 2

V. Quantity of estate devised, and exemption from debts.

6. Testator, after devising some real estate of apparently trivial value, and emancipating one slave, gave his wife, besides and above the use of one third of his real and personal estate, two men slaves with the horses and carts they drove, to be her own proper estate and to be at her disposal, also his carriage and horses, and all his furniture; and then gave his son all the residue of his estate, real and personal, after payment of his just debts, to him and his heirs; with a limitation over to others, of the estate thereby given to the son, in case he should die before twenty-one years of age and without heirs of his body: HELD, that the wife was entitled to a third of testator's estate, real and personal, precisely as the law would have given it to her, and to the specific legacies bequeathed to her, in addition thereto; therefore, 1. The wife was not entitled to a third of testator's estate clear of his debts, but only to a third of the surplus after the debts paid—but, 2. In ascertaining her third, the emancipated slave, and the specific legacies, should be taken into account, as part of the subject to be divided—and, 3. She took

but a life estate in her third of the real and slave property, and an absolute estate in her third only of the personalty other than slaves.

Newton v. Poole,

112

VI. Estate tail.

7. What is a devise of an estate tail. See Entail No. 1. and

Wright v. Cohoon,

370

WITNESS.

Competency.

Four commissioners under decree in chancery for sale of land, are named obligees in bond for the

purchase money; and suit is brought on the bond, against the obligor, in the name of the four obligees, for the benefit of another person claiming the beneficiary interest in the debt: one of the obligees and plaintiffs, having no interest in the case except as being obligee and plaintiff, is a competent witness for defendant on a plea of non est factum.

Hicks and others v. Goode,

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WRITING.

What contract of indemnity is valid though not in writing. See Indemnity No. 2, and

Chapman v. Ross,

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